# INTIMIDATION AND THE RIGHT TO STRIKE

## *MORGAN* v. *FRY*[1]

One of the most interesting recent developments in the law of torts has been the extension and reincarnation of old causes of action, brought out of retirement and presented anew under the name "industrial actions". This activity has been heightened in England in recent years, with an astonishing amount of litigation arising from strikes and other forms of industrial unrest which has allowed the courts to polish up and redefine the limits of these causes of action. Parallel, and not unconnected with this development, has been the jurisprudentially appetizing spectacle of a tripartite battle between trade unions, the courts and Parliament. No sooner has Parliament acted to protect the trade union movement from liability than its courts have rendered that legislation impotent either by unearthing a new tort, or by restrictively interpreting the legislation; although in the judicial corner of this seemingly eternal triangle an internal struggle has gone on. A survey has indicated that out of the eight leading cases decided by the House of Lords in this field in the last one hundred years, five were decided in a way which had the effect of limiting the scope of action which might lawfully be taken by workers and their organisations in industrial conflicts. At the Court of Appeal level, however, six out of the eight had been decided *in favour of* the workers.[2] When in *Rookes* v. *Barnard*[3] a *unanimous* House of Lords asserted union liability after a *unanimous* Court of Appeal had found for the defendants, it seemed that the House of Lords had set an irreversible trend in judicial policy, but since 1964 the Court of Appeal has undermined the whole effect of *Rookes* v. *Barnard* and may have sounded the cry for judicial retreat.[4] This, together with the enactment of the 1965 Trade Disputes Act (U.K.) should herald ultimate victory for the trade union movement.

The most striking case in this field is, of course, *Rookes* v. *Barnard* itself, and it is worthwhile to look first at the result of that decision before embarking upon a study of its successor, *Morgan* v. *Fry*. In *Rookes' Case* the plaintiff was a draughtsman employed by B.O.A.C., who resigned as a member from his union. The design office was a "closed shop"; and on his refusing to rejoin the union, its members sent a notice to the company informing that if the plaintiff were not removed within three days they would withdraw their labour. The company suspended the plaintiff and later lawfully discharged him. Mr. Rookes brought action against a trade union official and two fellow employees who were responsible for the notice and was awarded damages, the House of Lords ultimately holding that the tort of intimidation comprehended not only threats of criminal or tortious acts[5] but also threats of breach of contract.

In *Morgan* v. *Fry* the facts were somewhat similar. Four members of a union, including the plaintiff formed a breakaway association as a result of their dissatisfaction with the settlement of a wage claim by the union. An organiser of the union gave notice to his employer that members would not work with the plaintiff and other members of the secessionist group, and

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[1] (1968) 3 All E.R. 452.

[2] P. O'Higgins & M. Partington, "Industrial Conflict: Judicial Attitudes" (1969) 32 *Mod. L.R.* 53.

[3] (1964) A.C. 1129.

[4] Eg. in *J. T. Stratford & Son Ltd.* v. *Lindley* (1965) A.C. 269 and more especially *Morgan* v. *Fry supra* n.1.

[5] For a discussion of the consequences of this holding and as to how it affects the rules of privity in contract see K. W. Wedderburn, "Intimidation and the Right to Strike" (1964) 27 *Mod. L.R.* 257.

thereupon the employer lawfully terminated his service contract. The plaintiff sued the organisers of the union for damages based on intimidation and conspiracy. The trial judge, Widgery, J., found two defendants liable under the intimidation count and not protected by the Trade Disputes Act, 1906.[6] His Lordship dismissed the conspiracy count on the ground that the defendants' actions were not intended to injure the plaintiff but were done in the genuine belief that they were necessary to protect the legitimate interests of the union. An appeal by the two defendants held liable was upheld.

At the trial, counsel for the plaintiff relied on the decision in *Rookes* v. *Barnard*. The defendants however, argued that the House of Lords decision could be distinguished on the following grounds:[7]

1. That there was not a *threat* but merely a warning to the employer of action that might occur by reason of the feeling of members of the union.[8] This argument was rejected by Widgery, J. who found that the notice was a threat and that as a matter of practicability the employee could not be transferred to another part of the Port and so was discharged as a direct result of the threat.

