TORT INJURY TO ECONOMIC INTERESTS: SOME FACETS OF LEGAL RESPONSE

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During the past fifty years a number of causes of action have emerged which have as their hallmark an intention to injure the economic interests of the plaintiff. This article will focus on the discrete causes of action known as inducing breach of contract, unlawful interference with contractual relations, and intimidation.

It will examine the evolution of these torts, paying particular attention to two nodal English decisions—*Torquay Hotel Co. Ltd.* v. *Cousins*[1] and *Rookes* v. *Barnard*[2] and the extent to which the expansive judicial pronouncements contained in them have been received by Canadian courts. As well, attention will be directed at attempts to formulate a principle of general liability underlying the range of the nominate economic torts.

I. *Inducing Breach of Contract.*

The most well-defined economic tort arises in respect of an interference resulting in the breach of an existing contract. The origins of the tort stem from the action of enticing away the servant of another.[3] Concisely delimited for the first time in *Lumley* v. *Gye*,[4] it was held in that case on demurrer that the action for enticement was not confined to contracts between master and servant in the strict sense, but applied as well to any instance where professional services were rendered. As *Lumley* v. *Gye*[5] has ostensibly formed the basis for most subsequent examinations of the tort of inducement, it is important to understand the principles that it outlines. In essence the following were regarded as the requisites of the cause of action:

(1) that the defendant's actions be unlawful;
(2) that the person induced be under contract;
(3) that harm results from the defendant's conduct.

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[1] [1969] 2 Ch.D. 106.

[2] [1964] A.C. 1129.

[3] For a detailed account of the law prior to *Lumley* v. *Gye*, see Owen, Interference With Trade; The Legitimate Offspring of an Illegitimate Tort? (1976), 3 Monash U.L. Rev. 41.

[4] (1853), 2 El. & Bl. 215.

[5] *Ibid.*

In addition, the range of liability set out in that case was limited to instances where (i) the disputed contract was one to render services for a fixed period and, (ii) the defendant was motivated by malice. It is now evident that actions under the tort are confined in neither of these latter respects.[6] It should also be noted that subsequent cases[7] have expanded the range of the tort beyond interferences with contracts for personal services alone.[8]

Later in *Quinn* v. *Leathem*[9] the House of Lords recognized the general principle that interference with any contract is an actionable tort. "I think", said Lord Macnaghten, "the decision [in *Lumley* v. *Gye*] was right . . . on the ground that a violation of legal right committed knowingly is a cause of action, and that it is a violation of legal right to interfere with contractual relations recognized by law if there be no sufficient justification for the interference".[10] It is this dictum, together with some later elaboration, that forms the basis for an action for inducement[11] of breach of contract. It is now recognized that there are five essential elements to the tort. An intention to cause harm, knowledge of the contract, conduct resulting in breach of that contract with subsequent damage and a lack of justification. These elements will be examined so that the physiology of the tort can be seen.

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[6] In *Quinn* v. *Leathem*, [1901] A.C. 495, at p. 510, Lord Macnaghten expressly repudiated the suggestion that malice in the sense of spite was the gist of the action in *Lumley* v. *Gye*. *National Phonograph Co. Ltd.* v. *Edison, Bell Consolidated Phonograph Co. Ltd.*, [1908] 1 Ch. 335, at p. 367, held that the principle in *Lumley* v. *Gye* applies equally to contracts for a particular act as well as those for more extended dealings.

[7] *Bowen* v. *Hall* (1881), 6 Q.B.D. 333; *Temperton* v. *Russell*, [1893] 1 Q.B. 715.

[8] *D.C. Thomson & Co. Ltd.* v. *Deakin*, [1952] Ch. 646, per Evershed M.R., at p. 677, per Jenkins L.J., at p. 693; *J.T. Stratford & Son Ltd.* v. *Lindley* [1965] A.C. 269; *Daily Mirror Newspapers Ltd.* v. *Gardner*, [1968] 2 Q.B. 762; *Torquay Hotel Co. Ltd.* v. *Cousins*, *supra*, footnote 1.

[9] *Supra*, footnote 6.

[10] *Ibid.*, at p. 510.

[11] Writers tend to differ in the terminology they use to identify the tort. Some entitle it "Interference with Contract" (Winfield, Law of Tort (10th ed., 1975), p. 445) or "Inducement of Breach of Contract" (Salmond, Law of Torts (17th ed., 1977), p. 367) or "Interference with Contractual Relations" (Fleming, Law of Torts (5th ed., 1977), p. 676) or "Procuring a Breach of Contract" (Clerk & Lindsell, Law of Torts (14th ed., 1975), p. 394). For a discussion of the significance attributed to these differences in title see Hughes, Liability for Loss Caused by Industrial Action (1970), 86 L.Q.Rev. 181. When discussing the *Lumley* v. *Gye* action, this article will rely primarily on the word "inducement" because of the wide scope generally given to it. The term "interference" is admittedly still wider in scope, but its meaning has been modified by the *Torquay Hotel* decision, *supra*, footnote 1.

(1) *Intent.*

An act of inducement without the requisite intent to harm existing contractual relations is not actionable under this tort.[12] Furthermore, it is encumbent upon the plaintiff to show that the invasion of his contractual rights was intentional.[13] With a few exceptions,[14] the courts have been unwilling to impose liability for negligent interference with contractual rights.[15] The intent requirement is satisfied if the "wrongdoer either desires to bring about a result which is an injury to another, or believes that the result is substantially certain to follow from what he does".[16] Recklessness or quasi-intent is sufficient to impose liability[17] as is the existence of wilful blindness on the part of the defendant.[18] On the other hand, an honest mistake of fact, however unreasonable, will provide a defence.[19] It has been suggested,[20] that in "borderline" cases, that is in instances where the intent of the wrongdoer is uncertain, a presumption of intent should be utilized. However, to date neither Canadian[21] nor English[22] courts have been willing to adopt the proposition that one is deemed to have intended the natural and probable consequences of his conduct.

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[12] *Rookes* v. *Barnard, supra,* footnote 2, at p. 1212, per Lord Devlin.

[13] *Stott* v. *Gamble,* [1916] 2 K.B. 504.

[14] Loss caused by negligent misrepresentation is actionable: *Hedley Byrne* v. *Heller,* [1964] A.C. 465; *Wellbridge Holdings Ltd.* v. *The Metropolitan Corporation of Greater Winnipeg,* [1971] S.C.R. 957; loss suffered as a result of a manufacturer's failure to warn of a known inherent defect in his product is also actionable: *Rivtow Marine Ltd.* v. *Washington Iron Works,* [1974] S.C.R. 1189.

[15] *Cattle* v. *Stockton Water Works Co.* (1875), L.R. 10 Q.B. 453; *S.C.M. Ltd.* v. *W.L. Whitall & Son Ltd.,* [1971] 1 Q.B. 337; *Spartan Steel & Alloys Ltd.* v. *Martin & Co. Ltd.,* [1973] 1 Q.B. 27; *Rivtow Marine Ltd.* v. *Washington Iron Works, ibid.* An action based on negligent inducement of breach of contract was rejected in *McLaren* v. *B.C. Institute of Technology et al.* (1978), 7 C.C.L.T. 192 (B.C.S.C.).

[16] Fleming, *op. cit.,* footnote 11, p. 75.

[17] *Emerald Construction Co. Ltd.* v. *Lowthian,* [1966] 1 W.L.R. 691, at p. 704, per Diplock J.

[18] *Jones Brothers (Hunstanton) Ltd.* v. *Stevens,* [1955] 1 Q.B. 275, at p. 280, per Goddard C.J.

[19] *British Industrial Plastics Ltd.* v. *Ferguson,* [1940] 1 All E.R. 479, at pp. 483-484, per Romer L.J.

[20] Stevens, Interference with Economic Relations—Some Aspects of the Turmoil in the Intentional Torts (1974), 12 Osgoode Hall L.J. 595, at p. 610.

[21] *Dirassar & Jones* v. *Kelly Douglas & Co. Ltd.* (1967), 59 D.L.R. (2d) 452; Norris J.A. dissenting.

[22] *D.C. Thomson & Co. Ltd.* v. *Deakin, supra,* footnote 8, at p. 663, per Upjohn J.

(2) *Knowledge.*

The knowledge requirement of the tort has recently undergone considerable change. Initially the existence of this element was strictly enforced, and as recently as 1952 in *Thompson* v. *Deakin*[23] it was decided that the tort was to be confined to instances where the defendant had "knowledge". But "knowledge" of what? Evershed M.R.[24] considered that knowledge "of the contract" was required; it is apparent that he was referring to knowledge of a particular contract, that is, to some extent, knowledge of specific terms.

Fairly rapidly in the 1960's, however, there was a break from rigid adherence to this view. In *J.T. Stratford & Son Ltd.* v. *Lindley et al.*[25] the House of Lords upheld an interlocutory injunction that restrained the respondents from causing a breach of contract. It was held that the defendants need not know with precision all the terms of the contract. The real test was whether they had "sufficient knowledge of the terms to realize they were inducing a breach".[26] It was further decided that in light of the circumstances the court could assume the defendants had "sufficient" knowledge.

In *Emerald Construction Co. Ltd.* v. *Lowthian*[27] the rule as to knowledge was stated by Lord Denning M.R. in the following manner:[28]

> Even if they [the defendants] did not know of the actual terms of the contract, but had the means of knowledge—that would be enough. Like the man who turns a blind eye. . . . For it is wrongful to procure a breach of contract, knowingly or recklessly, indifferent whether it is a breach or not.

Lord Denning has consistently reiterated his "blind eye" or constructive knowledge theory in subsequent cases,[29] and, since it has not been judicially criticized, it must be taken to accurately represent the law. It is suggested, however, that some recent decisions have unduly eroded the knowledge requirement. While pre-*Stratford* v. *Lindley* decisions may have treated the issue too strictly, the present trend of imposing a positive duty upon the defendant to enquire or investigate as to the existence of any contract

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[23] *Ibid.*

[24] *Ibid.*, at p. 686; Jenkins L.J., at p. 698, makes reference to "the existence of a particular contract".

[25] *Supra,* footnote 8.

[26] *Ibid.*, per Lord Pearce, at p. 332. See as well the comments of Viscount Radcliffe, at p. 328 and Lord Donovan, at p. 342.

[27] *Supra,* footnote 17.

[28] *Ibid.*, at pp. 700-701.

[29] *Daily Mirror Newspapers Ltd.* v. *Gardner, supra,* footnote 8, at p. 781; *Torquay Hotel Co. Ltd.* v. *Cousins, supra,* footnote 1, at p. 138.

probably goes too far.[30] As in the past,[31] there should be no duty on persons to actively enquire as to the existence of contracts between others. To hold otherwise would be to impose extraordinary obligations on all parties to standard business relations.

Canadian courts,[32] too, have been willing to accept the proposition that something short of actual knowledge of precise terms is required. They have expressly stated that the existence of knowledge on the part of the defendant "can be assumed",[33] and the fact that "the precise terms of a contract"[34] are not known to a defendant is immaterial to the imposition of liability. One cannot quarrel with this type of knowledge forming the basis of the tort, so long as actual knowledge is required. But extending such knowledge to constructive knowledge of a broad contractual relationship places a party in ordinary business situations in the position of investigator with all the economic consequences that it entails.[35]

(3) *The Inducement.*

Various forms of conduct that affect contractual rights or relations are deemed tortious. "It might have been thought that an act 'would be sufficient interference' if it caused the breach. The persistent emphasis on the quality of the act interfering with business interests has militated against this approach: there has been a tendency to make the rather question-begging approach: did the defendant do a wrongful act?"[36] In *Thomson* v. *Deakin*[37] it was held that there exist three distinct forms of wrongful conduct which can give rise to liability.

