*R. J. Mitchell**

LIABILITY IN TORT FOR CAUSING ECONOMIC LOSS BY THE USE OF UNLAWFUL MEANS AND ITS APPLICATION TO AUSTRALIAN INDUSTRIAL DISPUTES[1]

In 1964 the House of Lords decided *Rookes* v. *Barnard*[2], launched the tort of intimidaton as a modern concept, and in so doing threw what are called the "economic" or "industrial" torts into a turmoil. The impact of this case upon the law relating to industrial disputes was considerable, since the economic torts have, at least in England, formed the basis of strike-control tactics. The decision, and subsequent developments, led to considerable discussion and speculation amongst writers as to the application of torts to industrial disputes cases[3]. In deciding *Rookes* v. *Barnard*, the House of Lords showed particular regard for the protection of economic rights and this approach served to trigger off an absolute avalanche of torts cases in the English industrial sphere[4]. These cases led in turn to substantial extensions and developments in the economic torts.

Such developments are of particular interest in Australia where there has been a parallel upsurge in the use of the tort weapon in industrial disputes[5]. This trend is quite novel, since, in this country, the use of the civil tactic has traditionally been a neglected industrial weapon[6]. Furthermore the position is exacerbated for the Australian trade unionist by the fact that he is, unlike his English counterpart, generally unprotected by legislation preventing the

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1. Some of the material in this article is drawn from the writer's LL.M. thesis, "Tort Liability for Strikes in Australia".
2. [1964] A.C. 1129.
3. It is impossible to list everything written here. Some of the major contributions are as follows: Hamson, "A Note on *Rookes* v. *Barnard*", [1961] *C.L.J.* 189; Hamson, "A Further Note on *Rookes* v. *Barnard*", [1964] *C.L.J.* 159; Hoffmann, "*Rookes* v. *Barnard*", (1965) 81 *L.Q.R.* 116; Hughes, "Liability for Loss Caused by Industrial Action", (1970) 86 *L.Q.R.* 181; Smith, "*Rookes* v. *Barnard:* An Upheaval in the Common Law Relating to Industrial Disputes", (1966) 40 *A.L.J.* 81, 112; Wedderburn, "The Right to Threaten Strikes", (1961) 24 *M.L.R.* 572; (1962) 25 *M.L.R.* 513; Wedderburn, "*Stratford and Son Ltd.* v. *Lindley*", (1965) 28 *M.L.R.* 205; Wedderburn, "Torts Out of Contracts: Transatlantic Warnings", (1970) 33 *M.L.R.* 309; and Weir, "Chaos or Cosmos? *Rookes, Stratford* and the Economic Torts", [1964] *C.L.J.* 225.
4. Some of the more notable examples are: *Stratford and Son Ltd.* v. *Lindley* [1965] A.C. 269; *Camden Exhibition and Display Ltd.* v. *Lynott* [1966] 1 Q.B. 555; *Emerald Construction Co. Ltd.* v. *Lowthian* [1966] 1 W.L.R. 691; *Morgan* v. *Fry* [1967] 2 All E.R. 386; *Daily Mirror Newspapers Ltd.* v. *Gardner* [1968] 2 W.L.R. 1239; *Torquay Hotels Co. Ltd.* v. *Cousins* [1969] 1 All E.R. 522; *Acrow (Automation) Ltd.* v. *Rex Chainbelt Inc.* [1971] 3 All E.R. 1175; *Brekkes Ltd.* v. *Cattel* [1971] 2 W.L.R. 647.
5. *Woolley* v. *Dunford* (1972) 3 S.A.S.R. 243; *Sid Ross Agency Pty. Ltd.* v. *Actors and Announcers Equity Association* [1971] 1 N.S.W.L.R. 670; *Adriatic Terrazzo and Foundations Ltd.* v. *Robinson and Owens* (1972) 4 S.A.S.R. 294. There are numerous other unreported cases. Some of these are listed in Appendix 2 to the *Department of Labour Discussion Papers*, prepared for the 1973/74 Industrial Peace Conference. A discussion of some of these cases may be found in Portus, "Civil Law and the Settlement of Disputes" (1973) 15 *Journal of Industrial Relations* 281.
6. Owing to a preference for proceedings under the various arbitration provisions: see Fleming, *The Law of Torts* (4th ed., 1971), 604: Sykes, *Strike Law in Australia* (1960), 146; and see also the comments of Evatt J. in *McKernan* v. *Fraser* (1931) 46 C.L.R. 343, 380.

use of tort remedies against him[7]. He remains therefore peculiarly vulnerable to this kind of attack and the increasing use of the tort law tactic by employers has begun to cause the Australian trade union movement considerable concern[8].

Broadly speaking, liability for damaging the economic interests of others in the course of industrial disputes has fallen into three categories; conspiracy, interference with contractual relations and (after 1964) intimidation. It is not, however, the purpose of this article to discuss the general application of the economic torts to industrial disputes. Its purpose is two-fold. First it is to ask whether, apart from the torts of conspiracy, interference with contract and intimidation, there is now a wider basis of liability for causing economic harm—a principle which now establishes liability for the intentional causing of economic loss by using unlawful means (hereafter referred to as "unlawful interference"). Secondly, its purpose is to examine the possible effect of such a principle in its application to Australian industrial disputes.

Some of the material in the article, such as that dealing with "unlawful means" conspiracies, and the actual decision in *Rookes* v. *Barnard*, is simply intended as a background to the issues with which the article is primarily concerned. However, in the latter part of the article, an attempt is made both to analyse the role of the tort of intimidation as part of the wider "unlawful interference" principle and to provide a basic formulation of this principle. The latter point necessarily involves a discussion of a number of important cases decided in the wake of *Rookes* v. *Barnard*. Finally, it must be remembered that the development of the economic torts has taken place, not entirely, but substantially, in the area of industrial conflict. Therefore, a basic concern of this article has been to assess the significance of the "unlawful interference" principle in relation to industrial disputes and the right to strike. Some general consideration is also given to two recent attempts by Australian Governments to legislate in this area.

Conspiracy to Use Unlawful Means

This topic presents a useful background to the main problem. It is a well recognised principle that if two or more persons combine together to cause economic injury to another by using "unlawful means", they will be liable to the injured party notwithstanding the fact that their unlawful acts did not constitute a recognised nominate tort. Thus in *Williams* v *Hursey*[9] a number of unionists picketed wharves to prevent the plaintiffs from gaining access to their work. It was held by the High Court that the pickets constituted an actionable conspiracy because such conduct was contrary to a provision of the Stevedoring Industry Act[10]. Although this type of conspiracy is also recognised in England[11], the bulk of the examples of its application are to be

7. The State of Queensland is the exception. In that State protective legislation was introduced in the Trade Union Act of 1915 and still remains in the form of ss.70, 71 and 72 of the Conciliation and Arbitration Act, 1961. However, the effect of these provisions has been greatly diminished by the passing of a recent amending provision giving the Governor in Council power to suspend the application of ss.70-72 for periods up to three months; see the Industrial Conciliation and Arbitration Act Amendment Act, 1974.
8. Both the South Australian and Federal Labor Governments during 1973 introduced legislation to protect trade unionists against liability for certain torts if they are acting in the course of an industrial dispute: see cl. 145, Bill for the Industrial Conciliation and Arbitration Act, 1972 (S.A.), and cl.55, Bill for an Act to Amend the Conciliation and Arbitration Act, 1904-1972 (Cth.).
9. (1969) 33 A.L.J.R. 269.
10. *Id.*, 286.
11. *E.g., Cunard Steamship Co.* v. *Stacey* [1955] 2 Ll. R. 247.

found in Australia[12], where statutes regulating industrial conduct are more common.

Thus if two or more combine to injure another, their conduct, whilst not amounting to a nominate tort such as assault or fraud, might still be actionable if it is "unlawful" in a wider sense. It is the combination of the conspiracy with the "unlawfulness" of the conduct which makes it tortious. But, though if X and Y conspire to break a statute in order wilfully to damage A their liability is well established, what is the result if X should act alone? It is here that the law becomes uncertain, because it was never clearly established that what it is tortious for two or more to do was correspondingly tortious for an individual to do.

This distinction between acts done in combination and acts done by individuals is somewhat unsatisfactory. There is no logical difference in the wrongfulness of combined conduct from that of individual conduct[13]. But the distinction may at least be understood by looking at the context in which the economic torts developed. For the large part they were specifically developed in the latter half of the nineteenth century for the purpose of dealing with organised strike activity. Judges then were inclined to the Benthamite view that combined conduct gave an unfair advantage against persons acting alone. In practice, of course, individual employers were many times more powerful than their trade union adversaries. But since the courts were philosophically committed to the view that there was a special kind of "threat" inherent in combined conduct, the law of tort developed different standards in judging the conduct of two persons or more from the standard adopted in assessing the unlawfulness of individual conduct[14].

Conspiracy by "unlawful means", then, was a separate head of liability. It grew out of the "conspiracy" concept, and it did not necessarily follow that what it was unlawful for two or more to do was equally unlawful for one to do. What then was the position of one person using unlawful, but non-tortious means, with intent to injure? The answer was that he would not be liable in tort. At least this appears to have been the position before *Rookes* v. *Barnard* was decided.

Trends Before Rookes v. Barnard

Even before *Rookes* v. *Barnard* (which has been something of a landmark in this area), Street recognised, apart from the tort of conspiracy, an innominate tort of causing economic loss by using unlawful means[15], though at that stage he was content to restrict "unlawful acts" to those with either a tortious

12. *E.g., Heggie* v. *Brisbane Shipwrights' Provident Union* (1906) 3 C.L.R. 686; *Southan v. Grounds* (1916) 16 S.R. (N.S.W.) 274; *Coffey* v. *Geraldton Lumper's Union* (1927) 31 W.A.L.R. 33.

13. How the modern law of conspiracy grew from a misconception of old principles is explained by Sayre in "Criminal Conspiracy", (1922) 25 *H.L.R.* 393.

14. It became established that a group of conspirators would be liable if they acted with an "improper" or "illegitimate" motive, notwithstanding the fact that their conduct was in no other way unlawful: see *Quinn* v. *Leatham* [1901] A.C. 435. On the other hand the presence of an "improper" motive in an individual could never serve to make that person liable unless his actions were otherwise "unlawful": *Allen* v. *Flood* [1898] A.C. 1.

15. Street, *The Law of Torts* (3rd ed., 1963), ch. 19, generally. But compare Salmond, *The Law of Torts (14th ed.* [by R. F. Heuston], 1965), ch. 17; Winfield, *The Law of Torts* (7th ed. [by J. A. Jolowicz and T. Lewis], 1963), ch. 25. *Cf.*, also, Sykes, *Strike Law in Australia* (1960), 177-178.

or criminal character[16]. However, the general trend of case-law before *Rookes* v. *Barnard* does not seem, on balance, to have confirmed Street's view.

In *Attorney-General* v. *Premier Line Ltd.*[17] Eve J. was of the opinion that the owner of a busline, operating without licence and contrary to statute, was not liable to his competitors in tort. His Honour stressed that a penal statute did not, as a general rule, give an action in tort for its breach unless it was the intention of parliament to provide such a remedy. The same argument was accepted in *London Armoury Co. Ltd.* v. *Ever Ready Co. (Great Britain) Ltd.*[18] where the defendant, who was an importer of goods, had failed, in breach of statute, to disclose the country of origin of certain goods. The defendant company was not liable to its trade competitor for breach of these provisions.

A more notable example is *Chapman* v. *Honig*[19]. In this case the plaintiff was a tenant and the defendant his landlord. The plaintiff had been subpoenaed to give evidence against the landlord in previous legal proceedings and in response had done so. As a result the landlord had served the plaintiff with a notice to quit. The court held that this notice was malicious and in contempt of court. However, the majority[20] held that a contempt of court was not the type of criminal conduct which conferred on an individual the right of an action in damages, and the plaintiff was, therefore, unable to recover[21].