2. That in *Rookes* v. *Barnard* there was in every service contract an express pledge not to strike. Counsel argued that because in this case there was no such clause and because the workers gave the strike notice for a period longer than that needed to terminate their contracts of service, there was no threat of a breach of contract. He argued this on two bases:[9]

(a) that the notice operated as lawful determination of the contracts, so that withdrawal of labour would not occur until the contracts were terminated; or

(b) that the contracts of service contained an implied term whereby the workmen might lawfully strike after due notice.

This second ground was rejected by his Lordship who commented[10] that since the men had contracted on the basis of not having a closed shop, it would be strange to find in the same contract an implied term making it lawful to strike to secure a closed shop. The first argument constitutes the crux of the case and was the subject of the Court of Appeal decision. Widgery, J. cited a passage from the judgment of Donovan, L.J. in the Court of Appeal decision in *Rookes* v. *Barnard*:[11]

> If a threat to break one's own contract of service be "unlawful",[12] the actual breach of it must be "unlawful" too. Yet no one seems yet to have thought that a strike itself in breach of contract is unlawful, and at this time of day I do not think that it is.

Widgery J. admitted that the view that a threat to strike is not "unlawful" must be wrong after the House of Lords decision, but pointed out that Donovan, L.J. clearly thought that breach of contract was involved and said: "I do not

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[6] (1967) 2 All E.R. 386, discussed by O. Kahn-Freund, Note (1967) 30 *Mod. L. R.* 564. The effect of the Trade Disputes Act 1906 will not be considered in the present note for two reasons: first, as the legislation has not been adopted in any Australian State except Queensland it would be of purely academic interest; and second, although the interpretation of s.3 of that Act so far as it relates to the tort of intimidation was the subject of much discussion in *Rookes* v. *Barnard, Stratford* v. *Lindley* and *Morgan* v. *Fry*, the 1965 amendment to the Act, pending a Royal Commission on the matter, clearly protects trade disputants from liability for intimidation.

[7] (1967) 2 All E.R. at 395.

[8] See Wedderburn, *supra* n.5 at 270. He too distinguishes between a "threat" and a "warning" and bases this distinction on the decision in *Rookes* v. *Barnard*. In *Morgan* v. *Fry* the Court of Appeal did not consider this point.

[9] (1967) 2 All E.R. at 395.

[10] *Id.* at 396.

[11] (1962) 2 All E.R. 579 at 600, cited by Widgery, J. at 395.

[12] By "unlawful" it is submitted that his Lordship must mean tortious or criminal and not simply liable for breach of contract. See also Wedderburn, *supra* n.5 at 260.

think that he is referring only to strikes which occur without prior notice."[13]

The plaintiff then succeeded, on this first basis, because his Lordship could find "nothing in the authorities . . . to support the view that strike action, *whether after notice or not,* is other than a breach of the contract of employment. . . ."[14]

On appeal much of the same argument was put forward as to whether or not the strike notice constituted a threat of breach of contract. According to Lord Denning, M.R., the essential ingredients in the tort of intimidation are a threat by one person to use unlawful means to compel another to obey his wishes, and compliance by the person so threatened rather than his risking the threats being carried into execution.[15] His Lordship noted that the threatened breach in *Rookes* v. *Barnard* was of a "flagrant kind" and added that if the decision were carried to its logical conclusion it would apply "not only to the threat of a flagrant breach of contract but also to the threat of any breach of contract and that it would apply to the strike notice in the present case if it were the threat of a breach of contract".[16] In deciding this point his Lordship read a passage from his judgment in *J. T. Stratford & Son Ltd.* v. *Lindley*[17] where he was considering a hypothetical factual situation similar to that in the present case. "Such a notice," his Lordship said, "is not to be construed as if it were a week's notice . . . to terminate their employment, for that is the last thing any of the men would desire. They do not wish to lose their pension rights and so forth, by giving up their jobs. The strike notice is nothing more nor less than a notice that the men will not come to work". In other words there is the threat of a breach of contract.