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[30] For criticism of the current trend, see Mills, Tort of Inducement of Breach of Contract (1971), 1 Auck. U.L. Rev. 27. It is in *Torquay Hotel Co. Ltd.* v. *Cousins, supra,* footnote 1, at p. 146, per Winn L.J., where his Lordship used the phrase "without regard to . . . and without investigating whether [a contract exists]. . .", that appears to go too far by placing a positive onus upon the defendant.

[31] *William Leitch & Company Ltd. et al.* v. *A.G. Barr & Company Ltd. et al.*, [1931] A.C. 90; *D.C. Thomson & Co. Ltd.* v. *Deakin, supra,* footnote 8, particularly at p. 698, per Jenkins L.J.

[32] *Posluns* v. *Toronto Stock Exchange* (1965), 46 D.L.R. (2d) 210 (Ont. H. Ct).

[33] *Ibid.*, at p. 262, per Gale J. See also *Slade & Stewart Ltd.* v. *Haynes et al.* (1969), 5 D.L.R. (3d) 736 (B.C.S.C.), where such knowledge was "inferred".

[34] *Ibid.*, at p. 268, per Gale J.

[35] For a discussion of the significance of the point in time at which a defendant obtains knowledge of the contract see Stevens, *op. cit.*, footnote 20, at pp. 604-609. Of course the "intent" and "knowledge" elements intersect, since one cannot ordinarily intend to induce a breach of a contract of which he has no knowledge. In the (rare) case of a true belief without knowledge such an intent can presumably be present.

[36] Street, The Law of Torts (5th ed., 1972), p. 335.

[37] *Supra,* footnote 8.

(i) *Direct Inducement.*

The most common form that interference takes is in the direct persuasion or inducement by the defendant of the contract-breaker.[38] Such direct intervention into the contracts of others is *per se* unlawful,[39] that is, it is established that such conduct is unlawful whether or not the means used to obtain the breach are in themselves independently unlawful.

In *Thomson* v. *Deakin,* Evershed M.R. referred to the

> . . .difficult question of distinguishing between what might be called persuasion, and what might be called advice, meaning by the latter a mere statement of or drawing of the attention of the party addressed, the state of facts as they were.[40]

The distinction is of critical importance for the latter is not actionable. By the same token, while persuasion is different from straight advice, advice which was intended to persuade is tantamount to inducement.[41] In essence, the issue appears to be one of causation. Any breach of contract that is "fairly attributable to any such pressure, persuasion or procuration on the part of the defendants"[42] is actionable.[43]

The manner of communication is not a relevant consideration: that is, the mode used to interfere is not in itself significant. If threats are used to induce breach they may be actionable regardless of whether the conduct threatened was lawful[44] or unlawful. Furthermore, the fact that the party breaching the contract was willing to be induced provides no defence.[45] If, however, the party had previously

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[38] This basic form of the tort is exemplified in the facts of *Lumley* v. *Gye, supra,* footnote 4, itself.

[39] *Posluns* v. *Toronto Stock Exchange, supra,* footnote 32, at p. 266, per Gale J. But an employee acting *bona fide* within the course of his employment is not personally liable for inducing a breach of contract with his employer and a third person: *Einhorn* v. *Westmount Investments Ltd.* (1969), 6 D.L.R. (3d) 71, (1970), 11 D.L.R. (3d) 509, 73 W.W.R. 161 (Sask. C.A.); *Neyland* v. *Genstar Ltd.* (1977), 76 D.L.R. (3d) 697 (B.C.S.C.).

[40] *Supra,* footnote 8, at p. 686.

[41] *Camden Nominees Ltd.* v. *Forcey,* [1940] Ch.D. 352, at p. 366, per Simonds J.; *Torquay Hotel Co. Ltd.* v. *Cousins, supra,* footnote 1, at p. 146, per Winn L.J. See *De Stempel* v. *Dunkels,* [1938] Ch. 352, at p. 366, per Simonds J., for a somewhat contrary treatment of the matter.

[42] *Thomson* v. *Deakin, supra,* footnote 8, at p. 686, per Evershed M.R.

[43] The relative positions of the adviser and the person advised may also be important factors. See, *Square Grip Reinforcement Co. Ltd.* v. *Macdonald,* [1968] S.L.T. 65.

[44] *Camden Nominees Ltd.* v. *Forcey, supra,* footnote 41. In two reported cases, defendants have been held liable for inducing breaches through threats of lawful action: *Read* v. *Friendly Society of Stonemasons Etc.,* [1902] 2 K.B. 732; *Temperton* v. *Russell, supra,* footnote 7.

[45] *Thomson* v. *Deakin, supra,* footnote 8, at p. 694, per Jenkins L.J.

decided not to perform, then subsequent interference is not actionable.[46]

If the defendant has dealings with the contract-breaker which are inconsistent[47] with the latter's contract, he may again be liable. In *Thomson* v. *Deakin,* Jenkins L.J. held that:[48]

> [I]f a third party, with knowledge of a contract between the contract-breaker and another, has dealings with the contract-breaker which the third party knows to be inconsistent with the contract, he has committed an actionable interference.

Such inconsistent dealings will, however, not be actionable if the third party accepts the benefits of an inconsistent contract at the insistence of the contract-breaker.[49] It may also be relevant to consider whether the third party entered the inconsistent dealing after having actively induced a breach[50] or whether he was *bona fide* taking advantage of a voluntary breach on the part of the contract-breaker.[51] In any event, it has been established that though the inconsistent dealings may have been commenced *bona fide*, "if it is continued after the third party has notice of the contract, an actionable interference has been committed by him".[52]

(ii) *Other Forms of Direct Intervention.*

Such interferences occur when the defendant through some positive act physically prevents the contract-breaker from performing his contract. Examples of such interferences would include the actual detention of the contract-breaker,[53] or perhaps the taking from the contract-breaker, "his only possible means of performing the contract; (for example, by stealing specialized tools)".[54] In such instances the conduct of the defendant must be wrongful in itself before liability can be incurred.[55]

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[46] *Board of Broadview School Unit No. 18 of Saskatchewan* v. *Saskatchewan Teachers Federation et al.* (1972), 32 D.L.R. (3d) 33 (Sask. C.A.).

[47] The word "dealings" is often limited to the actual formation of a contract.

[48] *Supra,* footnote 8, at p. 694.

[49] *Batts Combe Quarry Ltd.* v. *Ford,* [1943] Ch.D. 51.

[50] *British Motors Trade Association* v. *Salvadori,* [1949] Ch. 556, at p. 565, per Roxburgh J.

[51] *Batts Combe Quarry Ltd.* v. *Ford, supra,* footnote 49, where it was held that the conduct of some of the first defendants (mere acceptance by them of his bounty) did not comprise a cause of action.

[52] *Thomson* v. *Deakin, supra,* footnote 8, at p. 694, per Jenkins L.J.; see also *De Francesco* v. *Barnum* (1890), 45 Ch.D. 430.

[53] *Thomson* v. *Deakin, supra,* footnote 8, per Evershed M.R., at p. 678; per Jenkins L.J., at 695.

[54] *Ibid.*, per Morris L.J., at p. 702; see also *G.W.K. Ltd.* v. *Dunlop Rubber Co. Ltd.* (1926), 42 T.L.R. 376.

[55] Clerk & Lindsell, *op. cit.*, footnote 11, p. 408.

(iii) *Indirect Inducement.*

In the *Thompson* case it was argued before the Court of Appeal that any intentional breach of contract caused by the defendants, regardless of the means used, was actionable.[56] This claim was rejected, and it was held instead that if the breach was induced indirectly (through some third party),[57] then the means used must be intrinsically unlawful,[58] that is, apart from the breach of contract itself,[59] for any liability to be incurred. The reasons for the introduction of this direct-indirect dichotomy are obvious.[60] First, any other formulation of identification and differentiation would probably be inconsistent with the general principle that a lawful act cannot be made unlawful through motive alone.[61] Second, the distinction undoubtedly gives the courts an immense degree of flexibility in ascertaining whether or not the tort is to lie. Finally, the scope of the tort would have been greatly extended if the distinction had not been drawn. Indeed, to further limit any such extension, the court[62] also introduced the requirement that breaches induced by indirect means must be the necessary consequence[63] of such intervention.

While such reasoning may be conceptually valid, the rationale behind the direct-indirect distinction has met with substantial criticism.[64] In *Daily Mirror Newspapers Ltd.* v. *Gardner*[65] Lord Denning M.R. considered that indirect interventions did not require the use of unlawful means any more than did direct inducement, and in essence dismissed the dichotomy as placing an unwarranted

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[56] Both *Quinn* v. *Leathem, supra,* footnote 6, and *G.W.K. Ltd.* v. *Dunlop Rubber Co. Ltd., supra,* footnote 54, would tend to support such a proposition.

[57] *Thomson* v. *Deakin, supra,* footnote 8, per Evershed M.R., at p. 679; per Jenkins L.J., at pp. 693, 697-698; per Morris L.J., at p. 702.

[58] Where a breach is induced by the servant of a contractor, acting *bona fide,* he incurs no liability as he is viewed as the alter ego of the contractor. See *Scammell* v. *Hurley,* [1929] 1 K.B. 419, at p. 443, per Greer L.J.; *Thomson* v. *Deakin, supra,* footnote 8, at pp. 680-681; *Einhorn* v. *Westmount Investments Ltd., supra,* footnote 39; and *Neyland* v. *Genstar Ltd. et al., supra,* footnote 39.

[59] The emphasis on the unlawful means requisite is significant, and will be discussed in detail later.

[60] The court relied on *Lumley* v. *Gye, supra,* footnote 4; *Jasperson* v. *Dominion Tobacco,* [1923] A.C. 709; *G.W.K. Ltd.* v. *Dunlop Rubber Co. Ltd., supra,* footnote 54, for support in introducing this dichotomy.

[61] *Allen* v. *Flood,* [1898] A.C. 1 (H.L.).

[62] *Thomson* v. *Deakin, supra,* footnote 8, at p. 699, per Jenkins L.J.

[63] A breach procured directly need only be a reasonably foreseeable consequence to incur liability: *J.T. Stratford & Son Ltd.* v. *Lindley, supra,* footnote 8, at p. 333, per Lord Pearson.

[64] See Winfield, *op. cit.,* footnote 11, p. 451.

[65] *Supra,* footnote 8, at p. 782.

restriction on the tort. Soon thereafter, however, Lord Denning retreated from this position and declared that:[66]

> I went too far when I said in *Daily Mirror Newspapers Ltd.* v. *Gardner* that there was no difference between direct and indirect interference. On reading again *Thomson* v. *Deakin* with more time, I find there is a difference. Morris, L.J. there draws the very distinction between "direct persuasion to breach of contract" which is unlawful in itself; and "the intentional bringing about of a breach by indirect methods involving wrongdoing". This distinction must be maintained....

Despite this apparently strict adherence to the rules laid down in the *Thomson* decision, there does appear to be a general trend away from emphasis on the unlawful means requirement.[67] In New Zealand, for instance, the courts have constructed a viable alternative framework to deal with the issue. In the case of *Pete's Towing Services Ltd.* v. *N.I.U.W.*[68] the direct-indirect distinction was re-defined; indirect interference with a contract being that which is "identical and secondary to, but not the prime purpose of the action".[69]

The central issue to be determined, then, is whether the breach induced was the prime object of the defendant's conduct or whether it was merely secondary and tangential to it. The whole question thus turns on the defendant's intent. Only where the breach induced is incidental to the prime purpose of the defendant is the concept of "unlawful means" of any relevance.