It may be possible to rationalise cases such as *Attorney-General* v. *Premier Line* and *London Armoury Co.* v. *Ever Ready Co.* on the ground that the defendants lacked the requisite intent. Liability for "unlawful interference" requires not only the proof of unlawful activity but also, on behalf of the defendant, an intention to injure the plaintiff. It might be argued that the only intention of the defendants in such cases as these was to avoid the statute rather than to economically harm their competitors in trade. However, it is obvious that the requisite intent was not lacking in *Chapman* v. *Honig* and it is therefore difficult to undermine the whole pre-*Rookes* trend on this ground.

The second point is more significant and concerns the fact that many of these cases[22] are connected with the principle that a penal statute does not give a civil remedy for its breach unless parliament has so intended. It is sometimes suggested that the existence of this principle stands in the way of tort actions for "unlawful interference" when the "unlawful conduct" used involves the breach of a statute which does not provide a civil remedy[23]. In *Chapman* v. *Honig*, Davies L.J. said:

16. *Op. cit.*, 359. Naturally in the wake of cases like *Rookes* v. *Barnard* and *Daily Mirror Newspapers* v. *Gardner*, Street now accepts a wider view of the term "unlawful" in this context: see his 5th ed. (1972), ch. 19.
17. [1932] 1 Ch. 303.
18. [1941] 1 All E.R. 364.
19. [1963] 2 All E.R. 513.
20. Davies and Pearson L.JJ., Lord Denning M.R. dissenting.
21. An Australian decision to the same effect as these cases is *James* v. *The Commonwealth* (1939) 62 C.L.R. 339, where it was held that acts by government officials which were in breach of s.92 of the Commonwealth Constitution did not provide a ground of liability in tort. But see *Attorney-General* v. *Butterworth* [1962] 3 All E.R. 326.
22. *E.g., Attorney-General* v. *Premier Line Ltd.* [1932] 1 Ch. 303; *Attorney-General* v. *Butterworth* [1962] 2 All E.R. 326; *Bollinger* (J) v. *Costa Brava Wine Co. Ltd.* [1959] 3 All E.R. 800.
23. Christie, *The Liability of Strikers in the Law of Tort* (1967), 14-15.

> "But not all crimes give rise to a cause of action. . . . [N]ot in every case is an individual who has been injured by a wrongful act entitled to sue, even though the wrongful act is prohibited or made punishable by statute"[24].

But with respect, it is submitted that this approach to breaches of statute is misguided. The problem is caused by confusion between two distinct causes of action; breach of statutory duty and causing loss by "unlawful interference". There is no necessary connection between the two. Broadly speaking the action for breach of statutory duty requires the plaintiff to show that the statute must be intended by parliament to protect that class of people to whom the plaintiff belongs and it must correspondingly be intended to impose a burden upon that class of people to whom the defendant belongs. It is in application to the action for breach of statutory duty that the rule about statutes comes into force, since if it is not Parliament's intention to provide a civil remedy, it does not create the required relationship between the plaintiff and the defendant[25]. But in the action for "unlawful interference" based on the breach of a criminal provision, there is no need for the statute to create a connection between plaintiff and defendant. The nexus is provided by the defendant's intention to cause economic harm to the plaintiff[26]. The statute's only function is that it supplies the "unlawful means" which makes the intentional injury actionable[27].

Assuming this to be the prevailing view before the decision in *Rookes* v. *Barnard*, what was the effect of that decision on liability for "unlawful interference"?

Rookes v. Barnard: Two Views of Intimidation

The decision in *Rookes* v. *Barnard* is significant for a variety of reasons. In the first place it was the case which marked the courts' renewed interference in industrial disputes cases through the medium of tort law. Secondly, it was the first of a "new wave" of industrial tort cases which radically altered the law. Its own most important contribution to these developments was the establishment of the tort of intimidation.

But the decision in *Rookes* v. *Barnard* contained implications which went far beyond the mere establishment of intimidation as a ground of liability in tort, for it gave rise to suspicions that there was a wider base to the economic torts than many had supposed, and that liability for threats of "unlawful acts" might only be one form of this wider concept. The facts in the case were as follows.

Rookes was employed as a draughtsman with the B.O.A.C. and was a member of the Association of Engineering and Shipbuilding Draughtsmen until he resigned in 1955 following a dispute with union officials. An unofficial understanding between the union and the company existed, whereby the union members worked in a "closed shop". When efforts to have Rookes rejoin the union failed, the union sought to have him dismissed through an

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24. [1963] 2 All E.R. 513, 524.
25. Street, *Law of Torts* (5th ed., 1972), 261-272; Salmond, *Law of Torts* (16th ed. [by R. F. Heuston], 1973), 245.
26. Weir, "Chaos or Cosmos? *Rookes, Stratford* and the Economic Torts", [1964] *C.L.J.* 225, 231-232.
27. Without the "unlawful act" of course, the malicious desire to injure would remain non-actionable; see *Allen* v. *Flood* [1898] A.C. 1.

ultimatum delivered to the employers threatening to withdraw labour unless Rooke's employment was terminated. The company yielded to the pressure and Rookes was dismissed, albeit correctly and with due notice, thus avoiding any breach of contract. The parties agreed that it was a term of the individual employment contract that B.O.A.C. employees would not strike. Rookes' action was brought against two of his fellow employees, Barnard and Fistal, both union representatives and organisers of his dismissal. A third defendant, Silverthorne, was a paid union official involved in the dismissal, although not employed by B.O.A.C. Rookes' claim was based on the fact that the union representatives had conspired to have him dismissed by threats of "unlawful acts": that is, intimidation.

The case was fought on relatively new ground because it was not altogether clear that there was any such thing as a tort of intimidation imposing liability for "threats" of "unlawful" acts. And even if there was such a tort there was no authority for the proposition that a breach of contract had the element of wrongfulness required to make the "threat" actionable. With respect to the existence of the tort itself, the argument centred around a few old cases[28] and the views of Salmond in his *Law of Torts*[29]. There Salmond wrote:

> " . . . any person is guilty of an actionable wrong who, with the intention and effect of intimidating any other person into acting in a manner to the harm of the plaintiff, threatens to commit or procure an illegal act"[30].

In support of this proposition Salmond referred to some old cases. The earliest was *Garret* v. *Taylor*[31] where the plaintiff was the lessee of a stone quarry and damage was caused to him by the defendant who threatened the plaintiff's customers and employees with violence and "vexatious suits". The plaintiff recovered for his loss of trade. A similar case was *Tarleton* v. *M'Gawley*[32] where the plaintiff's ship was involved in trading with natives off the coast of Africa. The defendant, an opposition trader, fired at the natives to prevent them dealing with the plaintiff. One of the natives was killed and the others fled. The plaintiff recovered.

Keeble v. *Hickeringill*[33] is, however, a little different. Here the defendant continually discharged a gun so as to frighten away game from the plaintiff's property. Although the plaintiff recovered, the case does not really sit happily within the "unlawful means" framework. The defendant was discharging the firearm on his own property and there is nothing in the facts of the case to reveal even an implicit threat of violence against the plaintiff. Indeed it is difficult to see just what *Keeble* v. *Hickeringill* does stand for. In *Allen* v. *Flood* it was relied on by counsel to support the proposition that to injure another in his trade and livelihood is tortious *per se*. But the case was so harshly dealt with by some of the judges[34] that the better view might be to regard the case as one of nuisance.

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28. In particular, *Garret* v. *Taylor* (1620) Cro. Jac. 567; *Keeble* v. *Hickeringill* (1709) 11 East 574n; *Tarleton* v. *M'Gawley* (1794) Peake 270.
29. 1st ed. (1907).
30. *Id.*, 441.
31. (1620) Cro. Jac. 567.
32. (1709) 11 East 574n.
33. (1794) Peake 270.
34. See, *e.g.*, [1898] A.C. 1, *per* Lord Watson, 101-105; Lord Herschell, 133-135; Lord Davey, 174.

When *Rookes* v. *Barnard* was before the Court of Appeal Lord Pearson exhaustively examined these and other cases and concluded that they established a tort of intimidation[35]. This view was upheld in the House of Lords[36]. Rookes was awarded damages for the loss caused to him by the defendants' intimidation of B.O.A.C. The tort of intimidation was now recognised as comprising a threat of an unlawful act with the intention of causing loss. Liability would only occur however if the intimidated party yielded to the intimidation, as B.O.A.C. did, since only then would damage ensue from the "threat". In this particular case the unlawful act which the defendants had threatened was to breach their contracts of employment. More will be said about this aspect of the case later.

For many observers, *Rookes* v. *Barnard* simply confirmed what the texts had long recognised—that there was a tort of intimidation. But others sensed the fact that the decision perhaps involved a deeper issue, and that the case might be taken as a recognition of the principle that it is tortious to damage another economically by using unlawful means[37]: a principle which was, however, looked at merely in the context of a threat, and in this context dubbed with another name—intimidation.

It may be argued that as early as 1898, the House of Lords in *Allen* v. *Flood* had pointed to the existence of a general principle of tort based on the use of "unlawful means". That case was primarily concerned with the proposition that a man is liable for intentionally causing loss to another's trade and livelihood *per se*. It is well known that this proposition was rejected by their Lordships. But what is more important is the fact that cases such as *Garret* v. *Taylor* and *Tarleton* v. *M'Gawley*, which were used to support the proposition, were in fact explained away by Lord Watson as examples of:

> " . . . cases in which an act detrimental to others, but affording no remedy against the immediate actor, had been procured by illegal means"[38].

However since no unlawful means were present in that case, what was said in that regard was only *obiter* and much of it became obscured when the House of Lords in *Quinn* v. *Leatham*[39] drew the distinction between acts of individuals and acts done in conspiracy. Henceforth *Allen* v. *Flood* became established as the case where the action failed because there was no conspiracy.

A further pointer to the *Rookes* decision having a wider base lay in the fact that there has never before been an indication that a "threat" bore a legal consequence, which did not also attach to the commission of the act threatened. If you threatened to do something, it was the same as doing it[40]. This fact was recognised in the Canadian case *International Brotherhood of Teamsters* v. *Therien*[41]. That case involved a construction company who had entered into a collective agreement with the defendant union. Among other

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35. [1963] 1 Q.B. 623, 688.
36. [1964] A.C. 1129 *per* Lord Reid, 1167; Lord Evershed, 1184; Lord Hodson, 1198; Lord Pearce, 1233. Lord Devlin was content to rely on Salmond's text: *id.*, 1205.
37. *E.g.*, Weir, [1964] *C.L.J.* 225, 226; Hoffman, (1965) 81 *L.Q.R.* 116, 140.
38. [1898] A.C. 1, 104. See also Lord Herschell, 137; Lord Shand, 167; Lord James of Hereford, 180.
39. [1901] A.C. 495.
40. "Illegal means may be constituted by a threat to commit or procure an illegal act"; Clerk and Lindsell, *Torts* (11th ed., 1954), 324. See also Christie, *The Liability of Strikers in the Law of Torts* (1967), 174, 176.
41. (1960) 22 D.L.R. (2d) 1.

things, the agreement contained terms providing for the employment of union labour only, and for the submission of all disputes to arbitration. Under a local Labour Relations Statute the collective agreement was binding upon the union. The construction company habitually hired the services of the plaintiff who owned a trucking business. Union officials approached the plaintiff and asked him to join the union. When he refused the defendants threatened to picket the construction company sites until the construction company ceased dealing with the plaintiff. The construction company yielded to these threats and informed the plaintiff that his services would no longer be required. The plaintiff consequently suffered loss.

The plaintiff recovered on the ground that the defendant's threats were in breach of the collective agreement with the Labour Relations Statute, and therefore were unlawful. The threats were not viewed as a separate tort distinct from completed acts but, rather, as acts themselves amounting to the *use* of "unlawful means".

