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BUTTERWORTHS INDUSTRIAL LAW SERIES

LABOUR LAW IN AUSTRALIA

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CHAPTER 12

STRIKES AND OTHER CONCERTED PRESSURES—THE COMMON LAW CONTROLS

By "common law controls" we mean those legal restrictions on strikes and other concerted pressure tactics which do not owe their genesis to the Australian compulsory arbitration system, but evolved from the English common law; in so far as they are affected by statute, the statutes are based on English models.

This mainly concerns the tort pattern of civil liability at common law which was developed in England and exists in Australia. However, English statute law did purport to impose some degree of criminal liability on picketing, and this legislation was adopted in Australia. It does not constitute a very significant stream in this country, but its existence should be recognized.

A. TORT LIABILITY

The emergence of the trade unions as a vital force in industrial relations in the beginning of the last century in England, led to inevitable turbulence. The objects at which collective action on the part of the unions was aimed, necessarily involved the use of the strike weapon with all the ancillary weapons of persuasion, threats, boycotts and picketing. These constituted a threat to property interests and to the sanctity of contractual obligations, and still more to that expectation on the part of commercial interests that existing business arrangements, whether crystallized in formal contract or not, should continue on the normal pattern. Even when the outbreak of a strike did not directly lead to the breaking of contracts, it led to the disruption of normal business expectations that a course of trading once established should continue.

The law's response was quick and for a long time drastic. To a large extent it was a struggle between the courts and the unions, the latter aided by sporadic interventions by Parliament.[1] For a long time in the first half of the last century the doctrine of criminal con-

1 E.g. *Combination Laws Repeal Act* 1824 (5 Geo. IV, c. 95); *Combination Laws Repeal Amendment Act* 1825 (6 Geo. IV. c. 129); *Molestation of Workmen Act* 1859 (22 & 23 Vict. c. 34); *Criminal Law Amendment Act* 1871 (34 & 35 Vict. c. 32). The Conspiracy and Protection

spiracy was invoked by the law courts. When this was smothered by the legislature, tort liability was invoked and the bitter incidents of industrial strife came before the courts in the course of actions in tort for civil conspiracy and procuring breach of contract. The *Trade Disputes Act* of 1906 acted as a considerable curb on this type of litigation, but independently of this there occurred a later change in the trend of judicial decision, and with the ***Crofter Case***[2] in 1942, it seemed that the judicial attitude was to be that it was best for the law to retire from this area unless the motives actuating the industrial pressures went beyond the pursuit of industrial objectives or involved the commission of acts which were independent breaches of the ordinary law protecting property or personal safety, for instance, where they involved violence. However, with the decision of the House of Lords in 1964 in ***Rookes v. Barnard,***[3] there was manifested a renewed interest on the part of the law in the forms taken by industrial pressure. Though the English legislature reacted by removing the legal effect of the decision itself, it still did not touch other related doctrines, and the extent to which industrial disputes will continue to be aired in the English courts of law in the form of attempts to assert civil liability still remains uncertain.

In Australia, with the introduction of the compulsory arbitration system, employers tended to favour, in a strike or threatened strike situation, resort to the penal provisions of the arbitration statutes, whether that action was taken in the arbitration tribunals themselves or through magisterial courts of summary jurisdiction which acted as enforcing agencies for the decisions of the arbitration tribunals. During this century, tort actions for damages in the ordinary courts have been a rarity, and where they did occur they have been instituted by employees who have suffered hardship by action taken by unions or taken by employers at the behest of unions, for instance, in the situation where a non-unionist has been dismissed at the behest of unionists seeking a closed shop. One has almost to go back to the last century to find such actions being taken by employers.[4] This may have saved a certain increase in bitterness because the trade union movement in Australia, like its prototypes in the United Kingdom and the United States, has been perenially suspicious of the ordinary law courts. The present decrease in the credibility image of the penal sanctions of the arbitration system may possibly lead to

2 ***Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch,*** [1942] A.C. 435; [1942] 1 All E.R. 142.

3 [1964] A.C. 1129; [1964] 1 All E.R. 367.

4 The only early High Court case—***Brisbane Shipwrights' Provident Union v. Heggie*** (1906), 3 C.L.R. 686—was a case of employee action. There were, however, about the turn of the century, a few State decisions involving

a revival of the tort forms of action. If so, of course, the legal door is wide open. In only one State has there been a copying of the English *Trade Disputes Act.* A second point is that the numerous prohibitions contained in the industrial arbitration statutes may well react on the civil liability situation by supplying the necessary element of illegality in a combination. Obviously if a strike is illegal or partially illegal by statute or industrial award, it may well make the combination which masterminds the strike actionable for civil liability purposes.

Civil liability in England centred around three tort forms of action, viz. civil conspiracy, interference with contractual relations[5] and intimidation. The first one necessarily involves the combination of two or more; the latter two focus attention on individual action in the sense that an act by an individual is enough to attract liability. The first one involves an injury into the ultimate motive of the defendants; the latter two do not. The latter two, especially intimidation, could, however, play a considerable part in providing the necessary elements for conspiracy.

1. Conspiracy

(a) The early history — criminal conspiracy

The word "conspiracy" in the legal language of industrial law lacks the "cloak and dagger" associations which it conveys to the layman, and which it can undoubtedly possess in other areas of the law, for instance, in the case of conspiracy to commit murder or burglary. In industrial legal parlance, conspiracy simply connotes combination to effect some kind of economic injury. In striking at combination, the law, of course, struck at the heart of trade union pressures which inevitably depend on some kind of concerted action. A strike, unlike a lock-out, is easily indentifiable by virtue of the element of combination.

From 1799 to 1824, concerted pressures by employees, and for that matter the very existence of trade union activity, was interdicted by the Combination Acts. With the repeal of those Acts in 1824 and 1825,[6] employee combinations were confronted with the doctrine of criminal conspiracy under which participation in a combination for

5 This form of tortious liability was previously termed "inducing breach of contract", but in view of the decision in ***Torquay Hotel Co. Ltd. v. Cousins,*** [1969] 2 Ch. 106; [1969] 1 All E.R. 522, that no suable breach as between the parties to the contract need have occurred, it is probably better to use the more neutral word "interference".

6 5 Geo. IV c. 95 and 6 Geo. IV c. 129. The latter Act was less liberal than the earlier, owing to an outbreak of strike action after the passage of the

industrial purposes could be criminal. The law never quite reached the point of deciding that a combination was a criminal conspiracy merely because it aimed at inflicting and did inflict economic injury.[7] The law relied on associated doctrines such as intimidation and coercion, to render the combination illegal, but such tactics as threatening an employer with a withdrawal of labour unless he conceded union demands, or inducing employees to quit their employment were readily construed as acts of coercion.[8] The attempts of the legislature, which on the whole was disposed to lend some ear to the complaints of unions, to "catch up" with and frustrate some of the judicial interpretations, provide quite a fascinating picture. Such attempts were uniformly unsuccessful until the Disraeli Government in 1875 drew the fangs of the doctrine of criminal conspiracy by providing in the *Conspiracy and Protection of Property Act* 1875 that, in substance, an agreement or combination by two or more, to do any act in contemplation or furtherance of a "trade dispute", would not be indictable as criminal conspiracy unless the act, if done without combination, would be criminal. Intimidation remained but was re-defined in such a way that it was held to exist only if some breach of the peace was involved.[9]

(b) The growth of the tort and its development

It was not very long after the statutory abolition of criminal conspiracy that much the same pattern of liability appeared in the form of civil liability for damages.[10] The crime of conspiracy is replaced by the tort of conspiracy. The thread of liability, however, after a long period of hesitations, ambiguities and uncertainties, ultimately emerged in a clearer form than was ever attained by the criminal liability for industrial conspiracy. The common law based itself on the notion that a combination of two or more, which aimed at inflicting trade injury on another and resulted either in injury or the immediate likelihood thereof, was civilly actionable.[11] However, it was only

7 Sir Willian Erle was a strong protagonist of this view, e.g. ***R. v. Rowlands*** (1851), 5 Cox C.C. 436. But there was considerable opinion to the contrary, e.g. Wright: *Criminal Conspiracies and Agreements*, 1873, p. 41.

8 See ***R. v. Duffield*** (1851), 5 Cox C.C. 404, and ***R. v. Rowlands, supra.***

9 ***Gibson v. Lawson,*** [1891] 2 Q.B. 545, at p. 559.

10 E.g. ***Temperton v. Russell,*** [1893] 1 Q.B. 715; [1891-4] All E.R. Rep. 724. It had been unsuccessfully sought to use it against commercial combinations in ***Mogul Steamship Co. v. McGregor, Gow & Co.,*** [1892] A.C. 25; [1891-4] All E.R. Rep. 263.