Until quite recently it was generally agreed that liability could not attach to a defendant unless he induced the breach of a "valid and enforceable contract".[70] There now exists considerable authority for the view that an interference short of actual breach may be actionable and this matter will be dealt with later in this article.

But the requirement of a "valid and enforceable contract" remains unchanged. The mere fact that the terms of a contract might be somewhat tenuous[71] is of no significance. Nor does the existence of an option to terminate on the part of the contract-breaker provide

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[66] *Torquay Hotel Co. Ltd.* v. *Cousins, supra,* footnote 1, at p. 138.

[67] *Square Grip Reinforcement Ltd.* v. *Macdonald, supra,* footnote 43; *J.T. Stratford & Son Ltd.* v. *Lindley, supra,* footnote 8; *Emerald Construction Co. Ltd.* v. *Lowthian, supra,* footnote 17.

[68] [1970] N.Z.L.R. 32 (S.C.).

[69] *Ibid.*, at p. 47, per Speight J. The learned judge considered the test to be one of "proximity and intention".

[70] *Posluns* v. *Toronto Stock Exchange, supra,* footnote 32.

[71] *Daily Mirror Newspapers Ltd.* v. *Gardner, supra,* footnote 8, at p. 780, per Lord Denning M.R., where the evidence of the exact terms of the contract was described as "meagre".

the defendant with a defence.[72] In *De Jetley Marks* v. *Greenwood*[73] it had been held that only breaches which went to the root of a contract were actionable, but this no longer seems to be the law.[74] Clearly, however, if the contract is void, no tort is committed. Examples of such void contracts include gaming contracts[75], contracts contrary to public policy,[76] or contracts that hinge on the incapacity of one of the parties.[77] While the relevant case law is not as straightforward in the case of voidable contracts, the better view appears to be that interference with an extant, albeit voidable, contract is actionable.[78] It seems, too, that whatever the circumstances the plaintiff must be prepared to demonstrate a willingness to continue performance of the contract.[79]

(4) *Damages and Remedies.*

As the tort of inducing a breach of contract finds its origins in a general action on the case, it seems almost trite to emphasize the need for the plaintiff to establish some material damage. The existence of such damage may be proven, or in some instances inferred from the circumstances.[80]

Once the existence of damage is established, the plaintiff can seek a remedy either in the form of an injunction or in damages or both. If the plaintiff cannot show that the circumstances favour the granting of an injunction it may be refused despite the fact that all elements of the tort have been proven. In other instances, an injunction may lie although an action for damages has failed.[81] If the injured party seeks to recover damages under the tort, he may well receive a greater award than might be obtained in a conventional contract action for a breach of contract. This is true primarily because the relevant rules are wider than those utilized in contract

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[72] *Emerald Construction Co. Ltd.* v. *Lowthian, supra,* footnote 17; *Square Grip Reinforcement Ltd.* v. *Macdonald, supra,* footnote 43.

[73] [1936] 1 All E.R. 863, at p. 872, per Porter J.

[74] *Thomson* v. *Deakin, supra,* footnote 8, at pp. 689-690, per Evershed M.R.

[75] *Joe Lee Ltd.* v. *Lord Dalmeny,* [1927] 1 Ch. 300.

[76] *Northern Messenger Ltd.* v. *Frost* (1966), 56 W.W.R. 412 (Alta S.C.).

[77] *De Fransesco* v. *Barnum, supra,* footnote 52.

[78] *Keene* v. *Boycott* (1775), 2 H. Bl. 511. For a contrary opinion see *McManus* v. *Bowes,* [1938] 1 K.B. 98, at p. 127, per Slesser L.J. For a more detailed discussion of the law relating to voidable and unenforceable contracts see Stevens, *op. cit.,* footnote 20, at p. 613.

[79] *Long* v. *Smithson* (1918), 88 L.J. K.B. 223.

[80] *Exchange Telegraph Co.* v. *Gregory & Co.,* [1896] 1 Q.B. 147; *Goldsell* v. *Goldman,* [1914] 2 Ch. 603; *British Motor Trade Association* v. *Salvadori, supra,* footnote 50.

[81] *Lumley* v. *Gye, supra,* footnote 4.

under *Hadley* v. *Baxendale*,[82] and because damages are to be assessed in light of circumstances at the date of breach rather than the date of formation of the contract.[83] It should also be noted that there exists some support for the proposition that a plaintiff may recover for unintended harm if it is reasonably foreseeable[84]—if the loss suffered is not deemed to be too remote.

Damages are described as being at large and are therefore "a matter of impression and not addition", and "there is no question that in an appropriate case an amount exceeding the pecuniary loss can be assessed for the claim in tort".[85] Since it is an intentional tort exemplary damages may lie if the facts warrant them.

(5) *Justification.*

It is well-established that even if all the elements of the tort are demonstrated, no liability will attach to the defendant if he can show some legal justification for his conduct.[86] The defence is, however, fraught with uncertainty. "[T]he plea of justification nowadays is a flexible one and should not be regarded as confined to narrow strait-jackets."[87] Its scope—the basis, and the range of accepted conduct are incapable of precise definition. But some general criteria do exist, and they are contained in the dictum of Romer L.J. in *Glamorgan Coal Co.* v. *South Wales Miners' Federation*[88] where he held:[89]

> [R]egard might be had to the nature of the contract broken; the position of the parties to the contract; the grounds for the breach; the means employed to

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[82] (1854), 9 Ex. 341, 156 E.R. 145.

[83] Although this is not an absolute rule: *Johnson* v. *Agnew*, [1979] 2 W.L.R. 487, at p. 499 (H.L.).

[84] *Posluns* v. *Toronto Stock Exchange, supra*, footnote 32; *Jones* v. *Fabbi et al.* (1973), 37 D.L.R. (3d) 27 (B.C.S.C.), relying on *The Wagon Mound (No. 1)*, [1961] A.C. 388 (P.C.). Recent dicta, however, in both England and Canada have appeared to qualify the clear distinction formerly drawn between contract and tort damages: *H.L. Parsons (Livestock) Ltd.* v. *Uttley Ingham & Co. Ltd.*, [1978] 1 Q.B. 791, (C.A.), noted by Manchester, Remoteness of Damage—Contract and Tort Reconciled, [1978] New L.J. 1113; and *Asamera Oil Corp. Ltd.* v. *Sea Oil and General Corp. and Baud Corp. N.V.* (1978), 23 N.R. 183, at p. 219, per Estey J. (S.C.C.).

[85] *Vale* v. *International Longshoremen's and Warehousemen's Union, Local 508*, [1979] 5 W.W.R. 231, at pp. 238 and 240, per Seaton J.A. dissenting, but not in this regard.

[86] *Quinn* v. *Leathem, supra*, footnote 6; *Glamorgan Coal Co.* v. *South Wales Miners' Federation*, [1905] A.C. 239; *Read* v. *Friendly Society of Stonemasons, supra*, footnote 44.

[87] *Greig et al.* v. *Insole et al.*, [1978] 3 All E.R. 449, at p. 493, per Slade J.

[88] [1903] 2 K.B. 545, approved in the House of Lords, *supra*, footnote 86, at p. 252, per Lindley L.J.; see also *British Industrial Plastics Ltd.* v. *Ferguson, supra*, footnote 19, at p. 510, per Slesser L.J.

[89] *Ibid.*, at pp. 574-575.

> procure the breach; the relation of the person procuring the breach to the person who breaks the contract; and . . . to the object of the person in procuring the breach.

While supposedly relying on these general principles, the courts have in reality vacillated in their application. It has been suggested that a defendant's conduct may be justified if he were acting under some moral obligation.[90] But good faith and absence of malice on the part of the defendant do not as such provide any defence to an action based on inducement of breach of contract.[91] Another view is that "if the methods of interference are in themselves unlawful . . . there can be no justification, even if the defendant would have been privileged to accomplish the same result by proper means",[92] but this view, too, has been questioned.[93] The range of fact patterns that have been judicially considered and the inconsistencies that have emerged from them are numerous and a full discussion of them is beyond the aim of this article.[94] But two conclusions can be safely drawn: (i) the defence lies only within extremely narrow limits and in most cases a defendant will not be able to rely upon it, and (ii) each case will turn directly on the particular circumstances; no general inclusionary rule has emerged.[95]

II. *Interference Short of Breach of Contract: The Torquay Hotel Decision and Its Aftermath.*

It has already been pointed out that with the tort of inducing a breach of contract the defendant must actually induce a "breach" before any liability can be imposed. Until quite recently there was no unequivocal English or Canadian authority[96] which provided support for the view that there can be a cause of action for interference in the execution of a contract, such interference falling short of inducing a

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[90] *Glamorgan Coal Co.* v. *South Wales Miners' Federation, supra,* footnote 86.

[91] *Greig et al.* v. *Insole et al., supra,* footnote 87, at pp. 491-493, per Slade J.: ". . . impersonal or disinterested motives . . . do not as such give rise to a defence . . . ."

[92] Fleming, *op. cit.,* footnote 11, p. 683; Street, *op. cit.,* footnote 36, p. 545; Sayre, Inducing Breach of Contract (1923), 36 Harv. L. Rev. 663, at p. 688.

[93] See Heydon, The Defence of Justification in Cases of Intentionally Caused Economic Loss (1970), 20 U. of T. L.J. 139; Clerk & Lindsell, *op. cit.,* footnote 11, p. 413.

[94] For greater detail on the issue of justification see Heydon, *op. cit., ibid.*; Fleming, *op. cit.,* footnote 11, p. 682; and the decision of *Posluns* v. *Toronto Stock Exchange, supra,* footnote 32.

[95] *Pete's Towing Services Ltd.* v. *N.I.U.W., supra,* footnote 68, at p. 49, per Speight J.

[96] In the United States there exists, under the *prima facie* tort doctrine which is to be discussed later, clear support for the notion that intentional unprivileged interference with a contract, resulting in loss, is presumptively actionable.

breach. However, Lord Denning M.R., in the case of *Torquay Hotel Co. Ltd.* v. *Cousins*[97] provided that support.

The case came about because of attempts by the defendant Transport and General Workers' Union to organize hotel staff in Torquay. Prior to that, by agreement with the employers, the workers in the hotel business were organized primarily by the National Union of General and Municipal Workers. The management of the Torquay Hotel, because of the earlier agreements, rejected all attempts to enter negotiations with the new union. This rejection ultimately resulted in the picketing of the Torquay Hotel by members of the defendant union. At this point, certain relevant comments attributed to the manager of the plaintiff Imperial Hotel appeared in the Press. The striking members of the Transport and General Workers' Union were outraged at this apparent interference, and the Imperial Hotel was picketed as well. Esso Petroleum, the normal suppliers of fuel oil to the Imperial Hotel, were informed of the dispute and were warned by the defendant union to stay clear of the pickets. Following the "blacking" of the Imperial Hotel, none of the oil tanker drivers would cross the pickets.[98] The Imperial Hotel was able to obtain one delivery of oil from an independent company called Alternative Fuels; this firm was subsequently also notified of the dispute and refused to make any further deliveries. At this point, the plaintiff hotel's solicitors gave the defendant union notice of the contract with Esso, along with a summary of its terms, and requested that the embargo be withdrawn and the pickets removed. This request was ignored and the plaintiffs instituted proceedings for an interlocutory injunction *quia timet*.[99]

In Chancery,[100] Stamp J. granted an interlocutory injunction that restrained the defendant union and certain of its officials from further preventing the delivery of fuel oil to the Imperial Hotel. On appeal, the Court of Appeal unanimously affirmed the granting of the injunction.[101]

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[97] *Torquay Hotel Co. Ltd.* v. *Cousins*, *supra*, footnote 1. For a general discussion of the torts implications of a strike see Raday, Torts Liability for Strike Action and Third Party Rights (1979), 14 Israel L. Rev. 31.