Logically of course it makes no sense to say that a threat to do a thing is tortious and yet to do the thing itself is not. Such reasoning was forced upon the House of Lords in *Rookes* because there the court was dealing with a breach of contract as the "unlawful means". Had the court not distinguished the "threat" from the "deed" it would have followed that the commission of a breach of contract with intent to injure was tortious *per se*. In other words, that a mere breach of contract, if done with intention to injure, even in the absence of other tortious conduct, would itself provide an action in tort at the suit of the injured party. Some difficulties flow from this conception, as Lord Pearson pointed out in *Rookes* v. *Barnard*[42]. So far the courts have not directly considered these questions[43], though, if the remedies allowed for unlawful interference continue to expand, it is inevitable that they will be forced to do so. However, until such time as a court is called upon to rule in an action for "unlawful interference" in tort, based upon the commission of a breach of contract, the distinction between intimidation and "unlawful interference" will remain intact.

Finally, even if cases like *Garret* v. *Taylor* and *Tarleton* v. *M'Gawley* do support the intimidation principle, they are also obviously consistent with the broader proposition. In both cases there were threats of assaults. A simple example soon reveals that *Tarleton* v. *M'Gawley* cannot simply have rested on the 'threat" principle. If the defendant in that case, instead of frightening away the canoe, had sunk it and killed all on board, though the natives would have been prevented from dealing with the plaintiff it could not be said that they had been *coerced* not to deal with them[44]. Yet it is surely not tenable to argue that the plaintiff would not still have recovered. Once the shot was fired the plaintiff had a basis for his action for "unlawful interference", provided the unlawful act caused the cessation of business between natives and plaintiff.

In conclusion to this part therefore, it might be said that although *Rookes* v. *Barnard* was apparently a case which recognised the tort of "intimidation" there existed sufficient grounds for considering the decision in wider terms.

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42. [1963] 1 Q.B. 623, 695 (C.A.).
43. Some consideration is given to these points, *infra,* 446-447.
44. Hoffmann, (1965) 81 *L.Q.R.* 116, 121.

The Tort of Unlawful Interference since Rookes v. Barnard

The first confirmation that there was a wider principle inherent in *Rookes* may be found in the judgments of Lord Reid and Viscount Radcliffe in *Stratford* v. *Lindley*[45]. Stratford controlled two companies, Stratford and Son Ltd. and Bowker and King Ltd. The defendants were officials of the Watermen's Union. For some years the Watermen's Union had sought recognition by Bowker and King in order to negotiate terms and conditions on behalf of their members working for that company. Bowker and King refused to recognise the Watermen's Union but in 1963 recognised another union, the Transport and General Workers Union. Following this rebuff the Watermen's Union instituted direct action by placing an embargo upon the activities of Stratford and Son. That company operated a barge-hiring business and barge-repairing yard. Throughout the Port of London, members of the Watermen's Union were instructed not to handle any of Stratford's barges and the barge-repairing yard was declared black[46]. The result was considerable financial loss to Stratford and Son. Stratford and Son took action for an injunction against the boycott.

The House of Lords found for the plaintiff company because the defendant unionists had wrongfully induced breaches of contracts between Stratfords and their customers, the hirers. However, Lord Reid and Viscount Radcliffe went on to find for the plaintiffs on the further ground that the defendants had used "unlawful means" to injure the plaintiffs. To effect the embargo the unions had refused to handle Stratford's barges in defiance of the orders given by their employers. Therefore they were breaking their employment contracts and these breaches were being induced by union instructions. Since inducing breach of contract is tortious it is clear that the defendants were using means "unlawful" as against the employers, for the purpose of injuring Stratford: that is, they were liable for unlawful interference[47].

The approach taken by Lord Reid and Viscount Radcliffe was reinforced by the decision of the Court of Appeal in *Daily Mirror Newspapers* v. *Gardner*[48]. In that case the defendants were members of a union representing retail newsagents. Following a decision by the Daily Mirror to increase prices the wholesalers of newspapers attempted to pass the increase on to the retailers. The defendants took strong exception to this and resolved that members of the union should observe a week-long boycott of the Daily Mirror. This object was to be effected by sending "stop notices" to the wholesalers informing them that the Daily Mirror was not to be supplied to them for one week. The plaintiffs sued for an injunction on two grounds:

(i) that the defendants had used "unlawful means" to damage the plaintiffs in their trade; and
(ii) that the defendants were inducing a breach of the contracts of supply existing between the plaintiffs and the wholesalers.

The plaintiffs succeeded on both grounds but it is only the first ground with which this article is concerned.

On this point the plaintiffs argued that the recommendation to union members to boycott the Daily Mirror was "unlawful" since it was in breach

45. [1965] A.C. 269 (H.L.).
46. The Watermen's Union controlled 3,000 out of the 3,500 bargemen in the Port of London.
47. *Per* Lord Reid, 324; Viscount Radcliffe, 328-329.
48. [1968] 2 All E.R. 163.

of s.6(7) of the Restrictive Trade Practices Act, 1956. This argument was accepted by the Court of Appeal. It was held that should the boycott decision come before the Restrictive Trade Practices Court, the "inevitable result"[49] would be that the decision would be declared "contrary to the public interest"[50] and therefore "void". These facts were, in the courts opinion, sufficient to make the boycott decision "unlawful means".

As to the defendants' liability for using "unlawful means" Lord Denning said:

> "I have always understood that if one person interferes with the trade or business of another, and does so by unlawful means, then he is acting unlawfully, even though he does not procure or induce any actual breach of contract. Interference by unlawful means is enough"[51].

The *Daily Mirror* decision is significant for two reasons. Firstly it confirmed that outside of the established economic torts like conspiracy and interference with contract, there was a wider base of liability for unlawful interference with trade.

But the second, and more important, aspect of the case is the apparent width given to the meaning of the term "unlawful" in this context. Hitherto the courts had been reluctant to recognise that breaches of statutory provisions necessarily constituted "unlawful means" for the purposes of tort liability, although they were more inclined to do so when dealing with conspiracy cases[52]. Therefore this transition from "contrary to public interest" to "unlawful means" was somewhat novel, and has not gone without criticism[53]. The fact that it is far from clearly established that every breach of a criminal statute will constitute "unlawful means" in tort cases makes it difficult to see how conduct which is merely "not in the public interest" can do so, particularly when the Act only declares such conduct "void"[54] and not "illegal".

Criticism apart, the *Daily Mirror* decision does represent a gigantic step in the development of the tort of unlawful interference, although it remains to be determined whether it has gone too far in declaring breaches of such statutes to be "unlawful means" in the context of tort law[55].

The trend towards the acceptance of the unlawful interference principle was continued in the recent case of *Acrow Ltd.* v. *Rex Chainbelt Inc.*[56] Acrow was an English company carrying on a manufacturing business under licence from Handling Systems Inc., an American company. Following a dispute between the two companies, Systems Inc. attempted unlawfully to revoke the licence and to hamper Acrow's business. Systems Inc. issued instructions to Rex Chainbelt Inc., another American company, ordering them to cease supplying certain parts which Acrow needed to carry on production. Rex Chainbelt had substantial business connections with Systems Inc. and they

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49. *Per* Russell L.J., 171.
50. See s.21 of the Act. A similar restriction had been so declared in an earlier case; *Re National Federation of Retail Newsagents, Booksellers and Stationers' Agreement* [1965] 2 All E.R. 417. This case was relied upon by both Lord Denning M.R. and Russell L.J., at 169, 171, respectively.
51. *Daily Mirror Newspapers* v. *Gardner* [1968] 2 All E.R. 163, 169.
52. These points are made *supra.*
53. See, *e.g.*, Wedderburn, "Inducing Breach of Contract and Unlawful Interference with Trade", (1968) 31 *M.L.R.* 440, 441-442; Guest and Hoffmann, "When is a Boycott Unlawful?", (1968) 84 *L.Q.R.* 310, 316.
54. Restrictive Trade Practices Act, 1956 (U.K.), s.20(3).
55. In this respect Wedderburn has reservations: (1968) 31 *M.L.R.* 440, 442.
56. [1971] 3 All E.R. 1175.

therefore complied with the instructions given by that company. The result was severe interference with Acrow's manufacturing business. To bring an end to this disruption Acrow sued Systems Inc. and were awarded an injunction preventing the American company from interfering with their business being carried on under the licence. However, the instructions from Systems Inc. to Rex Chainbelt continued and so too did the embargo upon parts for Acrow. Acrow accordingly proceeded against Rex Chainbelt.

Nothwithstanding the fact that no contract existed between Rex Chainbelt and Acrow, the plaintiffs succeeded on the ground that Rex Chainbelt was interfering with Acrow's business by using unlawful means[57]. Whereas in normal circumstances the defendants could have, at any time, broken off their business connection with Acrow, they were prohibited from so doing here, because they had so acted in response to unlawful directions from Systems Inc. The instructions from that company were unlawful in that they were directly contrary to the terms of the injunction placed on them. Therefore Rex Chainbelt was aiding and abetting an unlawful act and was guilty of using unlawful means itself.

But it is submitted that the application of the "unlawful interference" principle in this case is open to serious objection. It is difficult to see how the defendant company was acting unlawfully when it was doing something which it had a perfect right to do, namely to cease a non-contractual business relationship with another company. The judgment of Pearson L.J. in *Chapman* v. *Honig* was based upon this precise point. In that case a tenant was given notice to quit by his landlord. Although the notice was contractually valid, it was given in circumstances amounting to a contempt of court. His Honour held:

> " . . . in the present case . . . there can be no such right of action in respect of an act which . . . as between the tenant and the landlord, has been done in exercise of a right under contract . . . and in accordance with its provision. The main reason is that the same act as between the same parties cannot reasonably be supposed to be both lawful and unlawful—in the sphere of contract valid and effective . . . and in the sphere of tort, wrongful and imposing a tortious liability"[58].

In *Acrow* v. *Rex Chainbelt,* Lord Denning himself refers to "unlawful means" and "an act which a person is not at liberty to commit"[59]. Although it is true that Systems Inc. were not at liberty to commit further acts harassing Acrow, there was no injunction against Rex Chainbelt. Were the court entitled to assume that the unlawfulness of the instructions from Systems Inc. pervaded the conduct of the defendant? In this respect the court stressed the fact that if it were not for the directions issued by Systems Inc., Rex Chainbelt would have been willing to supply Acrow[60].

Therefore their reason for acting was unlawful. Yet this would seem to conflict with the principle that a bad motive cannot make a lawful act unlawful[61]. Whatever the reason Rex Chainbelt decided to withdraw supplies,

57. *Per* Lord Denning M.R., 1181; Phillimore L.J., 1181; Megaw L.J., 1182.
58. [1963] 2 All E.R. 513, 523.
59. *Acrow Ltd.* v. *Rex Chainbelt* [1971] 3 All E.R. 1175, 1181. The same test is used in the *Daily Mirror case* [1968] 2 W.L.R. 1239, and the *Torquay Hotels case* [1969] 1 All E.R. 522.
60. [1971] 3 All E.R. 1175, 1181.
61. *Allen* v. *Flood* [1898] A.C. 1.

whether in response to an unlawful request or for private business reasons, the motive should be irrelevant if the act is otherwise lawful. The courts' mistake, it is submitted, was in assuming that the unlawfulness of System Inc.'s conduct *necessarily* pervaded the conduct of Rex Chainbelt. The effect seems to be that where an act can be both lawful and unlawful, the burden of proof is forced upon the defendant, to prove that he acted for the lawful and not the unlawful purpose. In its anxiousness to protect the free trade of Acrow, the court seriously undermined the right of Rex Chainbelt to decide with whom they would deal.