Lord Denning frankly admits in *Morgan* v. *Fry*[18] that though logically impeccable his argument must be wrong; for if it were correct it would do away with the "right to strike" which, on the authority of the older cases which he proceeded to analyse[19] is guaranteed where the strike notice relates to a period of sufficient duration to terminate the contract. These cases were all before their Lordships in *Rookes* v. *Barnard* and, as Lord Denning points out, no doubt was thrown on them, although for what they are authority is not exactly clear. His Lordship cites Lord Evershed in the House of Lords as expressly approving of the decisions:

> it has long been recognised that strike action or threats of strike action . . . in the case of trade dispute do not involve any wrongful action on the part of the employees, whose service contracts are not to be regarded as being or intended to be thereby terminated.[20]

Since the strike notice in *Rookes* v. *Barnard* was *less* than that required to determine the services contracts, it is submitted that Lord Evershed could mean any of three things:

(1) that unless there is an express contractual term not to strike (which his Lordship took to be decisive in *Rookes* v. *Barnard*) a threat to strike is never illegal;

(2) that a threat to strike will be wrongful if it is made within a period insufficient to terminate the contract of employment; or

(3) that such action might be illegal but was in all cases protected under the 1906 Trade Disputes Act (U.K.).

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[13] (1967) 2 All E.R. at 395.
[14] *Id.* at 396.
[15] (1968) 3 All E.R. at 455.
[16] *Ibid.*
[17] (1965) A.C. 369 at 285.
[18] *Supra* n.1 at 456.
[19] *Allen* v. *Flood* (1898) A.C. 1; *White* v. *Riley* (1921) 1 Ch. 1: *Riordan* v. *Butler* (1938) I.R. 749.
[20] *Supra* n. 1 at 457.

Whilst Lord Evershed seems to have taken the view[21] (contrary to that of the majority in the House of Lords) that s.3 of the Act might cover intimidation, it is suggested that the true view of his Lordship's *dictum* is the second enunciated above. His Lordship attempts to follow the old cases of *Allen* v. *Flood* and *White* v. *Riley*[22] mentioned by Lord Denning in *Morgan* v. *Fry* where, in spite of very wide *dicta* concerning a "right to strike", the decisions were probably based on the length of notice given. This statement by Lord Evershed, is, however, extremely wide and might be grasped at by courts in the future to propound a general theory of freedom to strike. For the purpose of the decision in *Morgan* v. *Fry*, where the notice was given in respect of a sufficiently long period, this wider and more general right did not have to be denied nor supported.

Lord Denning, M.R. concluded by citing Lord Devlin in *Rookes* v. *Barnard*: "it is not just a technical illegality, a case in which a few days longer notice might have made all the difference".[23] He read that sentence as meaning that where the strike notice is of proper length it is not even a technical illegality but perfectly lawful. With respect this is only one interpretation of what Lord Devlin meant; for although his Lordship compared such a "technical illegality" with the flagrant violation of a pledge not to strike, earlier in his judgment[24] he commented that "the object of the notice was *not* to terminate the contract either before or after the expiry of seven days. The object was to break the contract by withholding labour but keeping the contract alive for as long as the employers would tolerate the breach without exercising their right of rescission." Thus Lord Devlin might consider that even a strike notice of sufficient length could be unlawful; but he gives no indication as to whether it is a matter of interpretation of the notice in question or whether it is always so. His Lordship's other statement, relied upon by Lord Denning, is an unfortunate ambiguity.

Whatever be the true views of Lords Evershed and Devlin in *Rookes* v. *Barnard*, Lord Denning accepted the proposition that a notice of sufficient length to terminate a contract being lawful (and effective to terminate the employment), so too must a lesser notice be lawful: "it is an implication read into the contract by the modern law as to trade disputes."[25] His Lordship, however, after considering the effects of the Trade Disputes legislation bluntly states[26] that *Rookes* v. *Barnard* ought to be confined to the case where there is a pledge not to strike. This is an unjustifiable remark. His Lordship has succeeded in deciding the case by showing that there was no threatened breach of a contract and there was no need at all to make this unwarranted statement, restrictively interpreting the House of Lords decision and the law of intimidation. It is submitted that in this branch of the law one ought not to distinguish between breaches which are "flagrant" and those which are not.[27]