11 The common law never concerned itself much with the question of whether the actual infliction of damage was required, as distinct from the threat of it. At the level of technicalities, the actual incurring of damage is probably necessary for the common law remedy, but the point hardly warrants detailed research. Of course, in the case of a threat, an injunction can be sought, but English courts never showed the enthusiasm of their American

prima facie actionability—the common law recognized some defences. It so happened that some of the combinations, which in the early stages attracted the attention of the courts, were commercial combinations among traders to inflict injury in the economic sense on rival traders. In ***Mogul Steamship Co. v. McGregor, Gow & Co.***[12] the Court of Appeal and the House of Lords held that in the case of employer or, more correctly, commercial combinations, it was a defence that the combination action was taken in pursuit of private commmercial competition, albeit bitter commercial competition, and that it was taken to further the trade interests of the combiners.[13] This attitude was followed in later cases.[14] The courts, however, were markedly reluctant to recognize that combinations of workmen might have similar "trade interests" to serve. The actions of worker combinations in using pressure against employers in order to induce them to concede demands, particularly when used against customers of the employer, were apt to be regarded as "malicious"[15] even though the weapon used, viz. a threat to withdraw labour, is not basically different in concept from that used by commercial combinations against the "lone wolf" trader, viz. the threat of a withdrawal of trade custom from persons who deal with the offending individual. The word "malice", however, as applied to trade union concerted pressures, seemed to mean no more than a display of hot temper or immoderate language or something that indicated that the union did intend to interfere with the trade of the employer; the latter is obviously a concomitant of any determined strike or other industrial presssure action.[16] For a while it looked as if the determination of whether there was civil liability was going to depend upon whether the employer plaintiff had proved

Footnote 11—continued

counterparts for injunctions in labour disputes. Instances, of course, have occurred, e.g. ***Springhead Spinning Co. v. Riley*** (1868), L.R. 6 Eq. 551; ***J. Lyons & Sons v. Wilkins,*** [1896] 1 Ch. 811; [1899] 1 Ch. 255, and ***National Sailors' & Firemen's Union v. Reed,*** [1926] Ch. 536; [1926] All E.R. Rep. 381. An Australian instance is ***Slattery v. Keirs*** (1903), 20 W.N. (N.S.W.) 45. It must be admitted, however, that many English decisions since 1964 have been injunction cases.

12 (1889), 23 Q.B.D. 598; [1892] A.C. 25; [1891-4] All E.R. Rep. 263.

13 (1889), 23 Q.B.D. 598, at p. 614; [1892] A.C. 25, at pp. 36-7, 50. And see [1891-4] All E.R. Rep. 263, at pp. 268, 275.

14 E.g. ***Sorrell v. Smith,*** [1925] A.C. 700; [1925] All E.R. Rep. 1.

15 E.g. ***Quinn v. Leathem,*** [1901] A.C. 495; [1900-3] All E.R. Rep. 1.

16 See the explanation of Evatt, J., in ***McKernan v. Fraser*** (1931), 46 C.L.R. 343, at p. 404. It is probable that the jury's finding of malice in ***Quinn v. Leathem*** was due to the remarks of one of the defendant union officials that the non-unionists should be dismissed from employment and left to

that the union officials acted with "malice". However, that "slippery word" has now happily been discarded.[17]

The ***Crofter Case***[18] in 1942 finally held that employees too had available to them the defence that their combination was to advance trade interests, and the strong suspicion that there was a judicial double standard tended to disappear.[19]

Since the ***Crofter Case*** dissipated most of the confusion surrounding this area, it is not a rewarding exercise to try to reconcile the conflicting decisions in the era before that case, still less to attempt the same process in relation to the host of conflicting *dicta* appearing therein. It will probably be enough to indicate the purport of the main decisions.

In ***Mogul Steamship Co. v. McGregor, Gow & Co.***,[20] the case previously accorded brief mention, the tactics of a combination of shipping merchants, to isolate and ruin the business of a rival shipowner by refusing to deal with, or withdraw custom from, shippers of goods who dealt with the plaintiff, were held non-actionable because the combiners acted only in protection or advancement of their trade interests. In ***Sorrell v. Smith***,[21] similar reasoning was applied to the concerted action of a group of newspaper proprietors in threatening to withdraw newspaper supplies from persons who dealt with the plaintiffs, a combination of retail newsagents, who had originally attempted the same kind of action against wholesalers.

On the trade union combination aspect, the most outstanding decision was that of ***Quinn v. Leathem.***[22] Trade union officials were held liable for inducing a trade customer of the plaintiff employer to cease dealing with the plaintiff by means of a threat to call out the customer's workmen. The motivation of the concerted action was to compel the plaintiff to dismiss non-union labour. Feelings had run high and the action of the union could be regarded as both callous and high-handed. It was in this case that the words "malice", "intimidation" and "coercion" were freely applied to the conduct of the trade union people,[23] epithets behind which one is inclined to detect a strong moralistic tendency. Somewhat similar reasoning led to the House

17 See ***Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch***, [1942] A.C. 435, at p. 463; [1942] 1 All E.R. 142, at p. 158.

18 [1942] A.C. 435; [1942] 1 All E.R. 142.

19 The suggestion of such a double standard is strongly brought out by the contrast between ***Temperton v. Russell***, [1893] 1 Q.B. 715; [1891-4] All E.R. Rep. 724 (a case of trade union combination) and ***Jenkinson v. Nield*** (1892), 8 T.L.R. 540 (a case of employer combination against employees).

20 (1889), 23 Q.B.D. 598, and [1892] A.C. 25; [1891-4] All E.R. Rep. 263.

21 [1925] A.C. 700; [1925] All E.R. Rep. 1.

22 [1901] A.C. 495; [1900-3] All E.R. Rep. 1.

of Lords holding the union itself liable for conspiracy (in what would appear today to be a very typical industrial dispute situation) in the famous case of ***Taff Vale Railway Co. v. Amalgamated Society of Railway Servants.***[24] This case, which extended the liability of union officials to the funds of the union itself, was the decision which, more than any other, led to the passing of the *Trade Disputes Act* in 1906, of which more anon.

However, a more liberal attitude towards employee combinations was displayed in some decisions, even in the pre-***Crofter*** era. There was the famous decision in ***Allen v. Flood***[25] which is nowadays regarded as being based on the fact that no combination action had been proved, and is very important as decisively banishing the notion that there was some general tort, unassociated with combination, of interference with an individual's right to carry on his calling. In ***Hodges v. Webb***,[26] Peterson, J., held that it was not actionable to either threaten or prophesy that men would come out on strike. This holding, of course, now has to be reconsidered in the light of the decision in ***Rookes v. Barnard.***[27]

In Australia, most of the earlier decisions followed traditional lines,[28] and most trade union tactics came up against judicial condemnation when they ran counter to the preservation of commercial trade relationships in a *laissez-faire* society. However, in ***McKernan v. Fraser***[29] the High Court refused to interfere in a situation where union officials combined to prevent the employment of two members of a breakaway union by a threat of industrial action. Evatt, J., in an opinion which anticipated a good deal of the reasoning in the later ***Crofter Case***, analysed the difficult concept of malice and endeavoured to show that the mere existence of dislike by the union of the breakaways did not necessarily display a legally wrongful motive. He adopted the phrase "disinterested malevolence" to suggest that the motive that rendered a combination actionable was not the hatred which was merely the outcome of a clash between opposing interests.[30]

(c) The present law

In stating the present law, one must deal in separate segments with "conspiracy to injure" which indicates the kind of alleged conspiracy which involves an examination of motives, and on the other hand,

24 [1901] A.C. 426.

25 [1898] A.C. 1; [1895-9] All E.R. Rep. 52.

26 [1920] 2 Ch. 70; [1920] All E.R. Rep. 447.

27 [1964] A.C. 1129; [1964] 1 All E.R. 367.

28 E.g. ***Brisbane Shipwrights' Provident Union v. Heggie*** (1906), 3 C.L.R. 686; ***Roscoe v. Wells*** (1909), 11 W.A.L.R. 184.

29 (1931), 46 C.L.R. 343.

the conspiracy which involves acts themselves contrary to law either as means or as ends. One should then look at the provisions of the *Trade Disputes Act* 1906, perhaps with some inclination to be relatively brief, as in Australia this statute has been copied in Queensland only.

(i) *Conspiracy to injure*: In this situation it is assumed that the combiners commit no unlawful act apart from the fact of combination. The effect of the combination, by virtue of the very fact of concerted action, is to injure the trade, business, employment or livelihood of another.

In ***Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch,***[31] hereafter referred to shortly as "the **Crofter Case**", the House of Lords took certain *dicta* of Viscount Cave in ***Sorrell v. Smith***[32] and carried them to their logical conclusion. The principle that emerges can be stated thus: A combination which has as its object the injuring of the trade, custom, livelihood or the economic or financial interests of another, is prima facie actionable if it causes damage or possibly the inevitable probability of damage, but it is a defence that the motive of the combiners was to protect their trade or ordinary group interests.[33] How this defence can be legitimately employed to remove from the scope of liability the actions of combining trade unionists was shown by the facts of the ***Crofter Case*** itself. The union organized both the mill workers and the dockers on the Scottish island of Lewis where Harris tweed was manufactured. It imposed an embargo on the transportation of the plaintiff manufacturer's product. It so acted because it was seeking good collective bargaining relations and a unionized shop with another company, and that company had indicated that the plaintiff's "cut-throat competition" was an obstacle to the attainment of these ends.[34] It was held that these aims were sufficient to establish that the motive of the action taken was to advance trade interests. No independent illegalities existed, and it was not for the Court to pass judgment on the morality of the tactics adopted, any more, one is disposed to add, than a court was disposed to pass moral judgment on the tactics of the commercial monopoly in ***Mogul Steamship Co. v. McGregor Gow & Co.***[35] The word "malice" is to be avoided, and malevolence is not essential to the cause of action.[36] The plaintiff does not

31 [1942] A.C. 435; [1942] 1 All E.R. 142.

32 [1925] A.C. 700, at p. 712; [1925] All E.R. Rep. 1, at pp. 5-6.

33 [1942] A.C. 435, at pp. 446, 452; [1942] 1 All E.R. 142, at pp. 150, 152-3. The question as to whether there must be actual damage, has, in fact, already been mentioned.

34 The company with which the union was engaged in collective bargaining, spun the cloth in their local mills; the plaintiffs imported the yarn already spun from the mainland and so were able to cut costs.

35 [1892] A.C. 25; [1891-4] All E.R. Rep. 263.

have to prove "malice" to establish his case; it is for the defendant to establish the legitimate trade motive.