Another case determined in 1971 on the "unlawful interference" principle was *Brekkes Ltd.* v. *Cattel*[62], which was decided on the same point as adopted in the *Daily Mirror* Case. In *Brekkes* v. *Cattel* the plaintiffs controlled a transport company which delivered frozen fish to various members of the Birmingham Fish Association. The members of this association unanimously passed a resolution adopting the exclusive use of another transport system for the supply of their fish. Henceforth members of the association were prohibited from dealing with the plaintiff. The plaintiff company complained that the action of the association had interfered with the plaintiff's prospective contracts with the various Association members whom the plaintiff had previously supplied and therefore they were entitled to an injunction. Pennycuick V.C. held that the plaintiffs could not complain of an interference with their prospective contracts when their prospective contractors were themselves the persons disrupting the relationship[63]. However, the injunction was awarded on the ground that the resolution adopted by the Birmingham Fish Association was contrary to the Restrictive Trade Practices Act, and therefore constituted "unlawful interference"[64]. The decision in *Brekkes Ltd.* v. *Cattel* therefore not only adopts the unlawful means principle but also accepts the wide interpretation of "unlawful" which was adopted in the *Daily Mirror* case.

In conclusion to this part it is submitted that the above cases establish beyond doubt that there is a principle of liability in tort which, for the sake of convenience, may be labelled "unlawful interference". This principle exists independently of the established economic torts—conspiracy, intimidation and interference with contractual relations. The next part of the article is concerned with analysing the scope of the tort.

A Formulation of the Tort of Unlawful Interference

Reduced to a simple proposition the liability for unlawful interference may be stated in this way.

(i) If A acts against B, with the intention of causing him economic loss, and in the process uses means which are unlawful (even though not otherwise tortious) A is liable to B for the damage so caused[65].

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62. [1971] 2 W.L.R. 647.
63. *Id.*, 651.
64. *Id.*, 652.
65. *E.g., Acrow* v. *Rex Chainbelt* [1971] 3 All E.R. 1175. See also Weir, [1964] *C.L.J. 225, 231.* Note however, that this proposition is denied by Winfield who argues that the tort of using unlawful means is only actionable in three-party situations. In situations involving two parties only, the author relies upon *Chapman* v. *Honig* as establishing that liability for using unlawful means does not occur in the absence of a nominate tort or a breach of contract: see Winfield

(ii) If A acts against C with the intention of causing economic loss to B, and in the process uses means which are unlawful (even though not otherwise tortious) against C, then A is liable for the damage which results to B[66].

Thus if A, with the intention of injuring B, should assault B's solicitor C, A will be liable to B for any damage which results to B from A's conduct. This proposition has been denied[67], but it now unquestionably represents modern trends. Another example, in the "interference with business" context, is that if A should burn down C's warehouse in order to prevent him supplying goods to B, then this conduct would be actionable at the suit of B[68].

There are two further points. First, it is clear from the above formulations that "intention to injure" is the cornerstone of liability for "unlawful interference". This point will be taken up in more detail later. Secondly, the above propositions alone do not tell us a great deal about the *extent* of the tort. There still remains the central problem of determining what is "unlawful" conduct in this context.

The "Unlawful Means" Requirement

The scope of the term "unlawful" is basic to the whole area of the industrial torts, since they are all, in one way or another (with the exception of conspiracy to injure), dependent upon proof of some "unlawful" conduct. However, before the decision in *Allen* v. *Flood*[69], it was by no means certain that proof of "unlawful means" was necessary at all. Before *Allen* v. *Flood* there was considerable support for the proposition that all interference with trade and livelihood, if caused intentionally and without justification, was tortious *per se*[70]. This point was argued in *Allen* v. *Flood* and it is clear that had it been accepted some consolidation of the law in this area could have taken place under this general principle[71]. However, the majority in *Allen* v. *Flood* rejected the proposition and accepted a narrower base of liability, which required the presence of "unlawful means". Henceforth it was generally accepted[72] in the common law world that the presence of malice (intention to injure) in the absence of a breach of contract or some other "unlawful act" could not establish liability in tort[73]. The result of the decision in *Allen* v. *Flood* was that instead of a generalised principle rationalising the economic

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65 (Continued)
and Jolowicz, *Torts* (9th ed., 1971), 468-469. However it is submitted that the law has well and truly advanced beyond this point. In *Rookes* v. *Barnard* for instance it was clearly envisaged by Lord Devlin that the tort of intimidation would be actionable in two party situations as well as three party situations: see [1964] A.C. 1129, 1205.

66. *E.g., Daily Mirror Newspapers* v. *Gardner* [1968] 2 W.L.R. 1239.
67. Sykes, *Strike Law in Australia* (1960), 177.
68. Professor Fleming considers this point still open to question: *Law of Torts* (4th ed., 1971), 614 n.11.
69. [1898] A.C. 1.
70. See, *e.g.*, Bowen L.J. in *Ratcliffe* v. *Evans* [1892] 2 Q.B. 524, and also in *Mogul Steamship Co.* v. *McGregor, Gow & Co.*, [1889] 23 Q.B.D. 598.
71. Similar to the *prima facie* tort theory in America; see Heydon, "The Future of the Economic Torts," (1975) 12 *U.W.A.L.R.* 1 at 13ff.
72. Some debate did continue on the issue until the proposition rejected in *Allen* v. *Flood* was referred to as "the leading heresy" by Lord Dunedin in *Sorrell* v. *Smith* [1925] A.C. 700, 719.
73. Lord Watson in *Allen* v. *Flood* put it in the following terms: "The root of the principle is that, in any legal question, malice depends, not upon evil motive which influenced the mind of the actor, but upon the illegal character of the act which he contemplated and committed." [1898] A.C. 1, 94.

torts as a whole, what developed was a fragmented and disjointed area of liability which has, in recent times, come under increasing criticism[74].

What factors account for the position adopted by the House of Lords in *Allen* v. *Flood?* In the first place it has been suggested that the decision was one of political expediency, designed to protect a trade union movement which would have been destroyed by an unfettered "interference with trade and livelihood" principle[75]. There are supporting grounds for this argument, since in the conspiracy context, the courts had long displayed a reluctance to recognise trade union objectives as legitimate or justified.[76] However, there may be another explanation for the decision. A principle that it is tortious to interfere with a person's trade or livelihood completely cuts across the legality of trade competition, because it is the object of most enterprises to develop and prosper at the expense of their business competitors. The House of Lords had already faced this problem in *Mogul Steamship Co.* v. *McGregor, Gow and Co.*[77], a case in which the defendants had conspired with others to exclude the plaintiffs from a large part of their tea trade with China. It was held that the defendants were not liable because there was nothing wrongful in their conduct. Their actions were justified as being in the proper exercise of trade competition. Thus a general principle of causing economic loss without justification was, at this stage, still possible.

However, the defence of justification itself involves difficulties, as experience in American jurisdictions indicates[78]. It allows the courts to consider, as a matter of policy, the social, economic and moral aspects of the defendant's conduct. This inevitably places the judiciary at the heart of the matter, and would open the way for claims of prejudice, especially in employer-union disputes[79]. Furthermore, the development of a defence which would adequately protect fair business competition is a difficult and uncertain[80] process which would undoubtedly take many years to develop. The members of the court in *Allen* v. *Flood* must have been aware of these problems[81]. Thus it is open to suggestion that the adoption of an "unlawful means" criterion was a simpler alternative to the development of wide theories of justification.

Apart from conspiracy to injure[82], all that remained after *Allen* v. *Flood* was the tort of conspiracy by unlawful means[83] and the tort of interference with contract. Apart from these heads of liability the intentional infliction of

74. Weir, "Chaos or Cosmos? *Rookes, Stratford* and the Economic Torts", [1964] *C.L.J.* 225; Heydon, "The Future of the Economic Torts", (1975) 12 *U.W.A.L.R.* 1; Dawson, "Is There or Should There Be a Prima Facie Tort in New Zealand?", (1974) 2 *Auckland U.L.R.* 1.
75. Hoffmann, "*Rookes* v. *Barnard*", (1965) 81 *L.Q.R.* 116, 139; Heydon, "Justification in Intentional Economic Loss", (1970) 20 *U. Toronto L.J.* 139, 160.
76. *Temperton* v. *Russell* [1893] 1 Q.B. 715 (C.A.); *Trollope and Sons* v. *London Building Trades Federation* (1895) 11 T.L.R. 280.
77. [1892] A.C. 25.
78. Wedderburn, "Torts Out of Contracts: Transatlantic Warnings", (1970) 33 *M.L.R.* 309.
79. *Ibid.* See also Heydon, "The Future of the Economic Torts", (1975) 12 *U.W.A.L.R.* 1, 15.
80. *Ibid.*
81. For further discussion or the difficulties with the defence of justification in tort see Heydon, (1975) 12 *U.W.A.L.R.* 1, 15-16.
82. The question of conspiracy, in the view of Lord Herschell in *Allen* v. *Flood* was " . . . anomalous in more than one respect": [1898] A.C. 1, 124.
83. It was argued *supra*, that it was not until after the decision in *Rookes* v. *Barnard* [1964] A.C. 1129 that it became clear that an *individual* acting alone would be liable in tort for the use of "unlawful means". Thus until this point, the major effect of the decision in *Allen* v. *Flood* was in the conspiracy context; see the cases referred to in nn.11 and 12, *supra.*

economic loss by one person upon another, even if unjustified, was not tortious. The tort of interference with contract itself fell within the "unlawful means" concept, because, as Lord Watson pointed out in *Allen* v. *Flood,* it involved the commission of an act which the procurer knows to be illegal[84]. With the emphasis upon "unlawful means" rather than motive it was not surprising that when the tort of interference with contract was extended from the three party *Lumley* v. *Gye*[85] situation to the four party "indirect" form of interference, it was done on the basis that what the procurer did was an independently unlawful act[86]. Moreover, when the tort of intimidation was added to the list in 1964[87], the House of Lords, making their decision under the *Allen* v. *Flood* umbrella, was obliged to find that "breaches of contracts" could be "unlawful" for tort purposes.

The fact that conspiracy to injure was the one industrial tort which did not depend upon the commission of an unlawful act explains why it gradually drifted out of the picture in industrial disputes cases. It eventually became recognised that the categories of justification applying to it, were, in the trade union sphere, wide enough to block out its application[88]. Apart from this one area however, the defence of justification to the industrial torts has been virtually ignored. Since it was generally accepted that the use of "unlawful means" could not be justified[89] the whole question, until recently, appeared of little relevance to the industrial torts. The current revival of the justification issue, which will be dealt with later in this article[90], must be seen as a response to the ever widening "unlawful interference" principle.

The Meaning of Unlawful

With minor exceptions, concerning breaches of contracts[91], the scope for the application of the "unlawfulness" criterion is equal under each head of liability, whether it be conspiracy by unlawful means, intimidation, or "unlawful interference" on the part of an individual. However, the general approach of the courts to this requirement has been unsatisfactory. Little effort has been made at judicial level to determine, or categorise, in even the most general terms, the meaning of the term "unlawful" in the context of tort cases. Once the "unlawful" requirement was established it appears that the courts continued with its application on an *ad hoc* basis. Nothing illustrates this point better than the decision of the Court of Appeal in *Daily Mirror Newspapers Ltd.* v. *Gardner*[92], where, on application for an injunction it was held that the making of an arrangement which was possibly void under the Restrictive Trade Practices Act, 1956, was an "unlawful" act. There could be no basis for anticipating this decision. It was by no means clear that a breach of any statute constituted unlawful means. The Act in question certainly extended no individual tort remedy to injured parties. Furthermore, the arrangement was not "illegal" in the strict sense, but merely void. Never-

84. *Allen* v. *Flood* [1898] A.C. 1, 96.
85. (1853) 2 El. & Bl. 216.
86. *Thomson* v. *Deakin* [1952] Ch. 646. There is insufficient space in this article to discuss at length the tort of interference with contract in either its direct or indirect forms.
87. *Rookes* v. *Barnard* [1964] A.C. 1129.
88. *Crofter Hand Woven Harris Tweed* v. *Veitch* [1942] A.C. 435.
89. Fleming, *Law of Torts* (4th ed., 1971), 609; Dawson, (1974) 2 *Auckland U.L.R.* 1, 16; Dworkin, "Intentionally Causing Economic Loss—*Beaudesert Shire Council* v. *Smith* Revisited", (1974) 1 *Monash U.L.R.* 4, 30.
90. *Infra.*
91. *Infra.*
92. [1968] 2 W.L.R. 1239.

theless it was sufficient for the purposes of the Court of Appeal, and the injunction was granted.