Davies, L.J. took a similar approach to that of Lord Denning:

> it does appear strange that while a proper notice to terminate is not illegal and cannot amount to intimidation, a notice of what may be called a lesser intention is illegal and can therefore constitute the tort.[28]

His Lordship next analytically considered the situation and came to the

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[21] (1964) A.C. at 1190.
[22] Cited *supra* n.19.
[23] *Supra* n.1 at 457.
[24] (1964) A.C. at 1204. The later passage appears at 1218-19.
[25] *Supra* n.1 at 458.
[26] *Id.* at 459.
[27] This point is raised by Pearson, L.J. in the court of Appeal decision in *Stratford* v. *Lindley*, *supra* n.3 at 293, where his Lordship states that he could see no ground for "drawing distinctions between different classes of breach of contract that may be threatened".
[28] *Supra* n.1 at 460.

conclusion that, in a sense, there was notice of termination of the existing contract but with an offer to continue on different terms; in this analysis there being no need to distinguish between a notice of termination and a notice to strike or withdraw labour.[29]

Russell, L.J. considered the older authorities before embarking upon a dissection of the various judgments in *Rookes* v. *Barnard*. Lord Reid, his Lordship found,[30] concentrated mainly on the express "no-strike" pledge and only incidentally commented that men are entitled to threaten to strike if that involves no breach of their contracts. He took Lord Evershed[31] to be suggesting that without the "no-strike" clause there would have been no liability in intimidation. Lord Hodson treated[32] threats of breach of contract generally as illegal and presumably could have based his judgment solely on the short notice given, and Lord Pearce came to a similar conclusion[33] as "neither side wishes the contract to be determined".

When his Lordship came to the judgment of Lord Devlin, he stated the two views as to the effect of "a notice" and considered that Lord Devlin was taking a constructionalist approach and that it was a question of strictly construing the intention behind the strike notice.[34] With respect, it is submitted that Russell, L.J. twists the words of Lord Devlin by suggesting that his Lordship meant that it was too "technical" to hold that a few days short in the notice made the difference between lawful and unlawful means. Lord Devlin stated that the required length of time in a notice, if construed as a notice to terminate, would be a "technical illegality":[35] but surely a "technical" illegality is still an illegality.

Notwithstanding that in *Morgan* v. *Fry* the Court was at liberty to hold that the *Rookes* v. *Barnard* tort of intimidation had not been committed, simply by finding (as Lord Denning, M.R. and Davies, L.J. did) that there was no threat to breach a contract, Russell, L.J. based this power solely on his interpretation of what Lord Devlin had said in the House of Lords and, as he put it,[36] "in spite of the generality of the language of the majority" in that case.

His Lordship decided[37] that a case such as the present, where exactly the same or even greater pressure could be exerted by a threat of concerted termination of the contract, should be excluded from the law of intimidation. Thus his Lordship agrees with the policy adopted by his brethren but rather than follow their steps in showing that the facts of the case do not come within the ambit of the tort, he takes the opposite approach and excludes this factual situation from the operation of the tort.

Having disposed of the case, his Lordship concluded by discussing the general question of the right to strike. This concept is in his view, subject to the following enigmatic rules:[38]

(1) Even if a strike notice be of *proper* length the threat may be actionable depending on whether it is interpreted as concerted termination of contract or, following Lord Devlin's classification, as the threat of non-compliance with the contract during its existence.

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[29] *Id.* at 460-61.
[30] *Id.* at 463. What Lord Reid actually said ((1964) A.C. at 1169) was that "to intimidate by threatening to do what you have a legal right to do is to intimidate by lawful means".
[31] (1964) A.C. at 1180.
[32] As interpreted by Russell, L.J.: *Supra* n.1 at 463.
[33] See *id.* at 464.
[34] *Id.* at 463-64.
[35] (1964) A.C. at 1218-19.
[36] *Supra* n.1 at 464.
[37] *Ibid.*
[38] *Id.* at 465.