[98] The refusal of the Esso drivers to cross the picket lines is understandable in light of their membership in the defendant union.

[99] It should be emphasized that when proceedings were instituted, there had been no breach of contract.

[100] [1968] 3 All E.R. 43.

[101] *Supra*, footnote 1. The court unanimously agreed that no injunction could be granted against a union merely for a tortious act, thereby ending a rather extended judicial controversy: see Citrine, Trade Union Law (3rd ed., 1907), pp. 593-595. The court also agreed, however, that the acts of the defendant union were not done in "furtherance" of the trade dispute with the Torquay Hotel. Their conduct was

While the members of the court ultimately concurred in the result, they varied markedly in their analysis of the facts. The distinctions in interpretation stem primarily from the differing analyses of a *force majeure* clause that existed in the contract between Esso Petroleum and the Imperial Hotel. Basically, the clause[102] absolved Esso Petroleum from liability if oil delivery was somehow prevented by circumstances outside of its control including, as in this instance, labour disputes.

Russell L.J.'s reasoning followed traditional lines. He thought that the *force majeure* clause did not in any way preclude the possibility of a breach. "It [the exception clause] assumes a failure to fulfill a term of a contract—*i.e.* a breach of contract—and excludes liability—*i.e.* in damages—for that breach in stated circumstances. It is an exception from liability for non-performance rather than an exception from obligation to perform."[103]

With respect to his own decision to grant the injunction Russell L.J. explained the matter as follows:[104]

> It seems to me that, as they [the facts] appear at present, they demonstrate an attitude on the part of the defendant union officials of willingness directly to induce breaches of contract. . . . This justifies a continuance of the injunction pending trial.

The reasoning of Winn L.J. followed essentially the same lines for both the *force majeure* clause and the actual granting of the injunction. With respect to the former he stated:[105]

> No breach of contract by Esso was induced. However, the argument of counsel for the defendants that clause 10 of the written contract . . . would have

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deemed to be a manifestation of their anger towards the Imperial Hotel for its supposed intervention. For the Trade Disputes Act, 1906, 6 Edw. VII, c. 47, ss 4, 5(3), see Halsbury's Statutes (2nd ed., 1951), vol. 25 p. 1269. In Canada, most trade disputes are regulated by provincial legislation. But courts are reluctant to surrender supervisory authority in the absence of precise statutory language. For example, in British Columbia the Labour Relations Board has sole jurisdiction in respect of labour disputes under s.34(2) of the Labour Code, S.B.C., 1973, c. 122. But in *Pitura* v. *Lincoln Manor Ltd. et al.* (1978), unreported, New Westminister, C771822, Nov. 17, 1978 (B.C.S.C.), Munroe J. held that the court has not had its jurisdiction ousted to curb and control any actual or apprehended breaches of the general law, both civil and criminal. See also *Central Native Fishermen's Cooperative* v. *British Columbia Provincial Council, United Fishermen and Allied Workers' Union, et al.*, [1975] 6 W.W.R. 699 (B.C.S.C.).

[102] The relevant *force majeure* provision was clause 10 which in essence said: "Neither party shall be liable for any failure to fulfill any term of this agreement, if fulfilment is delayed, hindered, or prevented by circumstances which is not within their immediate control . . . including labour disputes." For the full clause see *[1969] 2 Ch. 115.*

[103] *Ibid.*, per Russell J., at p. 143.

[104] *Ibid.*

[105] *Ibid.*, per Winn L.J., at pp. 146-147.

> operated to prevent a failure or failures to deliver ordered instalments of fuel thereunder from being a breach does not seem to me to be sound. As I construe the clause it affords only an immunity against any claim for damages; it could not bar a right to treat the contract as repudiated by continuing breach.

With reference to the last point he suggested that the present case was not concerned with any threat or intimidation; but was one of conduct evidencing "such a disposition to induce or produce, to the prejudice of the Imperial Hotel, non-performance of contracts of their suppliers that relief by injunction was appropriate".[106]

But Lord Denning M.R., proceeded on a wholly different premise. He dealt with the problem on the assumption that because of clause 10 (the *force majeure* clause) non-delivery would not—could not—constitute a breach of contract on the part of Esso. He was not, however, willing to accept the contention that because no breach had been induced, no liability could be incurred.[107] Instead his Lordship was of the opinion that the time had come, "when the principle (that of *Lumley* v. *Gye*) should be extended to cover deliberate and direct interference with the execution of a contract".[108] He concluded that the "common law would be seriously deficient if it did not condemn such interference".[109]

Prior to the *Torquay* decision, the bulk of authority ran counter to the imposition of liability for interferences short of breach. Such a position is reflected in the words of Lord Donovan in *J.T. Stratford & Son Ltd.* v. *Lindley et al.*:[110]

> . . .the argument that there is a tort consisting of some undefinable interference with business contracts, falling short of inducing breach of contract, I find as novel and surprising as I think the members of this House who decided *Crofter Hand Woven Harris Tweed Co. Ltd.* v. *Veitch* ([1942] A.C. 435; 1 All E.R. 142 H.L.) would have done. . . .[111]

While some earlier dicta[112] exist that appear to lend support to Lord Denning's *Torquay* proposition, it is suggested that they provide only meagre strength to it. Most of this support is to be found in relatively early decisions when the tort of inducement of breach of contract had not yet reached the degree of expansion and

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[106] *Ibid.*, at p. 148.

[107] Lord Denning stated that: "The principle of *Lumley* v. *Gye* extends not only to inducing breach of contract, but also to preventing performance of it." *Ibid.*, at p. 137.

[108] *Ibid.*, at p. 138.

[109] *Ibid.*

[110] *Supra*, footnote 8, at p. 340.

[111] Lord Donovan's dictum was applied and followed in *F. Bowles & Sons Ltd.* v. *Lindley*, [1965] 1 Lloyd's Rep. 207, at p. 212, per Fenton Atkinson J.

[112] See the same view expressed by Viscount Simonds in *A.-G. for New South Wales* v. *Perpetual Trustee Co. Ltd. et al.*, [1955] 1 All E.R. 846, at p. 854 (P.C.).

sophistication that it enjoys today. In many of these early decisions the terms "inducement", "procurement" and "interference" seem to be used indiscriminately with little significance attached to their respective differences in meaning.[113] Accordingly, any pre-*Thomson* v. *Deakin* decision which speaks of "interference with contract" must be regarded and judged in light of its relative position in the evolutionary scale of inducing a breach of contract as a tort. The most significant statement foreshadowing an action for interferences with contract short of breach is contained in the judgment of Lord Reid in *Stratford* v. *Lindley*[114] where he expressly raised the issue, but declined to deal with it.

It can be seen, then, that whereas the prospect of expanding the *Lumley* v. *Gye* principle was not novel in itself, the implementation of such an expansion marked a significant departure from previous judicial trends. In pursuing this course, Lord Denning M.R. methodically outlined the basis of the tort:

> The principle can be subdivided into three elements: first, there must be interference in the execution of the contract. The interference is not confined to the procurement of a breach of contract. It extends to a case where a third person prevents or hinders one party from performing his contract, even though it be not a breach. Secondly, the interference must be deliberate.[115] The person must know of the contract, or at any rate, turn a blind eye to it and intend to interfere with it, see *Emerald Construction Co. Ltd.* v. *Lowthian.*[116] Thirdly, the interference must be direct. Indirect interference will not do. Thus a man who "corners the market" in a commodity may well know that it may prevent others from performing their contracts, but he is not liable for an action for so doing. A trade union official, who calls a strike on proper notice, may well know that it will prevent the employers from performing their contracts to deliver goods, but he is not liable in damages for calling it. Indirect interference is only unlawful if unlawful means are used.[117]

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[113] In *Quinn* v. *Leathem, supra,* footnote 6, Lord Macnaghten stated that it was "a violation of legal right to interfere with contractual relations . . . if there be no sufficient justification for the interference". Lord Lindley in the same decision also seemed to speak of an action founded upon unjustified interference in a man's business. See also *Jasperson* v. *Dominion Tobacco Co. Ltd., supra,* footnote 60, where the Privy Council dealt with the concept of actionable interferences with contract, particularly through the use of unlawful means.

[114] *Supra,* footnote 8.

[115] *Ibid.,* at p. 324.

[116] In the *Torquay* decision itself, it may have been somewhat difficult to argue that the defendant union actually intended to induce a breach of contract between the plaintiffs and Esso Petroleum. Their conduct was however sufficiently reckless or indifferent to satisfy the intent requisite as defined in *Daily Mirror Newspapers Ltd.* v. *Gardner, supra,* footnote 8. In the light of the recent House of Lords decision in *Express Newspapers Ltd.* v. *McShane,* [1980] 2 W.L.R. 89, holding that the test of conduct being "in . . . furtherance of a trade dispute" for the purpose of the English Act was subjective and turned on the honest belief to that effect by the defendants, the *Torquay* defendants' conduct today may not be characterised as "unlawful".

[117] *Torquay Hotel* case, *supra,* footnote 1, at p. 138. Lord Denning then went on to retract earlier statements in *Daily Mirror Newspapers Ltd.* v. *Gardner, ibid.,* at p.

While some commentators have viewed Lord Denning's proposition as a "welcome expansion",[118] others have been wary if not actually critical. Their concerns seem to focus on three distinct areas.

First, it has been suggested that Lord Denning's elaboration was in itself unnecessary—that in the *Torquay* case, the court should have dealt with the facts before it by making use of already existing case law.[119] For example, in both *Daily Mirror Newspapers Ltd.* v. *Gardner*[120] and *Emerald Construction Co. Ltd.* v. *Lowthian*[121] no breach of contract had occurred when the action was heard. The real issue was whether a breach was imminent and consequently whether an injunction ought to be granted. Thus, on its facts alone, the *Torquay* decision could easily have fitted into the existing mould and been defined in terms of the tort of inducing a breach of contract. As has been pointed out, both Winn and Russell L.JJ. followed this course of action. Lord Denning M.R. alone found it necessary to break with the *Lumley* v. *Gye* tradition because of his interpretation of the *force majeure* clause.

Though this view may have merit, it has clearly had little influence on subsequent judicial utilization of the *Torquay* principle. Lord Denning M.R.'s *obiter* statements have been reiterated and approved in numerous recent decisions.[122] There can be little doubt today that the *Torquay* principle is a part of the law in both England and Canada. Those few decisions that have attempted to refute the principle or have questioned its validity are of little weight. In *Mintuck* v. *Valley River Band No. 63A*,[123] O'Sullivan J.A. acknowledged the existence of the *Torquay* decision and the fact that it had met with approval in several later Canadian cases. Nevertheless, he stated that he "would not be prepared to follow Lord Denning's view without a decision to do so by the Supreme Court of Canada".[124] The

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782, that suggested there existed no difference between indirect and direct interference.

[118] Lewis, Interference with Contractual Relations (1969), 119 N.L.J. 382, at p. 383.

[119] Owen, *op. cit.*, footnote 3.