In the case of trade union actors it is probably better to talk about advancement or protection of "industrial" group interests rather than trade interests.[37] It is not every type of motive that will qualify for protection. It is clear that a mere personal vendetta unassociated with the pursuit of industrial interests will not attract protection.[38] Viscount Maugham gave other instances of motives, the existence of which would remove the protection, for instance the pursuit of a person for racial, political or religious reasons.[39] What is to be looked at is the proper activities of a group as such. Presumably it would be appropriate for a religious group to use pressure tactics against another religious group even though it was animated by motives of fanaticism. However, it is inappropriate for trade unionists to assume this mantle.[40]

Nor would the desire to replenish the union treasury necessarily qualify as a legitimate motive. It is improbable that the defendants in the ***Crofter Case*** would have been protected if they had been bribed by the other company concerned to put the plaintiff out of business.[41] On the other hand, it cannot be denied that in some cases the desire to protect union funds would qualify as a legitimate motive, though, of course, it would not protect acts which were in themselves illegal.

Another unprotected situation would probably be that where the action taken was done with the intention of merely proving the power of the combination.[42]

That the ***Crofter*** principle would be accepted in Australia, in the pure conspiracy to injure situation, is demonstrated by the attitude of High Court of Australia in ***Williams v. Hursey.***[43] There the plaintiffs, father and son, were members of the Waterside Workers' Federation in Hobart and were "sent to Coventry" by their fellow union members by reason of their refusal to pay a political levy resolved on by the branch of the union. The attitude of the unionists went beyond passive refusal to fraternize, as there was a determined, and for a time successful, attempt to prevent the plaintiffs from getting to their place of "pick-up" on the wharf. This technique was called picketing by the union, but in effect it involved blocking the wharf entrances by a

37 [1942] A.C. 435, at p. 462; [1942] 1 All E.R. 142, at p. 158 (per Lord Wright).

38 ***Huntley v. Thornton,*** [1957] 1 W.L.R. 321; [1957] 1 All E.R. 234.

39 ***Crofter Case,*** [1942] A.C. 435, at p. 451; [1942] 1 All E.R. 142, at p. 152.

40 It seems, however, that they could act *against* racial discrimination—***Scala Ballroom (Wolverhampton) Ltd. v. Ratcliffe,*** [1958] 3 All E.R. 220.

41 [1942] A.C. 435, at p. 446; [1942] 1 All E.R. 142, at p. 149.

human barrier of linked arms. In an action against the union[44] and various officials for conspiracy, the High Court came to the conclusion that there would be no liability on the ***Crofter Case*** type of argument. It was true that the controversy generated great bitterness which was exacerbated by the fact that there were strong Communist sympathisers in the union whilst the plaintiff belonged to a political party which later became the Democratic Labour Party. Nevertheless, the High Court was of the view that the action taken was taken because of a desire to enforce a principle that majority decisions taken by a union, viz. in this case the decision to make the levy, must be adhered to by individual members.[45] This approach is well in line with the Evatt distinction, in ***McKernan v. Fraser***,[46] between the hatred that was personal and the hatred that was merely symbolic of a difference in principle or interests. The plaintiffs, however, succeeded for another reason.

Given a motive which is unprotected by the ***Crofter*** principle, the individual who is party to the combination, is liable for conspiracy even though he commits none of the overt acts by which the conspiracy seeks to attain its ends. One is not confined to suing the ringleaders, nor is it necessary that the ringleaders be sued.

More difficult, however, is the question of mixed motives. Evatt, J., attempted an analysis of this difficult question in ***McKernan v. Fraser.***[47] He concludes that one must look at the whole nature of the combination. The mere fact that one or two evince malevolence does not colour the acts of all the combiners unless the predominant motive is malevolent.

(ii) *Conspiracy by illegal means:* In the ***Crofter Case*** it was stressed by the House of Lords that the reasoning of their Lordships was confined to the situation where there was no independent illegality.[48] If either the end sought or the means employed to achieve it were independently illegal, that is to say, possessed an unlawfulness which existed independently of the mere common law effect of combination as such, the protective mantle of the ***Crofter*** principle would fail to descend.

Australian cases have furnished more examples of the "independent illegality" situation than have English cases. This is understandable in view of the plethora of prohibitions contained in the compulsory arbitration statutes; it is possible, however, that the illegality may be derived from other legal prohibitions than those contained specifically

44 A trade union can be sued in tort in Tasmania as there has been no adoption of the English *Trade Disputes Act* 1906 in that state.

45 ***Williams v. Hursey*** (1959), 103 C.L.R. 30, at pp. 123-4.

46 (1931), 46 C.L.R. 343, at p. 404.

47 (1931), 46 C.L.R. 343, at pp. 399-402, 407-8.

48 [1942] A.C. 435, at pp. 445, 465-6, 488; [1942] 1 All E.R. 142, at pp. 150

in the arbitration statutes, and this in fact was what happened in ***Williams v. Hursey.***[49]

We have seen that in that case the union would probably have triumphed had the facts merely involved conspiracy to injure *simpliciter*. However, the High Court held that so-called "picketing" tactics on the wharf involved assault, whilst other conduct of the union and its sympathisers on the wharves in relation to the Hursey incidents involved breaches of the *Stevedoring Industry Act* 1956 (Com.).[50] It concluded, therefore, that the situation was one of conspiracy effectuating a possibly legitimate purpose by illegal means. The defendants were thus held liable.

In the ***Hursey Case*** some of the unlawful acts were torts as well as crimes, but the High Court's reasoning, of course, would also cover the situation where the illegal acts constituted criminal offences only, in fact more so. In ***Coal Miners' Industrial Union of Workers v. True***[51] the union secured the dismissal of a coalminer by reason of a threat that it would call a strike unless the employer acted to dismiss him. It was decided that the coalminer (plaintiff) could sue for conspiracy because a strike was an offence under the *Industrial Arbitration Act* 1912-1952 (W.A.), and hence the threat to procure it was also illegal. It may be that with the gift of hindsight one can now say that in the light of ***Rookes v. Barnard***[52] this situation was a perfect example of the tort of intimidation. However, the High Court obviously decided the case on the basis that the only independent illegality was one by the criminal law, and that there was no right of suit on the basis of an independently commmitted tort. It was the existence of the criminal act that vitiated the combination and so gave a civil cause of action in conspiracy.[53]

One perhaps may be accused of labouring this crime-tort distinction, but there is a reason for it, in fact, two reasons. If the only separate acts which are wrongly committed are torts, then at first blush not much is gained by framing the action in conspiracy. One might as well sue the actors on the separate torts. One advantage, however, is that if the combination is vitiated by the commission of acts which are themselves torts, one can sue the individual participant in the planning of the combination for damages for conspiracy, even though such individual participant himself did not commit those other torts.[54] But

49 (1959), 103 C.L.R. 30.

50 (1959), 103 C.L.R. 30, at pp. 78-9, 108-9, 125-6.

51 (1959), 33 A.L.J.R. 224.

52 [1964] A.C. 1129; [1964] 1 All E.R. 367.

53 (1959), 33 A.L.J.R. 224, at p. 227.

54 Seemingly this view was acted on in ***Rookes v. Barnard***, [1964] A.C. 1129; [1964] 1 All E.R. 367,

in the case where the separately wrongful acts are crimes and crimes only, then the action for conspiracy is the *only* medium for recovery of civil damages.[55]

The other reason has to do with the *Trade Disputes Act* and this will be mentioned under the next heading.

There is probably some limit to the range of illegal acts that vitiate a combination. It does not, for example, seem reasonable that a combination should become actionable as a conspiracy if the union participants parade peaceably down the street but without having obtained a permit from the local authority to do so, or the President and the Secretary plan tactics whilst indulging in after hours drinking in a hotel.

(iii) *The effect of the Trade Disputes legislation*: It is necessary to explore this position, as the statute of 1906 was copied in Queensland[56] with the substitution of the phrase "industrial dispute" for the English "trade dispute". It is provided by the English Act that an act done in pursuance of an agreement or combination by two or more persons should not, if done in contemplation or furtherance of a "trade dispute", be "actionable" unless the act if done without any such agreement or combination would be "actionable".[57]

The phrase "trade dispute" is defined substantially to mean any dispute between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment, or the terms of the employment, or with the conditions of labour of any person or persons.[58] The definition of "industrial dispute" in the Queensland Act is very much wider.

This verbiage has been rather narrowly interpreted in England. Thus it seems that the action of a firm in letting a "labour only" sub-contract would not generate a "trade dispute". It is true that the case in which this situation arose[59] was decided on the narrower issue of "contract of employment", but the decision would also seem to conclude the wider question whether there was a "trade dispute" at all. Nor does it seem that a secondary boycott situation would normally involve a "trade dispute".[60] Again in ***J. J. Stafford & Sons Ltd. v. Lindley***[61] a very narrow view was taken by the House of Lords which held that a trade

55 Save, of course, where there was a breach of a penal statute which was interpreted to give a civil right of action for breach of statutory duty.

56 *Industrial Conciliation and Arbitration Acts* 1961 to 1964, s. 72 (1).

57 *Trade Disputes Act* 1906, s. 1.

58 *Trade Disputes Act* 1906, s. 5.

59 ***Emerald Construction Co. Ltd. v. Lowthian,*** [1966] 1 W.L.R. 691; [1966] 1 All E.R. 1013.