Such an approach appears to heighten the degree of inconsistency and uncertainty which inevitably surrounds the use of "unlawful means" as a criterion for evaluating the tortiousness, or otherwise, of economic activity. In light of the failure of the judiciary to rationalise the position, or to define terms, one is simply left with the authorities, fragmented and inconsistent as they are. An exhaustive definition of the term "unlawful" is impossible. However, some indication of what might be regarded as "unlawful" for tort purposes, and some general conclusions as to the potential for future development, may be determined from an examination of past cases.

It may be argued that the term "unlawful" requires acts which are *at least tortious* as against the plaintiff or a third party. This seems to have been the view of Lord Dunedin in *Sorrell* v. *Smith*[93]. Furthermore Lord Watson may have been referring to torts when he referred to "acts in the nature of civil wrongs" in *Allen* v. *Flood*[94]. However it is generally recognised that the scope of the word unlawful for the purpose of liability for torts is not so restricted[95].

When Donovan L.J. was confronted with a similar difficulty in *Rookes* v. *Barnard*, he undertook an examination of the various definitions of the term "unlawful" as used in tort cases, and came to the conclusion that generally the authorities established a leaning towards restriction of the term "unlawful" to cover acts which were either criminal or tortious[96]. Such simplification does not, however, make the problem a great deal easier. What *types* of criminal act are "unlawful" in the tort context? Virtually all of the definitions reviewed by Donovan L.J. referred to crimes of violence[97], threats of violence[98], obstruction[99], intimidation[100] and fraud[101]. These examples of "unlawful means" are of little help since collectively they represent a fairly restricted class of common law crimes which also have tortious elements. What is more, it is obvious that any crime with tortious elements will automatically be unlawful for the purposes of tort liability—that much at least was pointed out by Davies L.J. in *Chapman* v. *Honig:*

> "It is, no doubt, true that in most cases a person injured by a criminal offence has a right of action against the criminal. That is because most crimes are torts. Acts of criminal violence to persons or property would be trespasses; larceny would be conversion; most frauds would give rise to an action in deceit; and so on"[102].

The real problem, at least since *Rookes* v. *Barnard*, has concerned crimes involving conduct which is not correspondingly tortious; *e.g.*, acts which are criminal because they breach penal statutes or which constitute common

93. [1925] A.C. 700, 730.
94. [1898] A.C. 1, 97-98.
95. Fleming, *op. cit.*, 613.
96. [1963] 1 Q.B. 623, 681.
97. See *Allen* v. *Flood* [1898] A.C. 1, *per* Lord Shand, 162, 165; Lord Herschell, 137. See also *Sorrell* v. *Smith* [1925] A.C. 700, *per* Viscount Cave, 714.
98. See *Allen* v. *Flood* [1898] A.C. 1, *per* Lord Herschell, 137. See also *Sorrell* v. Smith [1925] A.C. 700, *per* Viscount Cave, 714; Lord Sumner, 737.
99. *Allen* v. *Flood* [1898] A.C. 1 *per* Lord Shand, 165.
100. *Ibid.*
101. *Allen* v. *Flood* [1898] A.C. 1, *per* Lord Shand, 162; Lord Herschell, 137. See also *Sorrell* v. *Smith* [1925] A.C. 700, *per* Viscount Cave, 714.
102. [1963] 2 All E.R. 513, 524.

law crimes containing no tortious elements. None of Lord Donovan's examples exhibit this type of criminality.

On the other hand it has long been recognised in cases involving a civil *conspiracy* that a breach of almost any type of penal or industrial statute will support an action in tort[103]. It was argued earlier that it has often been the practice of the courts to give a broader interpretation to "unlawful means" in conspiracy cases because historically the judicial attitude towards combined conduct, especially in industrial disputes cases, was different from the approach taken in cases where individuals had acted alone[104].

The Canadian case *McKinnon* v. *F. W. Woolworth Co. Ltd.*[105], although not involving an industrial dispute, illustrates this approach. Here it was held that the crime of extortion would constitute "unlawful means" for the purpose of supporting an action in conspiracy notwithstanding the fact that the same conduct might not be actionable if committed by one person alone. The plaintiff in this case was an employee of Woolworths. Suspected of theft from the store the plaintiff was subjected to threats and coercion by the store manager and a private detective agent. Under pressure the plaintiff falsely confessed to the thefts and also "agreed" to pay a sum of money representing the amounts he was alleged to have misappropriated. The plaintiff sued the manager and detective agent for conspiracy. The court held that their conduct amounted to the crime of extortion. In the course of its judgment the Supreme Court (Alberta) said:

> " . . . the tort of conspiracy is broader than text-writers and commentators have suggested and is broad enough to give a cause of action where there has been an agreement to commit an unlawful act or do an otherwise lawful act in an unlawful manner . . . A crime is an unlawful act whether or not it would give rise to a cause of action if committed by one person"[106].

This approach is significantly wider than that taken by Lord Donovan in *Rookes* v. *Barnard*. It would follow from *McKinnon* v. *Woolworth* that all crimes, both statutory and common law, might be relied upon as establishing "unlawful means" in civil conspiracy cases[107]. This is perfectly consistent with previous case law where strikes and picketing in breach of criminal statutes have supported actions in tort[108].

In addition to crimes, "unlawful means" in the context of conspiracy cases obviously includes *all torts*. Thus conspiracies to use unlawful means have been based upon the torts of intimidation[109], and assault[110]. The term also includes lies told with fraudulent intent[111].

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103. *Heggie* v. *Brisbane Shipwrights' Provident Union* (1906) 3 C.L.R. 686 (breach of Queensland Criminal Code); *Southan* v. *Grounds* (1916) 16 S.R. (N.S.W.) 274 (strike in breach of statute); *Coffey* v. *Geraldton Lumpers Union* (1928) 31 W.A.L.R. 33 (strike in breach of statute); *Williams* v. *Hursey* (1959) 33 A.L.J.R. 269 (picketing illegal by statute).
104. *Supra*, 430.
105. (1968) 70 D.L.R. (2d) 280.
106. *Id.*, 287.
107. See also the wide remarks made by Lord Wright in *Crofter Hand Woven Harris Tweed* v. *Veitch* [1942] A.C. 435, 461.
108. *Supra*, n.103.
109. *Rookes* v. *Barnard* [1964] A.C. 1129.
110. *Williams* v. *Hursey* (1959) 33 A.L.J.R. 269, 285-286.
111. See *Greenhalgh* v. *Mallard* [1947] 2 All E.R. 255; *Wright* v. *Bennett* [1948] 1 All E.R. 227. However *Byrne* v. *Kinematograph Renters Society* [1958] 1 W.L.R. 762 may be to the contrary.

It is submitted that the purely historical distinction between combined conduct and individual conduct should now be disregarded when the complaint is one of using "unlawful means". The judgment in *Daily Mirror Newspapers* v. *Gardner* seems to confirm this. There is no logical reason why "unlawful means" should have a different meaning in conspiracy and intimidation cases than it does in cases of "unlawful interference".

Finally, it is submitted that there is little assistance to be gained from Lord Denning's reference, in *Torquay Hotels* v. *Cousins*[112], to acts which one is "not at liberty to commit"[113]. It is thought that this concept covers conduct which is unlawful in a broader sense than the mere commission of crimes or torts, though whether it may stretch to acts which are unethical or immoral, as has been suggested[114], is a problem for future consideration[115].

The next part of the article involves an examination of the main areas of unlawful activity as delineated by the authorities, and some consideration of how they might relate to liability for "unlawful interference".

(i) TORTS AND COMMON LAW CRIMES

At the very least, "unlawful means" takes in the commission of all torts. If the tort is committed by A against B, then B obviously has the customary action. If the tort is committed against B in order to injure C, C should have an action for unlawful interference[116].

Common law crimes containing tortious elements will also constitute "unlawful means". This therefore includes crimes such as assault, fraud, etc.[117] However it is submitted that even crimes which do not have tortious elements may suffice for the tort of unlawful interference. In the conspiracy context it has been accepted that all crimes constitute unlawful means[118].

Some problems may occur in the area of contempt of court. The finding in *Chapman* v. *Honig* that conduct amounting to contempt of court was not "unlawful" for the purpose of establishing liability in tort is patently inconsistent with the existence of a general "unlawful interference" principle. However, it is submitted that *Chapman* v. *Honig* is now so far out of step with the law that it should be ignored[119].

The same may be said of *Hargreaves* v. *Bretherton*[120]. In that case the plaintiff brought an action for damage suffered by him as a result of the defendant's perjury in a criminal trial. It was held that no civil cause of action could lie. Although there could be special problems with perjury[121], it may well be time to revise this decision, particularly in view of later cases like *Acrow* v. *Rex Chainbelt*[122].

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112. [1969] 1 All E.R. 522.
113. *Id.*, 139. The formula was repeated in *Acrow (Automation) Ltd.* v. *Rex Chainbelt* [1971] 3 All E.R. 1175 and *Cory Lighterage* v. *T.G.W.U.* [1973] 2 All E.R. 558.
114. Dworkin, (1974) 1 *Monash U.L.R.* 4, 23.
115. In support of his own proposition, Lord Denning's examples of acts which one is "not at liberty to commit" included the torts of intimidation and interference with contract, and breach of the Restrictive Trade Practices Act: *Torquay Hotels* v. *Cousins* [1969] 1 All E.R. 522, 530-531.
116. *Allen v. Flood* [1898] A.C. 1, 97-98, *per* Lord Watson.
117. *Chapman* v. *Honig* [1963] 2 All E.R. 513, 524, *per* Davies L.J.
118. *McKinnon* v. *F. W. Woolworths Co. Ltd.* (1968) 70 D.L.R. (2d) 280, 287.
119. See Hamson, "Inducing Breach of Contract—Interference with Business", [1968] *C.L.J.* 190, 191; Weir, [1964] *C.L.J.* 225, 232.
120. [1959] 1 Q.B. 45.
121. *Id.*, 52-54.
122. [1971] 3 All E.R. 1175.

(ii) BREACH OF CONTRACT

To categorise a mere breach of contract as unlawful conduct giving a tortious remedy for "unlawful interference" causes problems of a fundamental nature to contract law. In *Rookes* v. *Barnard* the House of Lords was called upon to determine, for the first time in a major case, whether a breach of contract could give rise to liability in tort. The finding that a breach of contract was "unlawful" for the purposes of the tort of intimidation was an innovation, since it was readily conceded by their Lordships that the authorities did not favour such a proposition[123].

It was argued that the decision in *Rookes* v. *Barnard* meant that the doctrine of privity of contract would be outflanked, since a third party, Rookes, was able to sue upon a threat of a breach of contract between two other parties, Barnard and the B.O.A.C.[124] This argument was rejected on the ground that the crux of the tort lay not in the breach of contract, but in the coercion aimed at the injured party, the *threat* of an unlawful act against A, with the *intention* of injuring B. In these circumstances B could scarcely be said to be suing upon A's contract[125].

But it must be remembered that the House of Lords were considering the unlawfulness of breaches of contract only in the sphere of the tort of intimidation. Further difficulties with the decision occur outside this context. Thus, if a breach of contract is unlawful in the context of threats, there is no reason why it should not be equally unlawful for the purpose of a conspiracy by unlawful means. In the Australian case *Martell* v. *Victorian Coal Miners Association*[126], the court held that a breach of contract was unlawful if carried out in combination:

> " . . . the defendants caused damage to the plaintiff by an injurious conspiracy carried out by unlawful means, and such conduct is clearly actionable as being not only a combination in pursuit of a malicious purpose to injure another, but also *an agreement to effect such a purpose by an improper act,* viz., by breaking their own contracts"[127].