[120] *Supra*, footnote 8.

[121] *Supra*, footnote 17.

[122] See *Einhorn* v. *Westmount Investments Ltd. et al.*, *supra*, footnote 39; *Mark Fishing Co. Ltd. et al.* v. *United Fishermen and Allied Workers' Union et al.* (1972), 24 D.L.R. (3d) 585, [1972] 3 W.W.R. 641 (B.C.C.A.), aff'd. 38 D.L.R. (3d) 316 (S.C.C.); *Celona* v. *Kamloops Centennial (Pacific No. 269) Branch of the Royal Canadian Legion et al.*, [1974] 2 W.W.R. 144 (B.C.S.C.); *McKenzie* v. *Peel County Board of Education* (1975), 5 O.R.(2d) 549 (C.A.); *Western Stevedoring Co.* v. *Pulp, Paper & Woodworkers* (1976), 61 D.L.R. (3d) 701 (B.C.S.C.).

[123] (1977), 75 D.L.R. (3d) 589, at p. 604 (Man. C.A.).

[124] *Ibid.*

Mark Fishing Co. Ltd. et al. v. *Allied Workers' Union et al.* decision, where the *Torquay* principle was applied by the British Columbia Court of Appeal[125] did ultimately go to the Supreme Court of Canada.[126] There the appeal was dismissed without comment. Had the Supreme Court wished to reject or modify the *Torquay* principle it would have clearly outlined the Canadian position. It is suggested that its passivity may well be viewed as approval of the principle.

A case that runs counter to most others and causes some confusion is *Brekkes* v. *Cattel*.[127] There Pennycuick V.C. cites the *Torquay Hotel* case with approval but apparently misconstrued the range of that decision since he rejected the plaintiff's contention that "interference with trade might be actionable even apart from the use of unlawful means".[128] Under the Denning formulation, it is evident that unlawful means need only be made use of if the interference is indirect. Any direct interference with a contract, however, is unlawful *per se*. The judgment is clearly an anomaly and probably *per incuriam*.

While reviewing decisions that question the *Torquay* principle, some mention should be made of Canadian authority prior to *Torquay Hotel* that runs counter to it. This is the British Columbia Court of Appeal decision of *Dirassar and James* v. *Kelly Douglas & Co. Ltd.*[129] This case dealt with an alleged inducement of breach of contract by the defendants, Kelly Douglas, who, as the financial backers of some developers, had exercised foreclosure rights against the developers, thus interfering with the contractual relationship between the developers and the plaintiff architects. The majority[130] opinion held that the defendants were not liable in tort as (1) they were not guilty of any procurement and (2) they had not intended to injure the plaintiffs.

In his judgment, Maclean J.A. referred to the "wrongfulness" element of the interference:[131]

> The first element which the respondents must prove in a case of this kind is that the act complained of (the extra-judicial foreclosure) was an act wrongful in itself. . . . As already indicated it is my opinion that Kelly Douglas was entitled to foreclose on the securities at the time it did, and it follows that the act complained of was not wrongful in itself.

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[125] *Supra*, footnote 122.

[126] [1973] S.C.R. vii.

[127] [1972] 1 Ch. 105.

[128] *Ibid.*, at p. 114.

[129] (1967), 59 D.L.R. (2d) 452.

[130] The minority judge, Norris J.A., based his dissent on a different view of the facts.

[131] *Supra*, footnote 129, at p. 488.

Branca J.A. reiterated this opinion in the following way:[132]

> It would appear from the canvass of authorities that it is an established principle of our law that if A acts lawfully and in all respects within his rights and in so doing does an act which causes loss to another, that other has no remedy though the loss which he suffers is or may be a necessary and inevitable consequence of the act lawfully done. In such a case it is a matter of indifference that A may act with malice or with spite against the one who suffers the loss or, indeed, that the acts were done with the very intent of producing that result....[133]

Clearly these views conflict with those stated by Lord Denning M.R., in *Torquay Hotel Co. Ltd.* v. *Cousins*. It is unfortunate that *Dirassar* seems not to have been drawn to the attention of the British Columbia Court of Appeal in the *Mark Fishing* case as it may tend to weaken its cogency. On the other hand the trend of authority, both in British Columbia and the other provinces, is so overwhelmingly directed in favour of the *Torquay* principle that it is unlikely to be adversely affected when that court again obtains the opportunity of examining it.

The second major criticism levelled at the *Torquay* principle is that it is of undefined scope.[134] This criticism is undeniably weighty. The *Torquay* principle has proven to be as malleable as was feared. The tort of interference with contractual relations short of breach as defined by Lord Denning M.R., has undergone frequent revision and expansion. Most commentators initially believed that the tort would be confined to instances where an interference had induced frustration or impossibility of performance[135] but this is clearly not the case today.

In *Einhorn* v. *Westmount Investments Ltd.*,[136] the defendants controlled two companies, one of which (Westmount Investments Ltd.) had entered into a contract with Einhorn. The defendants "knowingly and *mala fides*"[137] transferred all of Westmount's assets to the second company in order to prevent the corporate defendant from fulfilling its contractual obligations. Specifically the defendants were alleged to have acted with the intention of "delaying, hindering, disturbing or defrauding the plaintiff".[138] No

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[132] *Ibid.*, at pp. 500-505.

[133] Branca J.A. went on to say that if a third party intervened in a contract by unlawful means, and had both the required knowledge of the contract and intent to injure, then the intervening party would be liable for resultant loss or damage.

[134] Wedderburn, Torts Out of Contracts: Transatlantic Warnings (1970), 33 Mod. L. Rev. 309; Stevens, *op. cit.*, footnote 20, at p. 618.

[135] Wedderburn, *op. cit., ibid.*, at p. 310; Stevens, *op. cit., ibid.*, at p. 617.

[136] *Supra*, footnote 39.

[137] *Ibid.*, at p. 73 (D.L.R.).

[138] See paras 10 and 11 of the pleadings for the plaintiffs. These paragraphs are included in the text of the decision, *ibid.*, at pp. 72-73.

action based on frustration of contract could be maintained for conduct that merely delayed or hindered performance by one of the parties. For such an action to be supported, it is necessary that performance be completed in a matter that is fundamentally different from that originally anticipated.[139] Nevertheless Disbery J. demonstrated no hesitation in "adopting and applying" the *Torquay* principle. He felt that, "The statement of Lord Denning M.R., . . . also correctly expresses the law of this jurisdiction."[140]

The *Einhorn* decision also expounds a further rift from existing legal doctrine. Normally, a servant of a corporation acting *bona fide* within the scope of his authority is exempt from personal liability[141] for breach of contract. Disbery J. rejected this proposition by relying on Lord Denning M.R.'s *obiter* statements in *Torquay*.

There are other illustrations of Canadian adoption and expansion of the *Torquay* principle. The case of *Celona* v. *Kamloops Centennial (Pacific No. 269) Branch of the Royal Canadian Legion et al.*[142] was initially presented as an action for damages for inducing a breach of contract. The defendant branch had agreed in writing to purchase land and improvements from the plaintiff to replace its own premises which had earlier been destroyed by fire. At a meeting of its members the branch, realizing its inability to meet the financial obligations imposed on it by the contract, resolved to bring the contract to an end. A number of office-bearers were present at that meeting, including the treasurer of Pacific Command, who was appointed sole trustee of the board of management of the defendant branch. In that capacity he directed the branch's bank to pay to debenture-holders funds which were impressed with a trust in the plaintiff's favour. This action was subsequently endorsed at a general meeting.

Mackay J.[143] citing Lord Denning's statement of principle in the *Torquay Hotel* case held that: "The interference by Pacific Command . . . was deliberate and direct and it is liable for that interference." This case involved a direct interference in contractual relations that resulted in a breach of those relations. Nevertheless the *Torquay Hotel* principle was expressly adopted and must be taken to be included in the ratio of that judgment. Clearly the *Torquay*

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[139] See Cheshire and Fifoot, Law of Contract (9th ed., 1976), pp. 544, *et seq*; Fridman, The Law of Contract in Canada (1976), p. 483 *et seq*.

[140] *Supra*, footnote 39, at p. 75 (D.L.R.).

[141] *Said* v. *Butt*, [1920] 3 K.B., 497. But this rule has since been re-established in Canada: see *Neyland* v. *Genstar Ltd.*, *supra*, footnote 39; and *Einhorn* in the Saskatchewan Court of Appeal, *supra*, footnote 39.

[142] *Supra*, footnote 122.

[143] *Ibid.*, at pp. 155-157.

principle should never have been referred to, much less applied. Lord Denning in the *Torquay* decision sought to modify existing legal doctrine in order to make actionable a very specific range of conduct: interferences in the execution of a contract, which fall short of inducing a breach. The *Torquay Hotel* principle was not intended to be diluted so as to provide a remedy for the entire spectrum of tortious conduct vis-à-vis economic relations. While such a general formulation might be desirable,[144] it should only arise after the proper issues are struck and its policy foundations are set. Neither of these conditions is met in this case. Instead, the plaintiff's action was framed in an inducement of breach of contract—the appropriate remedies and case law ought to have been applied.[145]

Another example of the undisciplined expansion of the *Torquay Hotel* principle is to be found in *Pacific Trollers Assn. et al.* v. *United Fishermen & Allied Workers' Union*.[146] This was an application for an interim injunction where the defendant union had declared the applicant's fishing vessels "hot", so that shore workers would not handle them and there was imminent danger of large quantities of caught fish "becoming unfit for human consumption".[147] The union declaration arose out of its attempts to obtain control over the crewing of the applicant's vessels which had resulted earlier in an unsuccessful strike. Fulton J. adopted the *Torquay Hotel* principle in the following way:[148]

> With respect to a related aspect of the defendant's submission, that their acts were not unlawful because they were not aimed at procuring a breach of the plaintiff's contract . . . certain passages of Lord Denning, M.R., in Torquay Hotel Co. Ltd. . . . are directly on point. That decision has been approved and applied in numerous cases in this country.

After referring to the statement of principle in the *Torquay Hotel* case the learned judge continued:[149]

> . . . Although the issue here is not whether the defendants induced the shoreworkers to breach the terms of their employment under the collective agreements in question . . . it seems to be . . . the general principle[s] confirmed by Lord Denning M.R., are directly applicable here. The defendants interfered with the trade or business of the plaintiff, and they did it by unlawful means . . . and the means are unlawful even though they may not have been directed at procuring the breach of any particular contract.

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[144] The possible existence of an encompassing formulation that would cover the general area of deliberately causing economic loss will be discussed later.

[145] See *McKenzie* v. *Peel County Board of Education, supra,* footnote 122, where Dubin J.A. at p. 561 declined to use the *Torquay* principle in order to avoid unnecessary expansion.

[146] [1974] 4 W.W.R. 561 (B.C.S.C.).

[147] *Ibid.*, at p. 569.

[148] *Ibid.*, at p. 576.

[149] *Ibid.*, at p. 577.