60 ***Torquay Hotel Co. Ltd. v. Cousins,*** [1969] 2 Ch. 106; [1969] 1 All E.R. 522. This indeed was not a typical secondary pressure situation, but see the remarks of Winn, L.J., [1969] 2 Ch. 106, at p. 148; [1969] 1 All E.R. 522, at p. 538.

dispute was not involved where the union took action to disrupt the trade of the employer because a subsidiary of the latter had refused to accord the union recognition in collective bargaining. A dispute about bargaining rights is surely a dispute about industrial matters, and it surely would, in view of realities, fit into the description of a dispute in respect of the terms of employment or with the conditions of labour of any person, remembering that the *Trade Disputes Act* also defines "workmen" as meaning all persons employed in trade or industry, whether or not in the employment of the employer with whom the trade dispute arises. In ***Torquay Hotel Co. Ltd. v. Cousins***[62] Lord Denning, M.R., said that a "recognition" dispute was "clearly a trade dispute". He had, of course, expressed this view in ***J. T. Stratford & Son Ltd. v. Lindley*** in the Court of Appeal.[63] In ***Huntley v. Thorton***[64] there was held to be no trade dispute within the meaning of the Act where the defendant union officials conducted a campaign against the plaintiff because of his refusal to participate in a one-day stoppage, and took steps to ensure that he did not secure employment with any employer. They were held to be merely indulging a personal grudge.

In Queensland the term used is "industrial dispute", which is defined with a rather breathtaking width of phraseology which would not seem to permit the narrower English interpretations.[65]

Given the existence of a "trade dispute", what is the effect of the provision? There is obviously an area which is unprotected and where conspiracy liability would still be operative. The statute focuses attention on the legal quality of the act, on the supposition that it was committed by one individual in isolation. However, the test is not the practical effect of what the act of one individual would accomplish but the question whether the act constitues the kind of conduct which is capable of being tortious if committed by an individual.[66]

It is also suggested, although authority is lacking, that the word "actionable" should be given its precise legal meaning and should be interpreted to refer to civil liability only. The word "actionable" is not apt to indicate a situation where all that the individual incurs is the risk of prosecution. This is relevant to the situation where the sole liability is that created by a penal statute. Again it must be shown that the act is of such a quality that it would constitute a tort if com-

62 [1969] 2 Ch. 106, at p. 136; [1969] 1 All E.R. 522, at p. 528.

63 [1965] A.C. 269, at pp. 281-2; [1964] 2 All E.R. 209, at pp. 214-5.

64 [1957] 1 W.L.R. 321; [1957] 1 All E.R. 234. See also ***Conway v. Wade,*** [1909] A.C. 506; [1908-10] All E.R. Rep. 344.

65 *Industrial Conciliation and Arbitration Acts* 1961 to 1964 (Qld.), s. 5.

66 ***Rookes v. Barnard,*** [1964] A.C. 1129, at pp. 1171, 1211; [1964] 1 All E.R.

mitted by one individual alone, that is, it must be capable of being committed on the individual level.

In the light of these factors, it is submitted that Wedderburn is not correct in assuming that the area withdrawn from the protection of the Act is the whole area of conspiracy by unlawful means.[67] Take a situation such as that of ***Coal Miners' Industrial Union of Workers v. True***[68] and assume that there had been a Trade Disputes Act applicable in Western Australia. Now it is probable that on a ***Rookes v. Barnard***[69] analysis, any particular union official who conveyed the threat *did* commit the tort of intimidation, and this would remove the protection of the statute because there is an "actionable" single act. But assume that the employer had refused to dismiss True, and the union had then gone on strike without any breach of contract being involved. This is statutorily illegal conduct in Western Australia. However, for two reasons an action of conspiracy could not have been brought. The first is that there is no independent civil liability in existence. The second is that even if the view here submitted as to the meaning of "actionable" is wrong, the act is not one which if committed without combination would be "actionable" even in the wider sense, as going on strike involves in its nature a concerted activity.

A simpler situation is afforded by a strike on the waterfront where the strikers commit no independently tortious act or acts but breach certain provisions of the *Stevedoring Industry Act* 1956-1966 (Com.), relating to mode of work or the operation of waterfront gangs. Here the offending act would normally be one capable of being committed by one individual, but it would not be "actionable" in the sense described above.

2. Interference with contractual relationships

In view of ***Torquay Hotel Ltd. v. Cousins***[70] it is probably better to discard the old description of this tort as that of "inducing breach of contract".

This cause of action has kept its original association with non-industrial situations more strongly than in the case of conspiracy or intimidation. The case which most strongly fathered the pattern of liability, viz. ***Lumley v. Gye,***[71] was the case of the engagement of a singer which probably did not create an employer-employee relationship at all, and many later cases were not cases of industrial disputes as such.[72]

67 Wedderburn: *The Worker and the Law,* 1965, pp. 240-1.
68 (1959), 33 A.L.J.R. 224.
69 [1964] A.C. 1129; [1964] 1 All E.R. 367.
70 [1969] 2 Ch. 106; [1969] 1 All E.R. 522.
71 (1853), 2 E. & B. 216; 118 E.R. 749; [1848-60] All E.R. Rep. 208.
72 E.g. ***Brimelow v. Casson,*** [1924] 1 Ch. 302; [1923] All E.R. Rep. 40;

Nevertheless, the form of action is one peculiarly adaptable to industrial dispute litigation because of its insistence on the sanctity of contract, a matter to which industrial disputes do not, and possibly cannot, pay deference. The traditional way in which this liability was stated was that it was a tort for a third person to induce or persuade or procure one of two persons who were in an existing contractual situation to break that contract. Thus in ***Lumley v. Gye,***[73] Gye was held liable because in a situation where the singer was bound to sing exclusively at Lumley's theatre, he persuaded her to break that contract. The modern concept that it is possible for the intervener to be liable, even if there be no suable breach of contract, leads us to say that the tort may be constituted by causing, through inducement, a breakdown in, or termination of, existing contractual relationships. Thus in ***Torquay Hotel Ltd. v. Cousins***[74] the union and union officials created, rather unjustifiably from a moral point of view, a dispute with the management of the Imperial Hotel because they thought the manager had intervened in a dispute which it had with another hotel, and in order to strengthen its position, induced the Esso Co., which was under contract with the plaintiff company to supply its hotels (of which the Imperial Hotel was one) with all fuel oil requirements, to discontinue supplies to that hotel. There was no actual breach of contract as between the Esso Co. and the plaintiff because of a clause in the contract which excused performance in the case of labour disputes. Nonetheless, the union was held liable because in fact the contractual relationship was substantially interfered with. This was the approach of Lord Denning, M.R., but the other members of the Court did not disagree. It opens up wide and conceivably dangerous possibilities.

The most obvious application of this tort in the field of industrial relationship is where the inducement to break or frustrate is offered in respect of a contract of employment. It was here that in earlier times and even today in cases where there is no statutory protection,[75] the activities of the union organizer made him an easy mark. For in the normal situation the union organizer who persuades workmen to "down tools" has procured a breach of their several contracts of employment unless he also makes sure that they terminate such contracts by giving the legally effective period of notice. Thus in ***South Wales Miners' Federation v. Glamorgan Coal Co.***[76] union offiicials were held liable on the ***Lumley v. Gye***[77] principle because they had

73 (1853), 2 E. & B. 216; 118 E.R. 749; [1848-60] All E.R. Rep. 208.
74 [1969] 2 Ch. 106; [1969] 1 All E.R. 522.
75 In Australia in all States except Queensland.
76 [1905] A.C. 239; [1904-7] All E.R. Rep. 211.

induced coalminers to come out on a four-day stoppage in protest against an anticipated reduction of the price of coal to which price their wages were pegged.

The tort, however, can be used to strike at the techniques of the secondary boycott. It is actionable to induce breach of any kind of contract. The union, in the secondary boycott technique, aims to interfere with those who do business with the employer. In other words it aims to hit his suppliers, his wholesale or retail outlets or his sub-contractors. His relations with these people may not involve firm contracts, in which case the plaintiff, if he sues at all, has to sue in civil conspiracy or intimidation. If, however, there is an existing contract and the union induces the other party to refuse to perform it, then here we have interference with a contract of a commercial nature. Obviously this is actionable as in ***Torquay Hotel Co. Ltd. v. Cousins;***[78] moreover, the cause of action, as will be seen later, escapes the *Trade Disputes Act.*

So far we have been envisaging the bringing about of the breach or non-performance of a contract by a direct approach to one of the parties. This is not always the approach. One could, if one had the means to do so, disrupt the contract by creating conditions which would render it impossible for one party to perform it. There was an allegation of this type of tactic in ***D. C. Thomson & Co. Ltd. v. Deakin***[79] which arose out of the tactics of Messrs. Thomson & Co., printers and publishers, in obliging their employees, at point of engagement, to sign a written contract not to join a union. This kind of contract, known as the "yellow dog" contract in the United States and as "the document" in England, was regarded as obnoxious by the trade union world, and it is somewhat suprising to find it being practised in England as late as 1950. Some of Thomson's employees who had joined unions were summarily dismissed when the fact was known. This caused an understandably vigorous reaction from unions intimately connected with that area of employment. Bowaters Ltd., who under contract supplied Thomson's paper requirements, had a unionized work force. Approaches were made by union officials, whose identity was not clear, to Bowaters' drivers who as a result indicated to their employer that they "might not be prepared" to carry paper to Thomson's. This hint was enough for Bowaters who terminated supplies to Thomson's, thereby breaking their contract.

This essay in the tactics of the secondary boycott proved also successful from a legal point of view.