The same may be said for the tort of "unlawful interference". If a breach of contract will suffice to make threats and conspiracies actionable in tort, there is logically no reason why it should not do the same to the conduct of an individual. But this forces the conclusion that a breach of contract may also be a tort, a proposition which, although accepted by some commentators[128], has yet to be given careful consideration by any court.

One issue which would be paramount if breaches of contract were to be accepted as providing the base for an action in tort would be the question of damages. Since the injured party would have a choice of two actions he would undoubtedly choose that which would provide the best return[129]. In most

123. [1964] A.C. 1129, 1186. This finding has been criticised as unfounded from a strict contractual standpoint alone: see Dawson, (1974) 2 *Auckland U.L.R.* 1, 2 n.5.
124. *E.g.,* Wedderburn, "The Right to Threaten Strikes", (1961) 24 *M.L.R.* 572, and (1962) 25 *M.L.R.* 513. But compare Hamson [1961] *C.L.J.* 189, and Sykes and Glasbeek, *Labour Law in Australia* (1972), 351.
125. [1964] A.C. 1129, *per* Devlin L.J., 1208; Lord Evershed, 1187-1188; Lord Hodson, 1200-1201.
126. (1903) 9 A.L.R. 231.
127. *Per* Hood J., 245.
128. Weir, [1964] *C.L.J.* 225, 232; Heydon, *Economic Torts* (1973), 57.
129. *E.g., Schisgall* v. *Fairchild Publications Inc.* 137 N.Y.S. 2d 312 (1955).

cases this would be the tort action where the test of forseeability of loss is more liberal.

However it is unlikely that the House of Lords ever intended that such a result should flow from *Rookes* v. *Barnard*. Assuming that the courts will be reluctant to allow an action in tort for the mere breach of contract, the tort of intimidation would have to be regarded as a separate tort based on threats. It could not be regarded as a mere instance of the tort of "unlawful interference" since the term "unlawful" would have a wider meaning (including breaches of contract) in the context of threats than it has in the context of completed acts. Though this creates an "unnatural distinction"[130] between unlawful acts and unlawful threats, a tort/contract barrier is thus preserved.

On the other hand it may be argued that the distinction is preserved by the nature of the tort itself. Unlawful interference rests on an intention to injure; without that intention the unlawful conduct is not actionable. But breaches of contract are strictly actionable, with or without intention to injure. Thus it does not follow that every breach of a contract must be a tort. Only those breaches which were committed with the intention of damaging the other party to the contract will be actionable in tort. Whether this is a satisfactory distinction remains to be seen, but at this point of time it must be conceded that logically, at least, breach of a contract, accompanied by an intention to injure, will be actionable in tort.

(iii) BREACHES OF STATUTE

Conduct which is made criminal by statute has often formed the basis of "unlawful means" in conspiracy cases[131]. Furthermore, conduct which offends against statutory provisions may still constitute "unlawful means" notwithstanding the fact that it carries no criminal penalty under the terms of the statute. Thus in *Daily Mirror Newspapers* v. *Gardner*, and *Brekkes Ltd.* v. *Cattel*, conduct which was deemed merely "void" under the relevant provision was sufficient to provide an action for unlawful interference.

Until recently the general drift of these decisions seemed to be towards the acceptance of the proposition that the breach of any statutory provision would be "unlawful" for tortious purposes, even if the statute was not intended to provide a separate remedy for breach of statutory duty. It was argued above that this would depend upon a conceptual distinction between an action based upon the use of "unlawful means" with intention to injure, and an action based upon the remedy provided by the statute itself. However, recent decisions have not accepted this distinction.

In the High Court case, *Beaudesert Shire Council* v. *Smith*[132], the defendant's conduct was unlawful in two respects. The council's action in removing gravel from a river bed amounted to both a trespass, and a breach of statutory regulations. But the court stopped well short of accepting that the breach of any statutory provision was sufficient.

> "It is not possible . . . to adopt a principle wide enough to afford protection in all circumstances of loss to one person flowing from a

130. Hoffmann (1965) 81 *L.Q.R.* 116, 126.
131. See *Heggie* v. *Brisbane Shipwrights Provident Union* (1906) 3 C.L.R. 686; *Southan* v. *Grounds* (1916) 16 S.R. (N.S.W.) 274; *Williams* v. *Hursey* (1959) 103 C.L.R. 30. An English example is *Cunard* v. *Stacey* [1955] 1 Lloyds Rep. 247.
132. (1966) 40 A.L.J.R. 211.

> 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 for his injury"[133].

In this particular case, the court decided that the statutory regulations were not intended to confer a private remedy[134]. A similar result occurred in *Grand Central Car Park* v. *Tivoli Freeholders*[135] where McInerney J. held that the operation of a car park without the appropriate permit from local authority was not "unlawful" for the purposes of establishing liability in tort[136].

In England, the general direction of the law appears to have been upset by the judgment of Lord Denning M.R. in *Cory Lighterage* v. *Transport and General Workers Union*[137]. In this case his Lordship rejected the argument that "unfair industrial practices" under the Industrial Relations Act, 1971, would also serve as unlawful means in an action for unlawful interference[138]. This decision appears to be strongly out of line with the general tenor of the decisions in *Daily Mirror* v. *Gardner, Brekkes* v. *Cattel* and *Acrow* v. *Rex Chainbelt*. In *Cory Lighterage*, Lord Denning stated that the question was one of construction of the Act, which seems to firmly replace the law in its traditional position, but it does not appear to have been argued in the *Daily Mirror Case* that the contravened provision of the Restrictive Trade Practices Act was intended to give a civil remedy. It is therefore unclear as to which principle is currently guiding the courts in determining when breaches of statute will suffice for unlawful means.

(iv) BREACH OF AWARD

An aspect of the Australian industrial relations system is the determination of conditions of employment and disputes between employers and employees by the award of an Arbitration Tribunal. Awards are binding upon the parties to them, and they frequently contain clauses prohibiting strikes by the unions who are subject to that award. Generally it may be said that the breach of an award in either the State or Federal jurisdictions usually entails some kind of penalty, whether criminal or civil[139]. It follows therefore that the breach of the terms of an award might well provide another extension to the tort of "unlawful interference"[140].

Beyond these very general categories come a wide variety of instances of "unlawful conduct", including, for instance, public officers abusing their office[141] and possibly persons acting in breach of fiduciary duty[142]. On the other hand it is well established that agreements or resolutions in restraint of trade at common law do *not* constitute unlawful means for the purpose of

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133. *Id.*, 215 (emphasis added).
134. *Id.*, 213.
135. [1969] V.R. 62.
136. *Id.*, 74.
137. [1973] 2 All E.R. 558.
138. *Id.*, 568.
139. See Sykes, *Strike Law in Australia* (1960), 190.
140. See *Ruddock* v. *Sinclair* [1925] N.Z.L.R. 781. Logically the breach of an award should also provide "unlawful means" for the tort of intimidation: see Smith, *"Rookes* v. *Barnard:* An Upheaval in the Common Law Relating to Industrial Disputes", (1968) 40 *A.L.J.* 81 (Part 1) and 112 (Part II), 119.
141. *David* v. *Cader* [1963] 3 All E.R. 579.
142. *Dixon* v. *Dixon* [1904] 1 Ch. 161.

tortious liability[143]. It is not proposed to discuss these aspects save to note that a more detailed analysis has been attempted elsewhere[144].

The fact that the unlawful means criterion provides an unsatisfactory dividing line as to which economic activities are tortious requires little further elaboration[145]. There is no connection between the several categories other than that they are each composed of conduct which is unlawful in some sense. Furthermore there are patent inconsistencies. Conduct in restraint of trade at common law is not "unlawful means" for the purpose of tort liability[146], whilst conduct contrary to the public interest under the Restrictive Trade Practices Act is[147]. An act in criminal contempt of court has been held not to constitute unlawful means[148] whilst an act in civil contempt has[149]. Perjury is not "unlawful means"[150], yet it has been held that all crimes are "unlawful acts" in conspiracy cases[151]. It was suggested earlier that some of these difficulties may be rationalised in that they are problems arising out of the slower development of the "unlawful interference" principle in cases where no conspiracy was involved[152]. Thus, it is submitted, *Chapman* v. *Honig* and *Hargreaves* v. *Bretherton* are out of line with current thinking and ought to be ignored.

Finally, there are no obvious limitations to the extent of unlawful activities, common law or statutory, which might be opened up for tort purposes. There can clearly be no certainty to, or logical development of, the unlawful interference principle unless present approaches are radically restructured.

The Industrial Torts and "Unlawful Interference"

I will turn now to consider what effect the unlawful interference principle (what Weir would call the "minimum principle")[153] is likely to have on the industrial torts as a whole. The established industrial torts may be divided into four main categories, conspiracy to injure, conspiracy by unlawful means, interference with contract and intimidation. Of these, all but conspiracy to injure depend upon the proof of some conduct which is "unlawful" vis-a-vis the world at large, and for industrial disputes purposes conspiracy to injure is no longer significant[154]. With respect to the other "industrial torts", it is obvious that the continued rise of the tort of "unlawful interference" should lead to their increasing redundance. This is largely because in alleging damage caused by "unlawful interference" the plaintiff will often avoid the formalities involved in proving one of the established nominate torts. For instance, to prove an indirect interference with contract a plaintiff must prove:

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143. *Davies* v. *Thomas* [1920] 2 Ch. 189; *Eastham* v. *Newcastle United Football Club* [1964] Ch. 413; *Brekkes Ltd.* v. *Cattel* [1971] 2 W.L.R. 647.
144. Heydon, *Economic Torts* (1973), 55-58.
145. See the remarks of Viscount Radcliffe in *Stratford and Son Ltd.* v. *Lindley* [1965] A.C. 269, 329-330.
146. *Supra,* n.143. See also *Mogul Steamship Co.* v. *McGregor, Gow and Co.* [1892] A.C. 25.
147. *Daily Mirror Newspapers* v. *Gardner* [1968] 2 W.L.R. 1239; *Brekkes* v. *Cattel* [1971] 2 W.L.R. 647.
148. *Chapman* v. *Honig* [1963] 2 Q.B. 502.
149. *Acrow (Automation) Ltd.* v. *Rex Chainbelt* [1971] 3 All E.R. 1175.
150. *Hargreaves* v. *Bretherton* [1959] 1 Q.B. 45.
151. *McKinnon* v. *F. W. Woolworth* (1968) 70 D.L.R. (2d) 280.
152. *Supra,* 444-445.
153. [1964] *C.L.J.* 225, 226.
154. Nowadays most trade union objectives are accepted as "legitimate": see *Crofter Hand Woven Harris Tweed* v. *Veitch* [1942] A.C. 435.

(i) that the defendant's conduct was "unlawful"[155];
(ii) that the defendant's unlawful conduct caused the plaintiff loss through an interference with the plaintiff's contract[156];
(iii) that this loss was caused intentionally by the defendant[157];
(iv) that the defendant had some knowledge of the contract with which he was interfering[152].

But if the plaintiff brought his action upon the intentional and unlawful interference with the plaintiff's business (requirements (i) and (iii) above), it would be irrelevant whether or not the defendant had any knowledge of the plaintiff's contractual relations.

It would also follow that it would be unnecessary for the plaintiff to prove a conspiracy by unlawful means when the same unlawful conduct would give an action against the defendants individually. If the "unlawful act" will establish the nominate tort it should also establish liability for unlawful interference.