An injunction was accordingly granted the applicant. It is evident that this statement goes well beyond the *Torquay Hotel* principle. It is not confined to cases of interference with contractual relations but is extended to unlawful interference with trade or business. The extension is significant in that it threatens to make tortious various forms of standard commercial competition. Thus far, no weight has been attached judicially to Fulton J.'s statements, and it is doubtful that further decisions will confirm his position.[150]

Fulton J.'s comments also seem to abrogate the "intent" element referred to by Lord Denning M.R.[151] in the *Torquay Hotel* case.[152] It is suggested, however, that Fulton J.'s statements go no further than equating intention with recklessness or "wilful blindness"—an assumption consistent with numerous earlier decisions.[153]

The final major concern about the *Torquay* principle relates to its expansive features without any correlative development in the defence of justification.[154] The *Torquay Hotel* decision was successful in vastly expanding the range of liability that a defendant can incur for his conduct. There has, however, been no similar development of the defences available to the defendant. As has been pointed out, the defence of justification rests on unfirm foundations. The instances where the defence has been accepted are few and the reasons for it not being accepted are inconsistent. Perhaps with the continued use of the *Torquay* principle, the courts will be obliged to re-examine the common law position relating to justification, giving flesh to a legal skeleton that currently haunts the case law in an aimless manner.

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[150] *Western Stevedoring Co.* v. *Pulp, Paper and Woodworkers, supra,* footnote 122, makes extensive use of the *Pacific Trollers* case, but the relevant comments by Fulton J. were neither adopted nor referred to. The Australian case of *Beaudesert Shire Council* v. *Smith* (1966), 40 A.L.J.R. 211, does appear to be consistent with Fulton J.'s view on an even wider scale. That decision has, however, been trenchantly criticised. See Dworkin and Harari, The Beaudesert Decision—Raising the Ghost of the Action on the Case (1967), 40 A.L.J. 296. Those cases that have cited the *Beaudesert* decision have tended to distinguish it. See *Grand Central Car Park Pty. Ltd.* v. *Tivoli Freeholders,* [1969] V.R. 62; *Kitano* v. *Commonwealth of Australia* (1973), 2 A.L.R. 83. There exist numerous American decisions that extend liability to include interference with economic relations even in the absence of any contract.

[151] *Supra,* footnote 1, at p. 138.

[152] Lord Denning's principle was extended to cover only "deliberate interference" with the execution of a contract.

[153] *Emerald Construction Co. Ltd.* v. *Lowthian, supra,* footnote 17, per Diplock L.J., at p. 704; *Daily Newspapers Ltd.* v. *Gardner, supra,* footnote 8.

[154] Wedderburn, *op. cit.,* footnote 134.

It is also interesting to note that while Lord Denning's comments are usually in the forefront of any discussion based on the *Torquay Hotel* decision, it is Winn L.J. who at one point makes a truly radical proposal in that case:[155]

> Where a contract between two persons exists which gives one of them an optional extension of time, or an optional mode of performance of it, or part of it, but, from the normal course of dealing between them, the other person does not anticipate such postponement, or has come to expect a particular mode of performance, a procuring of the exercise of such an option should, in principle, be held actionable if it produces material damage to the other contracting party.

This statement extends protection to expectancies as well as contractual rights, and runs diametrically counter to the flow of legal doctrine.[156] In the hallmark decision of *Allen* v. *Flood*[157] Lord Herschell considered[158] that there was a "chasm between inducing a breach of contract and inducing a person not to enter a contract".[159] Lord Watson concurred but added that a person who interfered with an expectancy "might be held liable if he can be shown to have procured his object by the use of illegal means".[160]

It is thus actionable to interfere with a contract by lawful means, to interfere with an expectancy by unlawful means, but not actionable to interfere with an expectancy by lawful means, which is what Winn L.J.'s dicta comments purport to lay down. Whether or not Winn L.J.'s statements will take on the weight of a legal rule is conjectural at this stage. While it is true his dicta have been subsequently applied[161] there exist as well dissenting judgments.[162]

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[155] *Supra*, footnote 1, at p. 147.

[156] The general rule is that interference with economic relations which are merely prospective, and not yet crystallised in contract, is not actionable.

[157] *Supra*, footnote 61.

[158] *Ibid.*, at p. 121.

[159] Lord Herschell's statements were a response to the comments of Lord Esher M.R. and Smith L.J. in *Temperton* v. *Russell, supra*, footnote 7, who asserted that there was no distinction for the purpose of liability between inducing a breach of contract and inducing the non-entry into a contract. See also the comments of Erle J. in *Lumley* v. *Gye, supra*, footnote 4, at p. 232; to induce a person not to contract or deal with the plaintiff is to induce something which is "within the rights of the immediate actor, and is therefore not actionable insofar as he is concerned".

[160] *Supra*, footnote 61, at p. 96. See also *Quinn* v. *Leathem, supra*, footnote 9, at p. 510, per Lord McNaghten. In *Simms* v. *Community Improvement Corporation, McCluskey and School Board for School District #2* (1978), 23 N.B.R. (2d) 555, the New Brunswick Court of Appeal dismissed an action described as "tortious interference with his employment contract". She was employed on an annual contract and at the request of the school board was notified by the Superintendent of Schools that her contract was not going to be renewed. There was no breach of contract by the board and no unlawful means utilized by the Superintendent of Schools.

[161] In *Brekkes* v. *Cattel, supra*, footnote 127, at p. 114, Pennycuick V.C. said: "It has been established by a decision of the Court of Appeal [*Torquay Hotel Co.*

Footnote 162, see next page.

In the light of the relatively indiscriminate adoption of the *Torquay Hotel* principle itself, it may well be that the expressions of Winn L.J. do provide an omen of future judicial direction.

In summary, then, there exists in Canada a tort based on interference in the execution of a contract—interference that falls short of inducing breach. The scope of the tort, however, is yet to be defined. To deflect criticism of the sort already referred to, to bring certainty and consistency to the law and to avoid a weakening of the *Torquay* principle itself the courts will have to chart the limits of this new tort with caution. Certain issues require resolution: does the tort extend to cases where a defendant has merely persuaded a party to a contract to exercise a right to terminate which may be open to him, or an option that imposes more onerous burdens on the other party; does the tort extend to interferences with expectancies, to interferences short of actual frustration, to relationships other than contractual?

Also, while the premise upon which the new tort is based is now judicially entrenched it must be modified. The direct-indirect interference dichotomy is no more operationally valid under this tort than under an action for inducing a breach of contract. The defence of justification must receive the benefit of such modification and expansion that it requires and the element of knowledge perhaps re-defined to emphasize its essentially subjective features. Lord Denning has provided the strategy and it remains only for the judicial spear carriers to define the tactics to accomplish the goals of regularized and proper commercial transactions.

III. *Intimidation.*

Any discussion that deals with the tort of intimidation must focus its attention on the House of Lords decision of *Rookes* v. *Barnard.*[163]

The plaintiff, Douglas Rookes, who was employed for many years by B.O.A.C. as a draughtsman in its design office, claimed damages from each of the three defendants, jointly or severally or both, for using unlawful means to induce B.O.A.C. to terminate its contract of service with him. The plaintiff originally belonged to a trade union, the A.E.S.D.[164]—of which the defendants were

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Ltd. v. *Cousins*]—and it is not in question—that this tort of interference with contract applies not only where there is interference with contracts already made but where there is interference with contracts to be made." See also *Gershman* v. *Manitoba Vegetable Producers' Marketing Board,* [1976] 4 W.W.R. 406, at p. 410 (Man. C.A.).

[162] For example, Megarry J. in *Midland Cold Storage Ltd.* v. *Steer,* [1972] Ch. 630, said: "I am not prepared to hold . . . that . . . there is a tort of wrongfully inducing a person not to enter into a contract."

[163] *Supra,* footnote 2.

[164] The Association of Engineering and Shipbuilding Draughtsmen.

members—but later resigned because of a "falling-out". The union in an effort to maintain 100% membership passed a resolution stating that unless the "non-unionist Rookes is removed from the design office . . . a withdrawal of labour will take place". Even though the union had a no-strike agreement with B.O.A.C.,[165] the corporation when faced with this ultimatum felt compelled to terminate the plaintiff's contract. Rookes had no remedy against B.O.A.C. as he was dismissed by that corporation in accordance with his contract of employment. His only course of action, then, was to seek some remedy against the defendants.

At trial the jury found the defendants were party to a conspiracy to threaten strike action against B.O.A.C. in order to obtain the plaintiff's removal; that they made a threat of strike in order to obtain that dismissal; and that those threats did in fact cause the plaintiff to be ultimately dismissed. Rookes was awarded £7,500 in damages.[166] Sachs J.[167] further held that the defendants had committed the tort of intimidation.[168] He went on to conclude that as each individual defendant was guilty of an unlawful act they were afforded protection by neither section 1 nor section 3 of the Trades Dispute Act 1966, even though a "trade dispute" had existed within the meaning of that statute.

On appeal[169] the decision was reversed. While the tort of intimidation was recognized, it was unanimously decided that the threatened breach of one's own contract was not conduct sufficiently "wrongful" to constitute the tort. In any case, the court considered that sections 1 and 3 of the Trades Dispute Act protected the defendants from any liability because of the agreed-upon existence of a "trade dispute".

On further appeal to the House of Lords,[170] liability was restored. That decision resolved a number of issues:

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[165] The no-strike agreement with B.O.A.C. formed part of the contract of employment of each individual employee, thus having the sanctity of contract.

[166] On appeal this amount was reduced to £4,500.

[167] [1963] 1 Q.B. 623, at p. 631: "It has long been regarded as settled at common law that it is an actionable wrong to intimidate other persons to make them act in a manner which they themselves have a legal right to do, but which is likely to result . . . in loss to the plaintiff."

[168] This finding was essential in order to support the finding of conspiracy. Section 1 of the Trade Disputes Act, *supra,* footnote 101, made it necessary to establish individual tort liability upon which to found the conspiracy: ". . . An act done in pursuance of an agreement or combination by two or more persons shall, if done in contemplation of a trade dispute, not be actionable unless the act, if done without such an agreement or combination, would be actionable."

[169] *Supra,* footnote 167.

[170] *Supra,* footnote 2.

(1) The tort of intimidation does exist.

(2) The tort consists of harm being done to a plaintiff through a threat to do an unlawful act.

(3) A threat of a breach of contract is an "unlawful" act for the purposes of the tort.

Furthermore, a formulation of the principles governing the award of exemplary damages in England was made and the position of the new tort vis-à-vis the protection granted by sections 1 and 3 of the Trades Dispute Act was clarified.[171] The purpose of this section of the article is to examine the resolution of the three issues above by the House of Lords.

The main issue in the case was whether the defendants had committed the tort of intimidation. The defendants attempted to argue that there existed no such cause of action. At no time was any real weight given to this contention. At the time of the *Rookes* decision, there already existed considerable support for the presence of the tort in the common law of England.[172] Furthermore, the definition and elements of the tort had remained essentially unaltered since, for example, the first edition of *Salmond on the Law of Torts*: ". . .Any person is guilty of an actionable wrong who, with the intention and effect of intimidating any other person into acting in a certain manner to the harm of the plaintiff, threatens to commit or procure an illegal act."[173] Consequently it is not surprising that all nine judges who heard the case acknowledged the existence of the tort. The sentiment of the court is mirrored in the words of Lord Hodson who agreed, ". . .that the existence of the tort is established by authority".[174]

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[171] For a discussion of the exemplary damage aspect of the *Rookes* v. *Barnard* decision see Catzman, Exemplary Damages: The Decline, Fall and Resurrection of *Rookes* v. *Barnard*, [1973] Law Society of Upper Canada Special Lectures, pp. 41-53; Fridman, Punitive Damages in the Law of Torts (1970), 48 Can. Bar Rev. 393.