In an action for an injunction brought by Thomson & Co. against officials of the Transport & General Workers' Union who had allegedly

78 [1969] 2 Ch. 106; [1969] 1 All E.R. 522.

brought pressure to bear on Bowaters' drivers, it was recognized by the Court of Appeal that the generic ***Lumley v. Gye*** cause of action was not necessarily limited to the case where the intervener had made a direct approach by blandishment or threat to one of the contractual parties. It could cover the situation where the intervener had by other means, e.g. by causing third parties to act in a certain way, brought about a situation which led to the breakdown of the contract. However, the Court said that in this situation the other means must involve acts which were independently unlawful, that is to say, possessed a criminal or tortious quality apart from the fact that they led to a breach of contract.[80] In the instant situation this quality was lacking. The only wrongful act on the part of the interveners could be that they induced the breach of the various contracts of employment of Bowaters' employees, but in fact such contracts were not broken; it is doubtful whether the drivers even threatened to break them.

It may be commented that any contrary holding might well have caused some flutterings in the commercial world. It might have led to the conclusion that the action of A in preventing the sale of a certain quantity of product agreed to be sold by B to C by "cornering" the market in that product and so drying up supplies, would be an actionable tort.

It is true that in the ***Thomson Case*** there were other reasons why the intervening trade unionists should not be held responsible. There was no evidence that they knew of the existence of the main contract between Thomsons and Bowater's, and in this situation of alleged procurement by indirect means such knowledge would be essential.[81] Moreover, it seemed that there would be doubt whether the defendants did more than make a statement of facts to whoever they contacted.[82]

The tort of interference with contractual relationships is not one in relation to which the plaintiff has the onus of proving malice, nor is it relevant in itself that the defendant acted without malice. However, it is necessary to show that the defendant knew of the contract and intended to bring about its non-performance. The tort cannot be constituted by negligent conduct, and if the defendant acted under a belief, which must presumably be a bona fide belief, that what he was doing or proposed to do would not infringe anyone's contractual rights, he is not liable, provided that he does not act with reckless and wilful disregard for realities.[83] All this is fairly traditional learning

80 [1952] Ch. 646, at pp. 679, 682, 696-7; [1952] 2 All E.R. 361, at pp. 369, 370, 379.

81 [1952] Ch. 646, at p. 697; [1952] 2 All E.R. 361, at pp. 379-80.

82 [1952] Ch. 646, at p. 685; [1952] 2 All E.R. 361, at p. 373.

83 ***Short v. City Bank of Sydney*** (1912), 15 C.L.R. 148. English judges (notably Lord Denning, M.R.) have, however, recently been following a doctrine of constructive knowledge, e.g. *Torquay Hotel Co. Ltd. v. Cousins*

as applied to the situation where it is alleged that the intervener directly induced the breaking of the contract by direct approach to the parties. However, it has also been extended, as has been previously noticed, to the situation where indirect means are used by attempting to bring about a situation where breach or non-performance of the contract becomes inevitable. Here it is not enough that the intervener intended in a broad kind of way to disrupt the contractual relationships of the parties; he must know of the existence of that particular contract and intend to cause its non-performance.[84] The difficult point that if the independent wrongful act was inducing a breach of a contract of employment, it might itself be legitimated by s. 3 of the *Trade Disputes Act* was rather glossed over in ***D. C. Thomson & Co. Ltd. v. Deakin.*** It is a distinct question from that of the direct effect of s. 3 on the plaintiff's right of action.

In this tort it is not necessary to prove malice, nor is there any onus on the defendant to prove lack of it.[85]

The action for interference with contractual relations does not permit of the defence, available in the ***Crofter Case*** type of conspiracy situation, that the intervener acted only to further his trade interests. Some grounds of justification are alleged to exist, but they are very obscure. In ***Brimelow v. Casson***[86] the defendants were held justified in inducing theatre proprietors to cancel contracts with the plaintiff, a theatrical manager, on the ground that the latter was paying his chorus girls starvation wages. On the other hand mere community of interest between the interveners and one of the parties to the contract is not enough.[87]

Partial protection to action by way of interference with contract is given in England by s. 3 of the *Trade Disputes Act* 1906 which provides that an act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment, or that it is an interference with the trade, business or employment of some other person or with the right of some other person to dispose of his capital or labour as he wills. Neglecting for the moment the second limb of this section, the protection is obviously limited to the case where the only wrongful act is that of inducing breach of a *contract of service.*

84 ***D. C. Thomson & Co. Ltd. v. Deakin,*** [1952] Ch. 646, at p. 697; [1952] 2 All E.R. 361, at p. 379.

85 The latter is relevant only as evidence of lack of intent to disrupt contractual relationships.

86 [1924] 1 Ch. 302; [1923] All E.R. Rep. 40.

87 ***Camden Nominees v. Forceu (or Slack),*** [1940] Ch. 352; [1940] 2 All E.R.

As previously remarked, the interpretation given in England to the phrase "trade dispute" has been but modest.

The protection accorded by the first part of this section is limited to the case where the only reason for actionability of the conduct in issue is the breaking of a contract of employment. Obviously this affords no protection in a case like that of ***Torquay Hotel Co. Ltd. v. Cousins***[88] where the conduct in issue is actionable because of the inducement to break a commercial contract. This appears to apply where the contract interfered with is a "labour only" sub-contract.[89]

In the ***Cousins Case***[90] there was in fact a trade dispute between the union and the Torbay Hotel, and the action taken against the plaintiff's hotel was because the union thought, apparently wrongfully, that its manager was supporting the case of the former hotel. It was argued that the action of the unionists against the plaintiff's manager was in contemplation or furtherance of the trade dispute between the unionists and the former hotel. As to this, Lord Denning, M.R., remarked that the defendants were not furthering anything but their own fury.[91] Even if they were furthering a trade dispute it does not seem that they could invoke the protection of s. 3, as what they did was to interfere with a contract of supply of goods, not a contract of service. In the case of ***D. C. Thomson & Co. Ltd. v. Deakin***[92] it does not seem that had the interveners *otherwise brought themselves within the area of liability,* they would have been able to invoke the Act as the head contract, breach of which they would have induced by indirect means, was a contract of a commercial nature.[93]

The question of the meaning of the second provision in the section with its apparent reference to some cause of action for interfering with the economic liberty of a person to dispose of his capital or labour at will, has been discussed, probably authoritatively, in ***Rookes v. Barnard,***[94] and will be mentioned later.

Of the Australian States only Queensland has copied s. 3 of the English Act in s. 72 (2) of the ***Industrial Conciliation and Arbitration Acts*** 1961 to 1964. The reference, as in the case of the "conspiracy" section, is to "industrial dispute".

88 [1969] 2 Ch. 106; [1969] 1 All E.R. 522.

89 ***Emerald Construction Co. Ltd. v. Lowthian,*** [1966] 1 W.L.R. 691; [1966] 1 All E.R. 1013.

90 [1969] 2 Ch. 106; [1969] 1 All E.R. 522.

91 [1969] 2 Ch. 106, at p. 137; [1969] 1 All E.R. 522, at p. 528.

92 [1952] Ch. 646; [1952] 2 All E.R. 361.

93 It is submitted, however, that Evershed, M.R. ([1952] Ch. 646, at p. 687; [1952] 2 All E.R. 361, at p. 374), does not do sufficient justice to the argument that s. 3 removes the "independent illegality" which is necessary to support liability in the case of procurement by indirect means.

3. Intimidation

This was pushed into the centre of things by the decision in ***Rookes v. Barnard.***[95] Before the date of this decision, however, a tort of intimidation was recognized by Salmond[96] and was suggested by certain older cases. Salmond's view was that if A, by intimidation, caused B to perform or not to perform an act, and by reason of such act or refusal to perform such act, C sustained injury, C had a cause of action against A. It was quite possible that B had a cause of action as well. If, for instance, A threatened to commit arson to B's shop unless B terminated trading relations with C, and B accordingly did terminate such relations, then C could sue A. There would also be no reason, however, why B could not sue A, assuming he sustained loss of economic advantage by the termination, unless his acquiescence was unduly craven. It is also not inconceivable that a right of action may exist where the situation is merely a two-party one involving A and B only. If A by a threat of forceful, illegal action procures B to do something to his detriment, there is no reason why B should not be able to sue.

In both situations it was necessary that the threat was to do something illegal in relation to the person to whom the threat was made (the intimidatee), who in the two-party situation is the plaintiff, but who in the three-party situation is merely the instrument of damage. It was also thought that "illegal" connoted something in the way of personal violence or damage to property.[97] The notable thing about ***Rookes v. Barnard*** was that it introduced the notion that a threat to break one's contract was a threat of an "unlawful" act. To apply the terms "unlawful" or "illegal" to a breach of contract may be impeccable logically but it does have a rather strong ring.

The facts in ***Rookes v. Barnard*** are well known. The plaintiff was dismissed by his employer B.O.A.C. because of the statement by certain union officials that all the employees would withdraw labour. This was not inducing breach of a contract of employment because there was no breach; Rookes was dismissed on due notice by the employer. However, the House of Lords, restoring the trial judge's decision which had been reversed by the Court of Appeal, held that the essentials of the tort of intimidation were present. This was because the union and B.O.A.C. were parties to a collective bargaining agreement under and by virtue of the terms of which the union was bound not to go on strike for the duration thereof. It may well be that this was of itself a mere unenforceable "gentleman's agreement", but it was acccepted by both parties to the litigation that the terms of that agreement were written into the individual contract of employment of each workman so that each workman had promised not to engage in a strike. When the unionists went to see B.O.A.C. and made the statement, they were therefore held to have threatened to break their individual contracts of employment, and this was also held to amount to threatening an "unlawful" act. It may be commented at this point that three persons were sued. All of them were trade union officials; one of them, Silverthorne, was a full time union official, not an employee at all. The other two were employees.