However, intimidation will continue to occupy a special position unless the courts are willing to allow actions in tort for breaches of contract. If the alleged unlawful act involves the defendant breaking his own contract the plaintiff may be forced to plead intimidation and rely upon the threat (assuming one exists) since a breach of contract, in the completed sense, may not constitute "unlawful means" for the purposes of "unlawful interference".

Unlawful Interference and Industrial Disputes

At the beginning of this article I remarked upon the extent to which the economic torts had been a major anti-strike weapon in English industrial disputes. In a limited way the same pattern is evolving in Australia. However, whilst the economic torts have played a significant role in industrial disputes in England, this experience has rarely involved the application of a wide "unlawful means" principle[159] because the extent of industrial regulation has, until recently[160], been minimal. However, there is no shortage of unlawful means situations in Australia, and it is clear that the emergence of a general "unlawful interference" principle here would, theoretically at least, place even further restrictions on the right to strike.

The extent of the limitations on strikes varies from State to State. For example, in South Australia and New South Wales, strikes may be illegal if unaccompanied by the prescribed period of notice to the Minister[161]. In Western Australia the act of striking is absolutely illegal[162]. In Queensland and New South Wales strikes may be illegal unless they have been authorised by a secret ballot of union members[163]. Penal provisions against strikes in

155. *Thomas* v. *Deakin* [1952] Ch. 646.
156. *Rookes* v. *Barnard* [1964] A.C. 1129, 1212, *per* Lord Devlin.
157. *Ibid.*
158. *Ibid.* Although this requirement has been considerably relaxed in recent years, it is still necessary to show to some extent that the defendant knew he was disrupting the plaintiff's contractual relations; see *Emerald Construction Co.* v. *Lowthian* [1966] 1 All E.R. 1013.
159. One exception is *Cunard* v. *Stacey* [1955] 1 Lloyds Rep. 247.
160. Recent trends indicate a greater degree of statutory regulation of industrial relations in England: *e.g.*, Industrial Relations Act, 1971: Trade Union and Labour Relations Act, 1974; and the Employment Protection Bill, 1975.
161. Industrial Code, 1967-1968 (S.A.), s.129; Industrial Arbitration Act, 1940-1968 (N.S.W.), ss.99 and 99A.
162. Industrial Arbitration Act, 1912-1964 (W.A.), s.132.
163. Industrial Conciliation and Arbitration Act, 1961-1964 (Qld.), s.98; Industrial Arbitration Act, 1940-1968 (N.S.W.), s.99.

other States are less extensive. Most States prohibit strikes by certain government employees[164]. Furthermore, most arbitration statutes impose liability for aiding and abetting strikers or for instigating strikes[165].

It must also be remembered that even if the strike itself is not illegal by statute, the tactics involved in pursuing the strike might involve criminal activity. Thus all States impose limits upon the right of strikers to picket premises[166]. Another point is that certain unrepealed legislation in South Australia and New South Wales might give rise to criminal liability for such vague offences as "threats", "intimidation" and "molestation and obstruction" in the course of strike action[167].

Under these circumstances, the percentage of strikes which are technically illegal is very high. However Australian governments have traditionally been reluctant to punish strikers under the criminal law, and therefore the full force of the anti-strike provisions has rarely been experienced during industrial disputes. There is, perhaps, greater scope for their application in the civil law field, where government direction is less significant.

Finally, "unlawful means" are almost always present in industrial disputes cases because strikes usually involve breaches of the contract of employment. This may be so even where notice equivalent in length to that needed to end the contract is given, because notice to strike is not necessarily notice to terminate[168].

Intention to Injure

Liability for "unlawful interference" with economic interests requires an "intention to injure" on the part of the defendant. This element was surprisingly overlooked by the High Court of Australia in *Beaudesert Shire Council* v. *Smith*[169]. In that case the plaintiff Smith was the holder of a licence which authorised him to pump water from a river, property in which was vested with the Crown. The defendant council took gravel from the bed of the river thereby destroying the natural pool from which the plaintiff pumped his water. The plaintiff suffered loss and sued the council to recover. The actions of the council were unauthorised and it was held that therefore they were "unlawful" in that they constituted a trespass against the Crown.

The High Court decided that the plaintiff should succeed:

> "There is . . . a solid body of authority which protects one person's lawful activities from the deliberate, unlawful and positive acts of

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164. *E.g.,* Essential Services Act, 1958 (Vic.), ss.3 and 11; Industrial Code 1967-1969 (S.A.), s.129; Industrial Arbitration Act, 1940-1968 (N.S.W.), s.99.
165. Sykes, *Strike Law in Australia* (1960), 90.
166. *E.g.,* Crimes Act, 1900 (N.S.W.), s.454B; Employers and Employees Act, 1958 (Vic.), ss.52 and 53. The legislation of the other States in this area is virtually identical.
167. See the Combination Law Repeal Act Amendment Act, 6 Geo. IV c.129 (1825). It is arguable that this legislation is still in force in those States: see Sykes, *op. cit.,* 98.
168. See O'Higgins, "Legal Effect of Strike Notice", (1968) *C.L.J.* 223; Foster, "Strikes and Employment Contracts", (1971) 34 *M.L.R.* 275; *Report of the Royal Commission on Trade Unions and Employers Associations,* 1965-1968, Cmnd. 3623, paras. 936-952. The attempt of Lord Denning M.R. in *Morgan* v. *Fry* [1968] 3 All E.R. 452 (C.A.) to avoid the logic of this, by treating strike notice as a "suspension" of the employment contract has been criticised, and is unlikely to be followed; see Sykes and Glasbeek, *op. cit.,* 352-354; *Royal Commission on Trade Unions and Employers Associations,* paras. 936-952.
169. (1966) 40 A.L.J.R. 211.

> another . . . it appears that the authorities . . . justify a proposition that independently of trespass, negligence or nuisance, but by an action for damages upon the case, a person who suffers harm or loss as the inevitable consequence of the unlawful, intentional and positive acts of another is entitled to recover damages . . ."[170]

Thus the council was held liable notwithstanding the fact that there was no evidence that they even knew of the plaintiff's operation, much less than they intended to injure him. The liability of the council lay in the fact that it had committed unlawful acts and that the inevitable consequence of those acts was that injury to the plaintiff would result. It is submitted that the principle formulated by the High Court whereby liability attaches to the use of unlawful means in the absence of an intention to injure is wrong[171]. The proposition is certainly not justified by the authorities relied upon by the High Court. In fact the same group of cases including *Tarleton* v. *M'Gawley*[172], *Garret* v. *Taylor*[173] and *Keeble* v. *Hickeringill*[174] was relied upon by the House of Lords in *Rookes* v. *Barnard* as establishing the tort of intimidation, a tort in which intention to injure is paramount.

The application of this principle would have far reaching consequences in industrial disputes. Take, for instance, the use of strike action against a particular employer. If the strike involves an unlawful act, such as a breach of statute or a breach of contract, the unionists could expect to be liable at the suit of the employer whom they are trying to harm. However if the *Beaudesert* principle is applied, the scope of the unionists' liability quickly widens. Not only are they liable to those whom they intentionally damage by unlawful interference, they are also liable to those who suffer loss as an *inevitable consequence* of the unlawful interference. Thus persons who are unable to get to important business engagements because of a rail or train strike could recover from the striking union. So too could people who became ill owing to a lack of heating or air-conditioning during a power strike[175].

It is submitted that in the *Beaudesert* Case the High Court has stretched the principle of unlawful interference to a point which is not justified in principle or authority.

Unlawful Interference in Australia

The *Beaudesert* Case establishes a broad general principle of liability for "unlawful interference" in Australia despite apparent difficulties with the question of intention to injure[176], and this was approved in the New South Wales case *Sid Ross Agency* v. *Actors and Announcers Equity Association* of Australia[177]. Here the plaintiffs were a theatrical agency who in the course of their business provided artists for a number of New South Wales night clubs. The defendants intended to force the clubs to stop hiring artists from the

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170. *Id.*, 215.
171. See the criticisms advanced on this point by Dworkin and Harari, "The *Beaudesert* decision—Raising the Ghost of the Action upon the Case", (1969) 40 *A.L.J.* 196, 347; Standish [casenote], (1967) 6 *M.U.L.R.* 225.
172. (1794) Peake 270.
173. (1620) Cro. Jac. 567.
174. (1706) 11 East 574 n.
175. See Dworkin and Harari, (1969) 40 *A.L.J.* 347, 349.
176. Insofar as the High Court referred to acts "intentional" on the part of the defendant, it was establishing that it was necessary to intend the act done (as compared with negligent or accidental acts), not that an intention to injure is required.
177. [1971] N.S.W.L.R. 260.

plaintiffs. In pursuance of this objective they threatened first to picket the clubs, thereby inducing customers to refrain from entering the premises, and secondly that they would induce various club employees to break their contracts of employment. These threats were sufficient to coerce the clubs to refrain from dealing with the plaintiffs, whereby the plaintiffs' business was considerably damaged.

The plaintiffs alleged threats of unlawful acts, viz., the inducement of breaches of contracts and of nuisance against the agency. A further count argued that the tort of intimidation was but an illustration of a general principle "that a party is liable in tort, if by the use of unlawful means he deliberately inflicts business loss on another"[178]. At the hearing, the plaintiffs succeeded on the intimidation grounds, and did not proceed with the wider argument. Nevertheless, had it been necessary to do so, it appears that Mason J.A. (with whom the rest of the court agreed) would have embraced the wider principle, for he expressly considered "intimidation" in its wider aspects. In doing this his Honour formulated the principle establishing liability for threats of unlawful acts *"whether the cause of action be described as the separate tort of intimidation or not"*[179] and then proceeded to cite, with apparent approval, the High Court decision in *Beaudesert* (among others) as supporting such a proposition[180].

It is submitted therefore that these cases give an early pointer to the acceptance of a wide principle of "unlawful interference" into Australian labour law.

Statutory Protection for Australian Trade Unionists

Providing immunity by way of legislative protection has never been an important question in Australia because until recently the civil law had seldom presented a threat to trade union activities. Thus only one Australian State, Queensland, bothered to follow the example of England's Trade Disputes Act, 1906, and its use in that State has been negligible. However, following the change in industrial relations practice in the late 1960's, the need for protective legislation has been forcibly brought home to the Australian trade union movement. Whereas resort to civil law was rare in industrial disputes before about 1968, since then tort cases have become rather commonplace, and may be assuming the role of a customary anti-strike tactic[181].

Providing legislative protection against the use of the industrial torts is obviously difficult when the fluid position of the law gives the utmost scope for judicial circumvention. Judicial extension and development in this sphere reduced the English Trade Disputes Act to tatters in the 1960's and, therefore, the Queensland provisions are so far out of date as to be almost redundant.

Recent legislation in England has attempted both to restore the law substantially to the position it occupied before the experience of the Industrial Relations Act, 1971, and to widen the immunities for torts committed "in contemplation or furtherance of a trade dispute"[182]. The model adopted by the English Act is systematically to eliminate liability for each economic tort,

178. *Id.*, 763.
179. *Id.*, 766.
180. *Id.*, 767.
181. See the list of cases prepared in the *Department of Labour Discussion Papers*, prepared for the 1973/74 Industrial Peace Conference [Appendix 2]. This list is by no means exhaustive.
182. Trade Union and Labour Relations Act, 1974 (U.K.), s.13.

including inducement of breaches of contract and interferences with the performance of contracts[183], threats to break, or threats to induce the breach of or interference with the performance of contracts[184], and for conspiracy to injure[185]. What is more, for the first time in English experience, some attempt is made to deal with the unlawful means question, for it is provided that:

> (i) inducing breaches of contracts or interfering with the performance of contracts;
> (ii) threatening that breaches of contract will occur or be induced to occur, or threatening that interference with the performance of contracts will occur, or will be induced to occur;
> (iii) breaches of contracts; and
> (iv) interfering with a persons trade or livelihood
>
> "shall not be regarded as the doing of an unlawful act or as the use of unlawful means for the purposes of establishing liability in tort"[186].