For a detailed examination of the effects of *Rookes* v. *Barnard* on the Trade Disputes Act 1906 see Wedderburn, Intimidation and the Right to Strike (1964), 27 Mod. L. Rev. 257, at pp. 270 *et seq.*; Hamson, A Further Note on *Rookes* v. *Barnard*, [1964] Camb. L.J. 159, at p. 172. Note, however, that the provisions of the Trade Disputes Act have subsequently been revised and modified in the Trade Disputes Act 1965, c.48, which was still later replaced by s.132(1) of the Industrial Relations Act of 1971, c.72. These Acts seem to leave unaltered the proposition that the breach of contract is an unlawful act for the purposes of the tort of intimidation. Whether a withdrawal of labour is in breach of contract is uncertain.

[172] Halsbury's Laws of England (3rd ed., 1962), vol. 37, p. 126, para. 219.

[173] (1907), p. 441. Compare this to the 13th ed. (1961), p. 697, cited by Lord Devlin, *supra*, footnote 2, at pp. 1205-1206.

[174] *Ibid.*, at p. 1198.

A more contentious proposition by the defendants was that if the tort did exist, it was but narrowly delineated and included only threats of criminal or tortious acts. This reduced itself to the question, are the wrongful acts which the person or persons threatened, by way of intimidation, to do confined to acts in themselves criminal or tortious, or do they extend to other so-called "wrongful" acts including particularly breaches of contract? The House of Lords had very little authority upon which to base such an extension—an extension expressly and unanimously rejected by the Court of Appeal.[175] Lord Evershed[176] made reference, however, to two Irish cases[177] that supported the extension as well as the *obiter* comments of Harman J. in *Huntley* v. *Thornton*:[178] ". . .If, however, their actions amounted to threats of illegal strike action—that is to say, action to withdraw labour in breach of contract—then those acts were tortious and illegal."

Their Lordships opted in favour of the extension both as a matter of "principle"[179] and because it was not consistent with "logic, reason or common-sense"[180] to attempt to "draw the line"[181] between classes of threatened breach of contract. Support for this course was expressed in the strongest possible language. Lord Devlin stated that he found "nothing to differentiate a threat of a breach of contract from a threat of physical violence or any other illegal act. . . . If any intermediate party is improperly coerced, it does not matter to the plaintiff how he is coerced".[182] Lord Evershed said: ". . .I cannot be persuaded that there is in the constitution of the tort of intimidation an essential difference between tortious or criminal acts on the one hand, and unlawful acts consisting of

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[175] See particularly the statements of Sellers L.J. who expressed a preference for "restricting" intimidation to acts of violence or threats of violence or threat of a criminal or tortious character: [1963] 1 Ch. D. 623, at p. 672, also the comments of Donovan L.J. who felt that "no unlawful means were employed by Barnard and Vistal (two of the defendants) because 'unlawful . . . means . . . unlawful or being criminal or tortious'; and the threat to break their own contract of service . . . was neither.": [1963] 1 Ch. 623, at p. 684.

[176] *Supra,* footnote 2, at pp. 1185-1186.

[177] *Cooper* v. *Milba,* [1938] I.R. 749; *Riordan* v. *Butler,* [1940] I.R. 374. Both decisions agreed that a threat of breach of contract was an "illegal act". Both were, however, based on a misapplication of the comments of Lord Dunedin in *Sorrel* v. *Smith,* [1925] A.C. 700. See the comments of Lord Hodson in *Rookes* v. *Barnard, supra,* footnote 2, at p. 1200.

[178] [1957] 1 W.L.R. 321, at p. 344, cited by Lord Hodson in *Rookes* v. *Barnard, supra,* footnote 2, at p. 1200.

[179] *Ibid.*, at p. 1168, per Lord Reid.

[180] *Ibid.*, at p. 1186, per Lord Evershed.

[181] *Ibid.*, at p. 1206, per Lord Devlin.

[182] *Ibid.*, at p. 1209.

breaches of contract on the other."[183] And Lord Hodson considered that, "[i]t would be strange if threats of violence were sufficient and the more powerful weapon of a threat of a strike were not, always provided that the threat is unlawful,"[184] and later, "I do not think your Lordships are laying down a new principle in including a threat to break a contract under the head of intimidation. It is no more than an application of the existing principle to a case which has not been before considered".[185] The same sentiments were expressed by Lords Pearce[186] and Reid.[187]

Despite the unity of views of this unquestionably strong bench the proposed extension has come under considerable criticism. This criticism has focused on three particular matters.

First, it has been suggested that the decision has tended to abrogate the basic distinction between contract and tort. Contract and tort are distinguishable in that in the former one's duties are limited to the parties and in the latter one's duties are extended to the public at large. Supposedly, because of the *Rookes* decision, this distinction has become opaque. It is said that one may now maintain a cause of action on the threat of breach of a contract, which should be binding only on other persons, and to which the plaintiff is not a party.[188] It is suggested, though, that this criticism is misplaced. Suppose a three-party situation exists. A is the intimidator, B the party coerced, and C the person whom A intends to harm. It is clear that the harm upon which C bases his action is not that B has been threatened by A, but rather that there has been an invasion of an interest which C holds at the suit of B. That is to say, the action is framed out of A's improper attempt to regulate B's conduct vis-à-vis C—to C's detriment. Now suppose a two-party situation exists with A allegedly intimidating B. It has been suggested[189] that since the *Rookes* decision, this situation might well afford B with alternative or even concurrent causes of action. For example, A threatens B with a breach of contract unless B does X. Supposedly, B now ought to have an action for anticipatory breach or intimidation or both. In Canada, at least, it is clear that this is not the law. In the case of

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[183] *Ibid.*, at p. 1188.

[184] *Ibid.*, at p. 1201.

[185] *Ibid.*

[186] *Ibid.*, at p. 1234.

[187] *Ibid.*, at p. 1169.

[188] See Hamilton, *Rookes* v. *Barnard*: The Limits of the Tort of Intimidation (1965), 23 O. of T.L. Rev. 161; Wedderburn, *op. cit.*, footnote 134.

[189] Wedderburn, *op. cit.*, *ibid.*

Nunes Diamonds Ltd. v. *Dominion Electric Protection Co.*,[190] Pigeon J., for the Supreme Court of Canada expressly held that a plaintiff is confined to an action in contract where such a contract exists and governs the conduct of the parties concerned. The second criticism levelled against the *Rookes* decision is that it has wrought havoc with certain "elementary principles"[191] of contract, particularly the doctrine of privity.[192] The doctrine in essence lays down that no man can enforce a contract to which he is not a party. Superficially, it would seem that the *Rookes* decision runs counter to this proposition. It would seem that C (reverting to the three-party example given earlier) is given a cause of action based on the breach of contract between A and B. Their Lordships, aware of the difficulties involved, suggested that C's cause of action arose not because the contract was broken, but because it was not broken; that is, C's action is based not on a breach of contract, but on the threat to breach. Lord Devlin stated:[193]

> It is said that to give A a cause of action offends against the rule that one man cannot sue on another's contract. The cause of action arises not because B's contract is broken; it arises because of the action which B has taken to avert a breach.

Is this solution as facile and unrealistic as the critics claim? It would appear not. Instead it is suggested that Lord Devlin's analysis is correct. One must distinguish between the original act threatened by A against B, and any subsequent harm that results to C. In a *Rookes* situation, C is not basing his action upon the injury done to B by A nor is he seeking to enforce B's rights that have been violated. C's inability to maintain a cause of action based on the original wrongful act does not however preclude him from establishing a separate action based on the tort of intimidation. In the *Rookes* decision, for example, it is clear that the defendants perpetrated no wrong in relation to B.O.A.C.—no contract was breached; no relationship violated. Nevertheless the plaintiff Rookes was granted a cause of action. It is evident that this action was not an attempt to enforce B.O.A.C.'s rights but was an action based on harm resulting to Rookes alone. Furthermore, it must be remembered that the *Rookes*

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[190] [1972] S.C.R. 769 (S.C.C.). Modification of this rule, *e.g.*, by the Ontario Court of Appeal in *Dominion Chain Co. Ltd.* v. *Eastern Construction Ltd.* (1976), 12 O.R. (2d) 201, has been merely to the effect that concurrent tort and contract actions may lie where not excluded by the terms of the contract. Thus we can have a situation where an exception clause may confine the cause of action to that of contract whereas if the contract were silent, the doctrine of concurrency would apply.

[191] *Supra*, footnote 167, at p. 645, per Pearson L.J.

[192] Two leading cases that set out the elements of the doctrine of privity are *Dunlop Pneumatic Tyre Co. Ltd.* v. *Selfridge & Co. Ltd.*, [1915] A.C. 847; *Scruttons Ltd.* v. *Midland Silicones Ltd.*, [1962] A.C. 446.

[193] *Supra*, footnote 2, at p. 1208.

situation comes about when B's conduct with respect to C is not independently unlawful. Thus if B's conduct vis-à-vis C was unlawful, then A's wrong would not be one of the tort of intimidation, but he might well become liable either for inducing a breach of contract by B (depending on the circumstances), or by becoming a joint tortfeasor with B.

In any case, C's cause of action does not offend the rule that one person cannot sue on another's contract. The fact that *Rookes* v. *Barnard* has not violated any of the necessary implications of the doctrine is manifested in the language of subsequent cases.[194] If anything, the doctrine has become even more firmly entrenched[195] in recent years.[196] Today in Canada, there is no question that the doctrine is embedded in, and serves an important function in our contract law.[197]

The third major criticism of the *Rookes* decision is founded upon its effect on the Trades Dispute Act and its subsquent significance for industrial law. Discussion of this issue is beyond the scope of this article but the interested reader will find that there is no dearth of material on this subject.[198]

While *Rookes* v. *Barnard* provided the first comprehensive judicial outline of the major elements of the tort of intimidation,[199] it dealt as well with some other narrower matters that have subsequently been modified in later cases. Our definition reveals that the tort of intimidation consists essentially of A delivering a threat to B whereby A intentionally causes B to act either to his own detriment or to the detriment of C. From this definition a number of propositions emerge:

(1) A must deliver a threat.
(2) A must act intentionally.
(3) A's threat must cause B's subsequent conduct.
(4) A's threat may result in harm to B (two-party situation) or

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[194] See Fridman, *op. cit.*, footnote 139, pp. 401 *et seq.*; Cheshire and Fifoot, *op. cit.*, footnote 139, pp. 434 *et seq.*

[195] It should be noted that exceptions to the basic privity doctrine have been recognised. Agency relationships and trust relationships may well serve to negate the application of it.

[196] For earlier criticism of the doctrine see Hamson, The Reform of Consideration (1938), 54 L.Q.Rev. 236.

[197] See Fridman, *op. cit.*, footnote 139, pp. 401 *et seq.*

[198] See Carrothers Secondary Picketing (1962), 40 Can. Bar Rev. 57; Hamson, *op. cit.*, footnote 196, at p. 159; Wedderburn, *op. cit.*, footnote 134; Christie, Note on *Rookes* v. *Barnard* (1964), 42 Can. Bar Rev. 464; Hamilton, *op. cit.*, footnote 188.

[199] See *Morgan* v. *Fry*, [1968] 2 Q.B. 710, at p. 724, where Lord Denning concisely summarises the conclusions arrived at in the *Rookes* decision.

A's threat may ultimately result in harm to C (three-party intimidation).