The defendants rather discredited their case by the incredibly weak proposition that the plaintiff was suing to enforce a contract, or was relying on rights under a contract, and therefore fell foul of the rule that a third person who is a non-party to the contract cannot sue on it.[98] This is pure nonsense: there is no breach of contract. The threat to bring it about is merely used as a lever to secure concessions. If the threat had been unsuccessful and the workmen *had* carried out their threat to strike, then there would have been a breach of contract situation, but Rookes could no more have sued on it than the man in the moon.

The House of Lords had little difficulty in discrediting this grotesque argument. Where the real objection to the decision lies is the notion that to threaten to commit a breach of one's own contract is a threat of something "unlawful". A breach of contract may be "unlawful" in the generic sense, but does the unlawfulness attach to the threat in such a way as to make the threat "intimidatory"? The unlawfulness must be gauged in the light of it being involved in a threat which is intimidatory. It seems unreasonable to say that anybody is intimidated by a threat that somebody else will break a contract with him. If so, the lack of any reasonable and probable intimidatory effect would qualify the broad sense of "unlawfulness".

The House of Lords also appears to have assumed that the threat was to break one's own contract of employment, not to induce other people to break their contracts. The latter might have been protected by the *Trade Disputes Act* 1906..[99] It is difficult to see that the actions of the trade unionists involved one more than the other.

The question of the impact of this decision on the tort of conspiracy involves a discussion of the applicability of the *Trade Disputes Act* 1906 and this is left to the next heading. There is, of course, nothing directly in the *Trade Disputes Act* to protect the defendants

95 [1964] A.C. 1129; [1964] 1 All E.R. 367.

96 E.g. *Law of Torts*, 12th ed., pp. 669-71.

97 *Rookes v. Barnard* (in the Court of Appeal), [1963] 1 Q.B. 623, at p. 695;

98 See ***Rookes v. Barnard***, [1964] A.C. 1129, at pp. 1167-8, 1208-9; [1964] 1 All E.R. 367, at pp. 373-4, 399. It seems strange that this view should be supported by Wedderburn in (1964), 27 Mod. L.R. at pp. 263-7.

99 Probably it is. See ***J. T. Stratford & Son Ltd. v. Lindley***, [1965] A.C. 269, at

from liability for the tort of intimidation as such, unless it is in the concluding words of s. 3.

The actual effect of ***Rookes v. Barnard*** was removed by the English legislature in the *Trade Disputes Act* 1965 which is a curiously limited enactment. It may be that as Wedderburn speculates,[100] it has not removed all the possibilities inherent in ***Rookes v. Barnard.*** Conceivably the notion involved in the case could mean that every strike involves a "conspiracy by unlawful means" because of the breaches of contract involved. By way of comment on this, however, it may be mentioned that the House of Lords in the ***Crofter Case***[101] does not seem to have envisaged breach of contract *per se* as one of the unlawful acts which would vitiate a defence of protection of trade interests within the principle of the case.[102] And if it is *threat* of breach, i.e. intimidation, which is relied on as vitiating the defence in the ***Crofter***-type situation, that seems to be removed by the Act of 1965. The force of the argument is also blunted by the particular development evinced by ***Morgan v. Fry.***[103]

Now we come to ***Morgan v. Fry.*** In ***Rookes v. Barnard***[104] the threat to strike was regarded as a threat to break a contract of employment only because the promise not to strike was regarded as having been written in from another document. It was not authority for the proposition that in a situation uncomplicated by the existence of the collective bargaining contract, a threat to strike is a threat to break one's contract. This latter position involves the stark issue of whether going on strike is a breach of contract.

It was this general issue that arose in ***Morgan v. Fry***[105] where the plaintiff, the founder of a breakaway union, sued because his dismissal from employment was procured by a threat to withdraw labour unless he was not dismissed. Widgery, J., held that a threat to breach the employment contract was involved, and the tort of intimidation was established.[106] The Court of Appeal reversed. Undoubtedly the reason for this is to be found in the judgment of Lord Denning. He concedes the force of the reasoning that a threat to strike is a threat to break one's contract, but then follows this up by saying

100 (1966), 29 Mod. L.R. at p. 54.

101 ***Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch***, [1942] A.C. 435; [1942] 1 All E.R. 142.

102 However, Lord Wright ([1942] A.C. 435, at p. 465; [1942] 1 All E.R. 142, at pp. 159-60) refers to the possibility of the men being called out in breach of contract, and would characterize such action as a "wrongful act". But Viscount Simon, L.C. (at p. 447; [1942] 1 All E.R., at p. 150), refers only to "criminal or tortious means".

103 [1968] 2 Q.B. 710; [1968] 3 All E.R. 452.

104 [1964] A.C. 1129; [1964] 1 All E.R. 367.

105 [1968] 2 Q.B. 710; [1968] 3 All E.R. 452.

something which can be expressed roughly as: "But we just can't have this. It would destroy the right to strike altogether. We must think of something else".

He did think of "something else" and presented a rationalization of his position.[107] Such view was based on the fact that the union had given a strike notice of a length of over two weeks. A workman can, of course, terminate his contract by giving reasonable notice, and in the case of ordinary industrial employment a week's notice would usually qualify. If a workman at the termination of the period of such notice declined to work, he would, of course, thereby commit no breach of contract. What Lord Denning does is to attribute to a strike notice of at least the same length the same result of preventing any breach of contract situation from arising. On this reasoning the strike notice in the instant case was sufficient in point of length. Lord Denning does not indeed say the contract of employment is terminated; he regards it as suspended during the duration of the strike.

With all due respect it is submitted that this type of reasoning has no basis either in logic or factual reality. If all socio-political reasoning involving legal phenomena has to have some front of lawyers' reasoning, here the front becomes the merest facade. The suggested parallelism between a strike notice and a notice of termination of the contract is mistaken. A strike notice may indeed on its terms be interpreted as a notice of termination as indeed the Donovan Report points out. However, it is submitted that from a strike notice *per se* no such interpretation can reasonably be drawn. A notice of termination of the contract must at least evince an intention to terminate. When workmen go on strike, however, the last thing they usually intend is that they should sever the contractual relationship.[108] The threat of strike is a pure pressure tactic. The workmen do not usually even *threaten* to effect a permanent severance. The threat is of a temporary severance with a view to returning to work later with added wages in their pockets or with other such benefits, conceded by the employer, that they wish to obtain through the strike.

As regards Lord Denning's concept of the suspension of the contract, it is difficult to see the basis on which such a unilateral right of suspension can rest, unless, of course, the employer by words or conduct accepts it. No such right, for instance, rests with an employer. As will be gathered from the discussion in Chapter 6, when an employer has the right to terminate the contract, whether by notice or by summary dismissal in case of misconduct, he must either terminate or leave

107 [1968] 2 Q.B. 710, at pp. 725-8; [1968] 3 All E.R. 452, at pp. 456-8. Russell, L.J.'s approach, however, was different.

the contract on foot. No half-way house of suspension is available to him.

There are, of course, other difficulties. Has the union, in giving a strike notice, the necessary authority to act as agent for its members in terminating the several contracts of employment?

It is submitted therefore that Lord Denning's conclusion hardly even resembles a logical exercise.[109] It is purely a flourish to retain what English sentiment apparently thinks ought to be retained at all costs to logic, viz. the historic right to strike. Australian judges, who are somewhat more hard-headed in relation to the issue of the right to strike as a result of the experiences and experiments of the compulory arbitration system, would be extremely unlikely to adopt such reasoning. If indeed the ***Rookes v. Barnard*** principle, viz. that a threat to break one's contract of employment is a threat of an unlawful act in the sense required for the purposes of the tort of intimidation, were to be accepted in this country, some way of avoiding the result that a strike was always a breach of contract could possibly be found in the common practice of employers in Australia of ceasing operations either in whole or part when confronted with a strike threat. In such a case it might be argued that there is no actual breach because there is no specific command or direction to work which is capable of being disobeyed, and if the breach be regarded in the light of an anticipatory breach through repudiation, then it has been waived. There are, however, some difficulties about such a view.

Subject to this possibility, which may be regarded perhaps as somewhat too ingenious to be convincing, it is submitted that the almost inevitable result of ***Rookes v. Barnard*** (once the reasoning is accepted) is that the successful threat to strike, that is to say successful in the sense that it does not have to be implemented, *does* constitute the tort of intimidation. The fault in the result lies obviously in ***Rookes v. Barnard*** itself. What, in the submission of the writer, should never have been held was the proposition that a threat to break the contract of employment was "unlawful" in the sense that *intimidatory* consequences could reasonably be presumed to flow from it.[110] It might be unlawful in some minor key but not for the purpose of deciding that the bludgeon of intimidation was used. It was here that ***Rookes v. Barnard*** took the fatal step; it is hoped that in Australia the courts will not take that step. There seem reasonable grounds for concluding that the High Court of Australia would not accept the ***Rookes v. Barnard*** principle.

109 Moreover, his reference to ***Allen v. Flood,*** [1898] A.C. 1; [1895-9] All E.R. Rep. 52, seems to be unsound, as that was a case where the hiring was terminable at will.