(2) If the notice is treated as concerted termination of contract and the shortness of the notice be the only "breach" involved it should not be treated as unlawful.[39] This is because the pressure is the threat to withdraw from employment and ordinarily it would make no difference to the effectiveness of the pressure whether the threatened withdrawal was to begin on Monday or the following Wednesday.

Russell, L.J. is concerned mainly with arbitrary tests, policy reasons and concepts of pressure effectiveness for extending or delimiting the tort of intimidation; and whilst it is submitted that his Lordship has come to a just decision, there seem to be misconceptions in his judgment. It is essential to the tort that there be threat of illegality and if a strike notice is to be construed as akin to notice of termination it *must* be either a threat of breach (as where the notice is for insufficient length of time), or threat of lawful means of persuasion (as where the notice is of proper length). It is submitted that there is no room for arbitrary concepts such as "effectiveness of pressure" to creep into the realm of strike law.

It remains to consider the possible defence of "justification". This concept is an integral part of the tort of conspiracy, prompting Julius Stone[40] to speak of the single formula of "just cause and excuse" pounced upon by the courts in rationalising what has been an attitude of judicial neutrality in trade disputes involving no "strict" illegality. There is a similar defence to the tort of procuring breach of contract.[41] The House of Lords did not consider the point in *Rookes* v. *Barnard*[42] although it appears that Lord Devlin assumed that such a defence would be available. His Lordship stated[43] that "the case introduces a question not in issue here—whether a threat in such circumstances would be justifiable and whether it is intimidation to try to force a man into doing what law, if invoked, would compel him to do".

The possibility of such a defence was not considered in *J. T. Stratford & Son Ltd.* v. *Lindley* nor by Davies and Russell, L.JJ. in *Morgan* v. *Fry*. Widgery, J.[44] at first instance thought that once it was established that the conduct of the defendant was unlawful between the defendant and the employer, it could not be said that unlawful means could be justified *vis-à-vis* the plaintiff. Though begging the question this statement indicates that his Lordship would admit of no such defence to the tort. Lord Denning, M.R. on appeal thought[45] that the defendants might well have been justified but refused to consider what part the concept played in the tort. With this scant authority it rests upon future courts to determine the place of justification in intimidation.

The position after *Morgan* v. *Fry* is that strike notices will be classified as either of two types. It is strongly submitted that they should be classed as akin to notices of termination of contract rather than as notices of withdrawal of labour for the reasons suggested by Lord Denning, M.R. and Davies, L.J. This argument is even more persuasive in New South Wales where there has never been statutory protection of trade union activity and where this excessively technical tort, not yet stirred into action by litigants, could cause havoc to industrial stability. It is further suggested that once such notices are classed in this way, they must be either illegal threats, if

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[39] This flows from his Lordship's peculiar interpretation of Lord Devlin's judgment in *Rookes* v. *Barnard*: see the text *supra* at nn. 34-35.
[40] J. Stone, *Social Dimensions of Law and Justice* (1966) 391 ff.
[41] See e.g. J. G. Fleming, *Law of Torts* (3 ed. 1965) 657 ff.
[42] E.g. Lord Devlin in (1964) A.C. at 1206.
[43] *Id.* at 1209
[44] *Supra* n.6 at 397.
[45] *Supra* n.1 at 459.

the period is too short, or lawful if the required notice is given. There are two reasons for this:

(1) Logically it would be strange if a proper notice to terminate a contract were not illegal yet a notice of lesser import could give rise to tortious liability.[46]

(2) As Davies, L.J. suggested, the facts in this type of case easily lend themselves to classification as notices of termination (and not merely as equivalent to or less than such notices) together with an offer to return on slightly different terms.

On the one hand, therefore, the decision of the Court of Appeal seems a fair one on the facts of the instant case. On the other hand, it seems an expedient and practical disposition of the technicalities of *Rookes* v. *Barnard*. From both viewpoints, it is considered that the Court of Appeal made the right decision.

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[46] This is the argument advanced by Lord Denning, M.R. and Davies, L.J. and referred to earlier in the body of this note.