Apart from the question of liability for "interference with trade and livelihood" which was probably settled in *Allen* v. *Flood*[187] anyway, the effect of s.13(3) is to cut off some of the logical ramifications of the decision in *Rookes* v. *Barnard*, particularly insofar as they might lead to establishing that any breach of contract is "unlawful" for the purposes of all economic torts. This means therefore that breach of contract will not provide a base for intimidation, conspiracy by unlawful means, or for an action for unlawful interference, provided that the acts done are "in contemplation or furtherance of a trade dispute".

However, the provision clearly falls well short of covering the whole ambit of "unlawful means" situations. No immunity is provided where the "unlawful means" involve crime and breaches of statute, although it must be remembered that these instances rarely arise in Britain owing to the non-legal nature of the method of industrial regulation.

In endeavouring to fill some of the legislative void in this area in Australia, the Federal government chose to model their approach upon the English legislation. The 1973 Bill to amend the Conciliation and Arbitration Act, 1904-1972, contained the conventional immunities for trade unionists who, in the course of industrial disputes, interfere with contracts or commit the torts of conspiracy or intimidation[188]. However the Bill said nothing about "unlawful means", and as a defensive measure it was, as a result, open to challenge. The provisions exempted all conspiracies except those which

183. S.13(1)(a).
184. S.13(1)(b).
185. S.13(4).
186. S.13(3).
187. [1898] A.C.1.
188. Clause 55. In some respects the Commonwealth Bill went even further than the original Trade Union and Labour Relations Act, 1974. Thus the "inducing breach" provision was extended to cover "preventing or hindering" the performance of contracts—thus anticipating the acceptance of the principles enunciated in the *Torquay Hotels Case* into Australian case-law. The English Act, in its original form was strangely backward in this respect, although it was always arguable that the provision covering "inducing breach" automatically covered the lesser "mere interference" since they were based on the same conceptual principle. At any rate, the matter has since been closed by the amendment of the English Act so that it now covers both "inducing breach" and also "interfering with performance", see *Trade Union and Labour Relations (Amendment) Act*, 1976, s.3(2).

involved conduct which was actionable *in tort* if done by an individual. But decisions such as *Daily Mirror* v. *Gardner*, and *Acrow* v. *Rex Chainbelt* appear to deprive this type of provision of much of its value, since it may now be the position that a breach of a penal or industrial statute by an individual *is* actionable in tort. The same criticism may be made of the intimidation provision. The draft section protected only threats to break or to interfere with contracts, whereas it is quite clear that "unlawful acts" for the purpose of establishing intimidation will probably include breaches of penal and industrial regulations.

In seeking to legislate in this field the Federal government is hampered by constitutional limitations with which this article cannot be concerned. State legislatures, on the other hand, are not limited in the same way, and the provision brought before the South Australian Parliament in 1972[189] was far wider in effect than the Federal provision. In structure the South Australian provision was quite novel. It made no attempt to shield strikers from the established economic torts. Instead it extended a blanket immunity from *all forms* of tort liability for trade unions, officials and members whilst engaged in an industrial dispute[190]. This blanket immunity was qualified however, so that excluded from its operation were wilful acts or omissions which directly caused:

(i) death or physical injury to a person; or
(ii) physical damage to property or a wilful act or omission that constitutes a defamation[191].

The advantages of the South Australian approach lie in the fact that by providing a blanket immunity against all tort liability there is no possibility of a judicial outflanking of the protections provided. Liability for any tort, including unlawful interference, and unlawful means conspiracies, is effectively barred, apart from those areas such as assault and battery, trespass and defamation, which are expressly saved[192].

Conclusion

This article has primarily been concerned with two points. First, there is now a recognised principle of law establishing liability in tort for the intentional inflicting of economic loss, if such intention is coupled with the use of means which are intrinsically "unlawful". This principle applies equally to persons acting alone, or in combination with others. Secondly, this principle poses a clear and unequivocal threat to the right to strike in Australia.

There have been two distinct trends discernible in the development of the economic torts in the last decade. One has been the rapid broadening of the unlawful interference principle. The second has been the search for a *prima facie* tort based upon motive and policy. To a great extent the development of the first mentioned trend is due to the fact that the second alternative, a principle establishing liability for all economic loss caused intentionally and without justification, appears to have been abandoned in English law with the decision in *Allen* v. *Flood*. So far, the courts have avoided taking this further

189. A Bill for the Industrial Conciliation and Arbitration Act (1972).
190. Clause 145(1).
191. Clause 145(2).
192. Any discussion of the relative merits of the Federal model and the South Australian model is purely theoretical since both provisions were rejected in the respective Upper Houses; see 56 *Senate Debates* (1973), 2451; 1972 *Parl. Debs.* (S.A.), Vol. 3, 2730.

step, though certainly not as securely as some might imagine. In *Rookes* v. *Barnard*, Lord Devlin was prepared to leave open the question of "whether or not malicious interference by a single person with trade, business or employment is, or is not, a tort known to the law"[193]. Furthermore it is obvious that, in industrial disputes cases particularly, the courts have been arriving at results which are policy based rather than legally based.

How far the courts might achieve their objectives through means other than a *prima facie* tort can be observed in the development of the recognised economic torts. The invention of the tort of intimidation, the recognition of a general principle of "unlawful interference" outside of conspiracy cases, the ever widening ambit of the term "unlawful" and the gradual watering down of the strict requirements of liability for "interference with contract"[194] display an obvious intention to circumvent *Allen* v. *Flood* whenever possible. The inclination to recognise a tort of interference with *potential contracts* (i.e. contracts not yet formed) confirms the trend[195]. To connect such interference to a contractual situation is bordering on the ridiculous, but nevertheless to do otherwise would be in direct contradiction to *Allen* v. *Flood*. It must therefore be conceptualised as part of the tort of interference with contract, despite the fact that no contract need exist. Thus, without a great deal of predictability the courts are achieving their policy objectives despite the barriers which exist in principle[196].

From the industrial law point of view the steady advancement of the unlawful interference principle has made life more difficult for the trade union movement in the common law world. In Britain, it caused a steady outflanking of the traditional protections extended to strikers engaged in a "trade dispute"[197]. In Australia it could serve to remove the last vestiges of the right to strike. There are three reasons for this. In the first place, "unlawful interference" may have considerable advantages over the other industrial torts when it comes to matters of proof. In the second place opportunities for employers to complain of conduct of an "unlawful" nature are almost unlimited in Australia. Thirdly, Australian trade unionists in general have no statutory immunity against common law actions for strikes.

What defences are available to Australian trade unionists against an action for unlawful interference? One argument, which has so far fallen on deaf ears, is that there should be no scope for the use of the common law in collective union-employer disputes in Australia. Whilst in Britain the common law has remained the base of collective labour relations, in Australia the conciliation and arbitration system of determining industrial disputes has been superimposed upon the common law. Hence unions have traditionally expected to find their rights to take collective action governed by their obligations under the statutorily regulated system, rather than at common law. The sudden unprecedented resort to civil actions in the late 1960's and early 1970's found

193. [1964] A.C. 1129, 1215-1216.
194. *Stratford and Son Ltd.* v. *Lindley* [1965] A.C. 307; *Emerald Construction Co.* v. *Lowthian* [1966] 1 All E.R. 1013; *Torquay Hotels Ltd.* v. *Cousins* [1969] 1 All E.R. 522.
195. *Torquay Hotels* v. *Cousins* [1969] 1 All E.R. 522, *per* Lord Denning M.R., 532; Russell L.J., 534; *Brekkes* v. *Cattel* [1971] 2 W.L.R. 647, 651, *per* Pennycuick V.C.
196. J. T. Cameron, "Conspiracy and Intimidation: An Anti-Metaphysical Approach", (1965) 28 *M.L.R.* 448, 450 states: "The law is confused chiefly because it already struggles to the results which such a principle [*sc.* a *prima facie* tort] would give, but does so while denying the principle itself."
197. The Trade Disputes Act, 1906 and 1965. See now, Trade Union and Labour Relations Act, 1974, s.13.

trade unions particularly vulnerable. However, it is extremely unlikely that this view would find favour with Australian courts. In *Sid Ross Agency* v. *Actors and Announcers Equity Association*[198] it was held that such questions of policy were matters for the legislature.

On the other hand, there is some indication that the dual nature of the Australian industrial relations system, in its statutory and common law elements, will sometimes provide a protection for trade unions. A court of equity will not usually grant an injunction when there is an alternative tribunal which has the authority to deal with the dispute between the parties[199]. Thus in *Atlas Industries Australia Ltd.* v. *McDonald*[200], a case involving a dispute over "labour only" sub-contracting, there was a suggestion by Lush J. that had the provisions of the Labour and Industry Act, 1958, been applicable to the dispute, then he might have refused to grant the injunction.[201] This approach was affirmed in *Harry Miller Attractions* v. *Actors and Announcers Equity Association.* In that case, Street J. refrained from awarding an injunction notwithstanding the fact that the conduct of the defendants amounted to an interference with the plaintiff's contractual relations. The reason for the court's refusal was that the dispute constituted an "industrial dispute" under the Commonwealth Conciliation and Arbitration Act and therefore the parties should be left to pursue their remedies under the provisions of that Act[202].

It is submitted however, that in Australia, where the extension of statutory imunities for strikers is unlikely for political reasons, the prospect of a co-ordinated defence available to trade unionists in the future depends largely upon the revival of the defence of justification. This issue has already received some attention in Britain, where Lord Denning M.R. has advanced it as a possible defence to the torts of intimidation[203] and "unlawful interference"[204], in situations where there is a suggestion of deliberate fomentation of trouble by anti-unionists or break-away unionists. In the New Zealand case, *Pete's Towing Services* v. *N.I.U.W.*[205], the plaintiff operated a barge service, and contracted to deliver supplies to Ready Mixed Concrete. To keep down labour costs the plaintiff unloaded sand directly from his barge onto the trucks of Ready Mixed Concrete, thereby evading the employment of waterside workers. The defendants declared the plaintiff's barges "black", thereby directly inducing breaches of the plaintiffs contracts with Ready Mixed Concrete. Speight J. held, however, that the Union's conduct was justified. In by-passing the employment of registered waterside workers the plaintiff was infringing their legal rights[206], and secondly the defendant union and the Waterside Workers Union had put forward "fair" conditions for the settlement of the dispute which the plaintiff was unreasonable not to accept. Under such circumstances the union was under a duty to its members to act, since otherwise the members.

198. [1971] 1 N.S.W.R. 760.
199. *Harry Miller Attractions* v. *Actors and Announcers Equity Association* [1970] 1 N.S.W.R. 614, 615, *per* Street J.
200. Unreported. Text of Judgment handed down by Lush J. in the Supreme Court of Victoria on 11th September, 1967.
201. Text of Judgment, 12.
202. *Supra,* n.199.
203. *Morgan* v. *Fry* [1968] 3 All E.R. 452.
204. *Cory Lighterage Ltd.* v. *T.G.W.U.* [1973] 2 All E.R. 558.
205. [1970] N.Z.L.R. 32.
206. Under s.29(2) of the Waterfront Industry Act, 1953 (N.Z.), a registered waterside worker had the right to preferential employment over those not so registered.

> " . . . might encounter scorn and reprisals and [the union] . . . be exposed to a real possibility of financial detriment which industrial disharmony and breakdowns often entail"[207].

In his recognition of the relevance of the elements of "fairness" and "justice"[208] Speight J. appears to have gone beyond previous rulings on the justification issue[209]. However the broader consideration given to the whole nature of the defence may represent the first step taken by the courts towards balancing the "right to strike—right to economic freedom" scales which have become so imbalanced through common law development in the past ten years.

207. [1970] N.Z.L.R. 32, 51.
208. *Ibid.*
209. Mills, "The Tort of Inducement of Breach of Contract", (1971) 1 ***Auckland U.L.R.*** 27, 41-42.