110 See remarks of Russell, L.J., in *Morgan v. Fry,* [1968] 2 Q.B. 710, at pp.

The danger that ***Rookes v. Barnard*** would proscribe the right to strike, by holding every successful threat to use it intimidatory, was thus brought to nought partly by the Act of 1965, and partly by the dubious reasoning of ***Morgan v. Fry.*** Other implications of the decision in ***Rookes*** have been discussed both by judges and academic writers. Thus in ***J. T. Stratford & Son Ltd. v. Lindley,***[111] which did not involve an intimidation situation at all, there is a perfect cascade of judicial *dicta,* most of which have been examined through the microscope by learned commentators.[112] Thus it was said by Lord Pearce that ***Rookes v. Barnard*** did not withdraw from the protection of s. 3 the threats of a trade union official to the employer to call a strike in breach of the contract of employment.[113] He was not liable to the employer for inducing a breach of contract, and it followed that he was not liable to the employer for threatening to induce a breach of contract. Apparently, Lord Reid regards ***Rookes v. Barnard*** as resting on the fact that it was a third party who was injured. However, it seems that if s. 3 protects against action by the employer, it should equally protect against action by a third party.[114] The position reached in ***Rookes v. Barnard*** seems to depend on the notion that there was a threat to break one's own contract, not to induce others to break theirs. The latter would be protected, no matter who sued.

The immediate effect of ***Rookes v. Barnard*** was to help the workman who has been "squeezed out" as the result of the clash between the forces of capital and labour. Yet it could, in theory, be availed of by the employer, and there seems little reason in logic against it. There is no reason why the intimidatee, if he is forced to yield to an unlawful threat, should not sue the intimidator if he can prove any damage caused by so doing. It is difficult to see why, from the viewpoint of logic and not emotion, B.O.A.C. in the ***Rookes*** situation could not have sued the unionists if it could have shown that it had lost the services of a good employee whom it was difficult to displace. However, the abovementioned remarks in ***J. T. Stratford & Son Ltd. v. Lindley*** seem to reject any such idea, a result hardly to be regretted on social grounds.

In Australia, once the essentials of the tort of intimidation are accepted, the particular result of ***Rookes v. Barnard*** which centres

111 [1965] A.C. 269; [1964] 2 All E.R. 209; [1964] 3 All E.R. 102.

112 See, for example (1965), 28 Mod. L.R. 205; (1965), 81 L.Q.R. 116; (1970), 86 L.Q.R. 181. It is possible that too much has been written and too much made of the implications of judicial *dicta* to convey nuances of which the authors of these *dicta* were probably quite unaware.

113 [1965] A.C. 269, at p. 336; [1964] 3 All E.R. 102, at p. 114. See also Lord Upjohn, [1965] A.C., at p. 337, and Lord Donovan, [1965] A.C., at p. 340.

114 See remarks of Lord Denning, M.R., in *Morgan v. Fry,* [1968] 2 Q.B. 710, at

round the unlawfulness of the threat to break the contract of employment, is hardly needed. The door is already wide open; the unlawfulness is already established from other sources. Thus in Australia the act of strike is illegalized very frequently by state arbitration statutes; it may be made a breach of award by a "bans" clause in a federal award, and there may be such statutory prohibitions as that of picketing in the previous South Australian statute,[115] or of refusal to work with a person in the *Stevedoring Industry Act*.[116] Here the threat to strike or use ancillary pressures is made unlawful by statute (or by instrument which is based on statute) without going to the English reasoning which makes it unlawful by virtue of the common law.[117] It is true that in some situations the nature of the statutory prohibition would need to be considered. Thus in Queensland a strike is made illegal, assuming the award carries no anti-strike clause, only if it is carried into effect without its prior approval at a union-conducted ballot,[118] and it is dubious whether a threat to call a strike would be construed as a threat to call one without the prior steps required by law to make it lawful. There is a general presumption that one does not intend to break the law. Notwithstanding this kind of consideration, the question of the availability of the tort of intimidation in Australia is merely one more instance of the fact that so far as the industrial torts are concerned, the field is wide open in this country.

4. The interaction of intimidation and conspiracy

By virtue of the way in which s. 1 of the *Trade Disputes Act* is framed, the decision of the House of Lords in ***Rookes v. Barnard***[119] had an important effect on the tort of civil conspiracy, and this effect is relevant in Queensland where the gist of the *Trade Disputes Act* provision appears in the *Industrial Conciliation and Arbitration Acts* 1961 to 1964, s. 72 (1).

The relevant section of the *Trade Disputes Act* provides in effect that an act done in pursuance of a combination shall, if done in contemplation or furtherance of a trade dispute, not be actionable unless it would be actionable if done without combination. Now it is possible to have a situation where a number of intimidators are

115 This has now been repealed by the *Industrial Code* 1967 of that State.

116 *Stevedoring Industry Act* 1956-1966, s. 44.

117 This is recognized in ***Nimmo v. Diversi*** (1926), 20 Q.J.P.R. 141, at p. 145. It, of course, lends added significance to the holding in ***McKernan v. Fraser*** (1931), 46 C.L.R. 343, that the threat in the situation in that case was not a threat to strike as strikes were peremptorily prohibited by the South Australian statute.

118 *Industrial Conciliation and Arbitration Acts* 1961 to 1964, s. 98.

sued jointly and severally on the basis that each of them has committed that tort. It may be that in such a situation the words of s. 1 could be regarded as constituting a prima facie bar.[120] However, this was not what was done in ***Rookes v. Barnard.*** Barnard and his fellow actors were obviously sued for *conspiracy*. If it was merely a case of a number of people being sued in the one action for singly committed torts of intimidation, then it is difficult to see how Silverthorne, who was not an employee at all, was held liable.[121] He could not have threatened to break a contract of employment because he had none to break. His inclusion is intelligible, however, on the ground that if there is a general conspiracy to cause injury through threats to break contracts of employment, one person who was party to that conspiracy could be sued as a fellow conspirator, even though he himself had not made any such threat because in his case there was no contract to break.[122] His complicity has not got to be proved by evidence that he committed a separate tort.

Whether the situation in ***Rookes v. Barnard*** was that of conspiracy constituted by a combination to break contracts, or was one of several persons being sued together as concurrent tortfeasors in the tort of intimidation, s. 1 of the *Trade Disputes Act* 1906 had an obvious relevance because on the face of it, it requires a court to decide whether the act was "actionable" *if committed by one person.* The defendants contended that this referred to the factual situation and that it was ridiculous to contend that the action of one person in threatening to break his contract of employment could possibly have intimidated a powerful corporation such as B.O.A.C. To this the House of Lords replied by saying that this was not the question; the question was whether the tort of intimidation was in its quality the sort of tort which was capable of being committed by an individual. [123] To this question the answer must be in the affirmative. The view of the House of Lords, though very doubtful on the literal interpretation of the section[124] which seems to direct attention to the very act in the context in which it was committed, is probably justifiable on the basis of the true objective of the section, which seems designed to speak to the situation where the only element of actionability was the fact of combination, in other words the "conspiracy to injure" situation.

120 This would be difficult, however, on the House of Lords' reasoning in ***Rookes v. Barnard, supra.***

121 Actually it was his executrix who was held liable.

122 See ***Morgan v. Fry,*** [1968] 2 Q.B. 710, at p. 729; [1968] 3 All E.R. 452, at pp. 458-9. This kind of approach seems to survive the analysis of Evatt, J., in ***McKernan v. Fraser*** (1931), 46 C.L.R. 343, at pp. 399-402.

123 [1964] A.C. 1129, at pp. 1171, 1189, 1211-2; [1964] 1 All E.R. 367, at pp. 376, 387, 401. This is trenchantly criticized by Wedderburn in (1964), 27 Mod. L.R. at pp. 271-2.

If the above view as to the effect of ***Rookes v. Barnard*** on the tort of conspiracy be accepted, then the decision is notable not only as giving new force of application to the tort of intimidation as such, but also as enabling the *Trade Disputes Act* to be by-passed for the purposes of the tort of conspiracy by providing a case where actionability would exist even apart from combination. Intimidation becomes important not only as a tort in itself but also as a means by which the cover of the *Trade Disputes Act* in an action based on conspiracy can be removed. It appears, however, that a threat to induce breaches of contract is protected by the Act,[125] provided, of course, they are breaches of a contract of employment.

5. Residual forms of action

Though tort liability in the situation of industrial pressures has now crystallized in three specific torts, it seemed likely at the turn of the century that there might be wider causes of action. This is, for instance, manifest in some remarks in ***Quinn v. Leathem.***[126] The possibilities which existed at the time are now in orthodox thought regarded as an explanation for the enactment of the second limb of s. 3 of the *Trade Disputes Act.*

The first limb of that section provides that an act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment. The second limb is more general. Ignoring the verbiage introduced by the first limb, it provides that an act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it is an interference with the trade, business or employment of some other person or with the right of some other person to dispose of his capital or labour as he wills.

This second limb of s. 3 was raised as a defence in ***Rookes v. Barnard.*** It was argued that what the intimidators did was protected by that section. The House of Lords, however, said that the situation was not one where the act of the defendants would be actionable on the ground *only* that it was an interference with trade or with the free disposability of capital or labour. It was also actionable on the score of a distinct, separate act, viz. intimidation.[127] This inevitably led to the question what then was the scope of the provision? The House of Lords in effect answered "none". They thought the enactment of the provision

125 ***J. T. Stratford & Son Ltd. v. Lindley,*** [1965] A.C. 269, at p. 336; [1964] 3 All E.R. 102, at p. 114 (per Lord Pearce); ***Camden Exhibition & Display Ltd. v. Lynott,*** [1966] 1 Q.B. 555, at p. 565; [1965] 3 All E.R. 28, at pp. 32-3 (per Lord Denning, M.R.). It is submitted that this is *not* limited, *pace* Lord Pearce, to the case where the employer sues.

126 [1901] A.C. 495, at pp. 535, 537; [1900-3] All E.R. Rep. 1, at p. 16.

127 ***Rookes v. Barnard.*** [1964] A.C. 1129, at pp. 1177-8; [1964] 1 All E.R. 367

explainable in view of the state of sentiment prevailing at the time of its enactment. The legislature was at that time in doubt whether there might not be a wider tort of interference with trade generally and reacted by providing for the contingency. The second limb of s. 3 therefore merely meant that *if* mere interference was or could be a tort, then there should be no liability only on the ground of that interference.[128]

It seems that any tendency to develop a wide view that intentional interference with economic interests or with liberty to carry on business or to work, was actionable, seems to have been stifled by ***Allen v. Flood***[129] where it was held that action by a single individual leading to the dismissal of the plaintiff from employment was not actionable, even if it could be regarded as "malicious". Certainly ***Quinn v. Leathem,***[130] which was a later decision, was not entirely consistent with this, which may go to support the view that Parliament in 1906 was dealing with what it regarded as an uncertain area of the law.

It therefore seems that no general tort of economic interference is ever likely to be established. That liability exists only in the context of combination, and even there it is subject to the qualifications of the ***Crofter Case.***[131]

It is possible to interpret certain peculiar language used by Lord Reid in ***J. T. Stratford & Son Ltd. v. Lindley***[132] as indicating that there is a tort of causing economic harm by means apart from intimidation and without interfering with existing contractual relationships.[133] It is difficult to know what Lord Reid meant, but it is suggested that too much regard should not be paid to every *obiter* that falls from a judge. Such a cause of action arising from general "illegality" would be inconsistent with the basic rules acted on in too many other fields of the law.

The only other residual form of liability seems to reside in the old tort of "harbouring", which made it actionable to continue to employ the servant of another after notice of the prior contractual relationship. This form of action was asserted in ***Jones Bros. (Hunstanton) Ltd. v. Stevens,***[134] but the limitations laid down by the Court seem to render future development of the tort unlikely.

128 [1964] A.C. 1129, at pp. 1174-7; [1964] 1 All E.R. 367, at pp. 377-80 (per Lord Reid). See also ***D. C. Thomson & Co. Ltd. v. Deakin,*** [1952] Ch. 646, at pp. 688-9; [1952] 2 All E.R. 361, at pp. 374-5.

129 [1898] A.C. 1, at pp. 123-6; [1895-9] All E.R. Rep. 52, at pp. 80-2.

130 [1901] A.C. 495; [1900-3] All E.R. Rep. 1.

131 [1942] A.C. 435; [1942] 1 All E.R. 142.

132 [1965] A.C. 269, at p. 324; [1964] 3 All E.R. 102, at pp. 106-7.

133 Such interpretation is made by Hoffman in (1965), 81 L.Q.R. 116, and also by Wedderburn in (1965), 28 Mod. L.R. at pp. 211-2

It is hoped that tort actions for damages on the conspiracy or intimidation pattern do not become common in Australia as the result of the current loss of credibility affecting the so-called penal provisions of the industrial arbitration system. The writer is one of those who believe that strikes affect so many interests in the community that some legal control over their incidence is necessary, and to maintain a *laissez-faire* philosphy in this matter is ultimately quite unrealistic. However, it would also appear that the imposition of sanctions should be the business of special labour tribunals. The ordinary courts deal with concepts which are remote from the everyday round of industrial relations, and tort liability involves the playing with concepts far removed from the ken of the worker. Talk of conspiracy to break contracts of employment is surely sufficiently unreal, but what area of Disneyland do we reach when we solemnly discuss whether a particular situation reveals a conspiracy to threaten to break contracts of employment or one to threaten to induce others to break their contracts or, a conceivable possibility, one to induce others to threaten to break their contracts?

B. PENAL LIABILITY FOR PICKETING

We have here to notice a certain pattern of legislation dealing with picketing. Picketing, of course, is a recognized technique of concerted pressure tactics, though in its proper use it should be limited to persuasion and should be non-violent. It is not used to a very vital extent in Australia but its employment in the United States is on a very large scale. It could, of course, figure as either the basis of, or as incidental to, action which could attract civil liability for conspiracy along the lines discussed above. However, it has also been dealt with by certain statutes imposing penal liability. The statutes concerned are English-type statutes and owe nothing to the compulsory arbitration system. They are not of great importance but it is necessary to say something of their existence.

Although the *Conspiracy and Protection of Property Act* 1875 (Eng.) conferred a boon on the trade union movement in the removal of the doctrine of criminal conspiracy so far as trade disputes were concerned, it contained other provisions of a more restrictive character. It made intimidation and molestation, offences,[135] and also created an offence of "watching or besetting" the house or place of work of a person.[136] Clearly the activity of picketing would involve such a "watching or besetting". However, there followed a proviso, which

135 Section 7. Actually, however, it was held that intimidation was an offence only if it was likely to involve a breach of the peace—***Gibson v. Lawson***, [1891] 2 Q.B. 545, at p. 559.

protected from the operation of the provision, picketing which took place merely to obtain or communicate information. Such protected picketing need not be in contemplation or furtherance of a "trade dispute". By the *Trade Disputes Act* 1906 the protection to picketing was both broadened and narrowed. It was broadened so as to include picketing for the purpose of persuading a person to work or not to work, which would assuredly be the most normal type of picketing; it is probable too that the provision gave protection against civil liability. The narrowing effect was that the 1906 Act limited the protection to picketing in contemplation or furtherance of a trade dispute as defined by the Act.[137]

The various Australian state legislatures adopted the general pattern of the watching or besetting provisions[138] but with the exception of Queensland, they stopped at the 1875 provisions. In Queensland[139] the protection is extended to picketing for the purposes of persuasion, but such picketing must be in contemplation or furtherance of an industrial dispute as defined in the *Industrial Conciliation and Arbitration Acts* 1961 to 1964. It seems that the protection here accorded is merely from criminal liability.

Under the English provisions of 1875, injunctions were granted in respect of picketing which, although peaceful, was clearly of the type involving persuasion tactics.[140] However, if the decision in ***Ward, Lock & Co. Ltd. v. Operative Printers' Assistants' Society***[141] represents the law, then the entire sting of the "watching or besetting" provisions is removed before one approaches the question of the statutory proviso of protection. The gist of this decision was that the whole complex of punitive provisions in the English Act of 1875 was introduced by the words "wrongfully and without legal authority", so that the particular provision as to "watching or besetting" only came into play if the picketing was already wrongful, that is to say, was already either a criminal wrong or a civil tort. Eliminating the position that the act was already criminal by virtue of the other provisions of the law, for instance, when it was violent, then the conduct had to constitute a tort. If that condition was fulfilled, then the section operated to convert what was already a tort into a criminal offence. It seems that in terms of practical results the only tort which would normally so be

137 *Trade Disputes Act* 1906, s. 2 (1).

138 *Crimes Act* 1900 (N.S.W.), s. 545B; *Employers and Employés Act* 1958 (Vic.), ss. 52-4; *Criminal Code* 1899 (Qld.), s. 534; *Criminal Law Consolidation Act* 1935-1969 (S.A.), s. 264; *Criminal Code* 1913 (W.A.), s. 550; *Conspiracy and Protection of Property Act* 1889 (Tas.), s. 6. The New South Wales enactment has no protective provision in favour of picketing as such.

139 *Criminal Code* 1899, s. 534.

140 *J. Lyons & Sons v. Wilkins* [1896] 1 Ch. 811 ... [1899] 1 Ch. 255

applicable would be that of public nuisance. The net result would seem to be that if the picketing was of such a nature that it constituted a public nuisance then it would be converted into a criminal offence.

It seems that the view taken in the ***Ward, Lock Case*** would be accepted in Australia,[142] and the second ground of the New South Wales decision in ***Re Van de Lubbe,***[143] that picketing *necessarily* constituted a public nuisance, should be discarded as clearly wrong.

The specific protection given to the act of picketing in Australian States other than Queensland is clearly nugatory because picketing designed merely to communicate information would be a rarity. This seems to matter but little because the dominant view appears to be that the whole "watching or besetting" provision operates only where there is a pre-existing tortious situation.[144]

However, the position in Queensland is somewhat different. It is true that Queensland gives the broader type of protection of the 1906 English Act, that is to say, it comprehends "persuasional" picketing. However, the main structure of the Queensland version of the "watching or besetting" offence is quite different. The statement of the offences is not prefaced by the words "wrongfully and without legal authority" so that the *ratio decidendi* of the ***Ward, Lock Case*** disappears. The result may well be the surely unintended one that not only persuasional but purely informational picketing is subject to less protection in this State than under the statutes which merely followed the English Act of 1875.[145]

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The question of the liability of the union itself to be sued in tort for industrial pressure tactics, and the issue, now possibly settled by ***Torquay Hotel Co. Ltd. v. Cousins,***[146] as to whether s. 4 of the *Trade Disputes Act* permits action for an injunction against the union, are not germane to the present chapter. Again, any implications flowing from the *Donovan Commission Report*[147] have been regarded as being too peculiar to the English position for discussion here.

142 ***Ex parte Farrell; Re Fongold*** (1936), 36 S.R. (N.S.W.) 386; ***Re Van der Lubbe*** (1949), 49 S.R. (N.S.W.) 309.

143 (1949), 49 S.R. (N.S.W.) 309.

144 Conceivably, of course, the situation could involve a tortious conspiracy situation, but in that case the defences available in ***Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch,*** [1942] A.C. 435; [1942] 1 All E.R. 142, would be operative.

145 It is true, however, that the phrase "industrial dispute" is defined very widely in the *Industrial Conciliation and Arbitration Acts* 1961 to 1964 (Qld.), s. 5.

146 [1969] 2 Ch. 106; [1969] 1 All E.R. 522.

147 *Report of the Royal Commission on Trade Unions and Employers'*

BOOK TWO

COLLECTIVE ASPECTS OF FEDERAL AND STATE LABOUR LAW