(1) *The Nature of the Threat.*

A threat can be defined as something which puts pressure, perhaps extreme pressure, on the person to whom it is addressed, to take a particular course of action.[200] It must be coercive conduct that demands a particular action or abstinence from a particular action. By the same token, however, it is clear that a threat need not be express, but can be implied or perhaps framed in superficially polite language. On the authorities as they stand it is also evident that threats in themselves are not tortious—only if A threatens to commit a wrongful act is there a tort. This was confirmed by Lord Reid in *Rookes* v. *Barnard* who said:

> So long as the defendant only threatens to do what he has a legal right to do he is on safe ground . . . but I agree with Lord Herschell[201] that there is a chasm between doing what you have a legal right to do and threatening to do what you have no legal right to do.[202]

All analysis then must ultimately focus on the meaning of the expression "wrongful", "unlawful", or "illegal" in the context of this tort. The most blatant types of "unlawful" threats are those of a criminal or tortious nature, those dealing with breaches of statute, those dealing with breaches of contract. We will return to this matter later in the article.

(2) *Intention.*

Both the torts of inducing breach of contract and inteference with contract short of breach hinge on the intention of the defendant. The tort of intimidation is founded upon the same requisite—a defendant can incur no liability unless his conduct was intentional. Negligent conduct will not suffice. Lord Hodson[203] in the *Rookes* case stated that intimidation was "actionable as a tort if it is likely to harm the appellant and is followed by reasonably foreseeable damage". But this dictum seeks only to deal with the remoteness of damage issue, that is the extent and type of damage suffered by the plaintiff. An objective test for the required interest is not sufficient to maintain an action based on the tort of inducement of breach of

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[200] Clerk & Lindsell, *op. cit.*, footnote 11, p. 415.

[201] *Allen* v. *Flood, supra*, footnote 61, at p. 121.

[202] *Supra*, footnote 2, at p. 1168. See also *Crofter Hand Woven Harris Tweed Co. Ltd.* v. *Veitch*, [1942] A.C. 435, at p. 467, per Lord Wright; *D.C. Thomson & Co. Ltd.* v. *Deakin, supra*, footnote 8, at p. 676, per Lord Evershed M.R.; *Roman Corporation Ltd.* v. *Hudson's Bay Oil & Gas Co. Ltd.* (1973), 36 D.L.R. (3d) 413, at p. 420, per Martland J. (S.C.C.).

[203] *Ibid.*, at p. 1202.

contract; it would be consistent with neither precedent nor logic to attempt to impose liability on this basis (that of an objective test) for the tort of intimidation. Therefore to impose liability it must be established that it was "the intention . . . of the threat to injure".[204] In the words of Lord Devlin, in a three-party intimidation situation, "It must be proved that A's object was to injure C through the instrumentality of B."[205] In *Central Canada Potash Co. Ltd. et al.* v. *Government of Saskatchewan et al.*,[206] an action in intimidation was discussed by the Supreme Court of Canada where the appellants had been ordered by the provincial Deputy Minister of Mineral Resources to reduce its production of potash or face the possibility of their mineral leases being cancelled. The Deputy Minister issued his threat pursuant to legislative powers he reasonably believed to be possessed by the Minister. The legislative scheme granting those powers though, was subsequently found to be *ultra vires*. For the court, Martland J. pointed out that the plaintiffs were party to the contract with the Ministry and held, ". . . the tort of intimidation is not committed if a party to a contract asserts what he reasonably considers to be his contractual right and that other party, rather than electing to contest that right, follows a course of conduct on the assumption that the assertion of the right can be maintained".[207]

Martland J. went on to hold that the Deputy Minister was obliged to enforce such statutory schemes until they are found to be *ultra vires*, and that his intention in this case was not to injure the appellant but rather to induce compliance with an existing legislative scheme.[208]

(3) *Causality.*

It seems almost trite to say that unless the harm suffered by the plaintiff was caused by the threat of the defendant, no action can be maintained. It is incumbent upon the plaintiff to establish that the harm suffered resulted from the unlawful means utilized by the defendant. Consistent with the notion that B's harm must have been caused by A's threat is the idea that B must submit to A's threat before the tort of intimidation can be invoked.[209] Thus, if A threatens

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[204] *Ibid.*, at p. 1183, per Lord Evershed M.R. Such intent may be based on wilful blindness or constructive knowledge.

[205] *Ibid.*, at p. 1208.

[206] (1978), 88 D.L.R. (3d) 609. In this case the action was unsuccessful.

[207] *Ibid.*, at p. 640.

[208] *Ibid.*, at p. 642. Intention in this context focusses on the foresight and *desire* of the defendant. It was inevitable that economic injury would be caused by the threat but the predominant motive (desire) was to enforce the statutory scheme.

[209] *Stratford* v. *Lindley*, *supra*, footnote 8, at p. 284, per Lord Denning M.R.; *Huljich* v. *Hall*, [1973] 2 N.Z.L.R. 279, at p. 286.

B, but B resists, then B has, at that juncture, no cause of action. If A carries out his threat, then B clearly has some remedies[210] but not the tort of intimidation as a cause of action. Only when B submits, to his (or another's) detriment, to the coercion of A, can an action be founded.

(4) *The Nature of the Intimidation.*

The tort of intimidation is most frequently relied upon in situations where A threatens B with unlawful conduct (that is unlawful in relation to B) so that B acts in a manner that causes C injury. It must be borne in mind that B's conduct relative to C need not be unlawful. A third party intimidation occurred in *Rookes* v. *Barnard,* and consequently it is to this type of case that the principles of that decision are most directly applicable.

There exists very little authority that deals with the situation where A threatens B with an illegal act and thereby causes B to act to his detriment. Nevertheless, the two-party form of the tort of intimidation clearly exists. Lord Devlin in *Rookes* v. *Barnard* cited *Salmond on the Law of Torts* as authority for the existence of this form of the tort:[211]

> It cannot be doubted that it is an actionable wrong intentionally to compel a person, by means of a threat of an illegal act, to do some act whereby loss accrues to him: for example, an action will doubtless lie at the suit of a trader who has been compelled to discontinue his business by means of threats of personal injury made against him by the defendant with that intention.

This form of the tort probably includes threats of breach of contract, but such inclusion has been subject to some adverse comment.[212] The criticism is not unfounded. In a two-party situation when threatened with a breach of contract B has recourse to a variety of remedies, without having to rely on the tort of intimidation. For instance, B can sue for anticipatory breach, await the breach and then sue for damages,[213] can seek an injunction, can seek an order for specific performance in advance or at the time of the breach or can treat the contract as repudiated. In light of B's relatively

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[210] For example, A may be able to base his action on the torts of battery, inducing breach of contract, or defamation, depending on the circumstances. A may also attempt to seek an injunction after having received the threat, but prior to execution.

[211] *Rookes* v. *Barnard, supra,* footnote 2, at p. 1205; Salmond on Torts (13th ed., 1960), p. 697. Had the action in the *Potash* case, *supra,* footnote 206, succeeded it would have been an illustration of a two-party intimidation.

[212] See Hamson, *op. cit.*, footnote 171; Hoffman, *Rookes* v. *Barnard* (1965), 81 L.Q.Rev. 116, and the comments of Martland J. in the *Potash* case, *supra,* footnote 206, at p. 640.

[213] This alternative is of course subject to B's duty to mitigate his damages.

protected position there seems to be no compelling reason why the tort of intimidation should be made available to him. Outside threatened breach of contract, however, there is no basic distinction between the principles applicable to "two-party" intimidation, and the more common form of the tort. Some note should be given, however, to the cryptic gloss by Lord Reid in *Stratford* v. *Lindley*:[214]

> *Rookes* v. *Barnard* was a case in which the defendants caused loss to the plaintiffs by using unlawful means to induce a third party to inflict that loss on him. A case where the defendant presents to the plaintiff the alternative of doing what the defendant wants him to do or suffering loss which the defendant can cause him to incur is not necessarily in pari casu and may involve questions which cannot arise where there is intimidation of a third person.

To what questions does Lord Reid refer? What restrictions or distinctions did he perceive in the different forms of the tort? Perhaps Lord Reid ought to have elaborated upon the qualifications or reservations hinted at because his dictum has not yet received judicial notice or clarification.

One issue remains to be discussed—that of justification. Though the rules pertaining to the defence of justification tend to be haphazard, one fairly consistent judicial approach is apparent: the defence of justification will not normally be made available to a defendant who has made use of illegal means to achieve his object. This general approach flows from the proposition that since the tort of intimidation hinges upon the existence of unlawful conduct by the defendant, the defence of justification should not be a relevant consideration. Nevertheless, in *Rookes* v. *Barnard* Lord Devlin hints that the defence may exist.[215] Since the *Rookes* decision, there have arisen other suggestions that the defence may occupy some position within the tort of intimidation.[216] Most of the comments have, however, been speculative and it remains to be seen if the defence will lie in some concrete fashion. The view of excluding justification as a defence when unlawful means have been used is only superficially compelling. In fact this approach would impose an arbitrary restriction upon the defence. The illustrations given by Lord Denning[217] of instances wherein the defence might serve some useful function are well considered, and do not give rise to any unreasonable risk of conflict of legal interests.

The law that governs the tort of intimidation, as it exists in Canada, follows very closely the guidelines that have been

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[214] *Supra*, footnote 8, at p. 325.

[215] *Supra*, footnote 2, at p. 1206.

[216] See *Morgan* v. *Fry*, *supra*, footnote 197, at p. 729, per Lord Denning M.R.; *Cory Lighterage Ltd.* v. *T.G.W.U.*, [1973] I.C.R. 339, at p. 357, per Lord Denning M.R.

[217] *Ibid.*

established by the English courts. As the concepts relevant to the tort appear to be somewhat more finite than those applicable to other economic torts, there seems to be less divergence in the decisions of these respective jurisdictions. But as late as 1970 in this country there was some question as to the existence of the tort at all. However, since that date the case law reveals that intimidation forms a solid part of Canadian tort law.[218] A few examples will serve to illustrate this.

In *Canadian Ironworkers Union No. 1.* v. *International Association of Bridge, Structural and Ornamental Ironworkers Union, Local No. 97 et al.*,[219] the defendant union, in a jurisdictional dispute, employed unlawful acts (work stoppages illegal under the Labour Relations Act[220]) and persuaded contractors and subcontractors not to let out contracts or entertain bids from the plaintiff union, which was effectively put out of business. The facts reveal a classic example of three-party intimidation: the defendant threatened the intermediary party with unlawful conduct that resulted in loss to the plaintiff. In addition, if the plaintiff was unable to rely upon the tort of intimidation, he had no right of action because the intermediary party's conduct relative to himself was entirely lawful. Bull J.A. appraised the facts as follows:[221]

> An illegal strike was in existence, intimidatory threatening demands were made at the meeting to the representatives of the contractors and subcontractors actually involved in the strike. Without compliance with those demands that strike would have continued. The general agreement . . . was impelled and enforced upon the contractors by the illegal threat to continue an illegal strike. . . . A subcontractor's clause valid in itself was agreed upon by the unlawful means of threats and improper persuasions which themselves were based on an unlawful situation.

Nemetz J.A., as well, though he dissented on the facts, acknowledged the existence of the tort.[222] The Supreme Court of Canada[223] when considering the case on appeal failed to deal with the intimidation aspect other than tangentially. The appeal was dismis-

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[218] See, for example, *Gershman* v. *Manitoba Vegetable Producers' Marketing Board*, *supra*, footnote 161; *Mintuck* v. *Valley River Band No. 63A et al.*, *supra*, footnote 123; *Canadian Ironworkers Union No. 1* v. *International Association of Bridge, Structural and Ornamental Ironworkers Union, Local No. 97 et al.* (1970), 73 W.W.R. 172, aff'd. [1972] S.C.R 295; *Canadian Pacific Railway Company et al.* v. *Building Material Construction and Fuel Truck Drivers Union, Local 213*, [1971] 5 W.W.R. 1 (B.C.S.C.).

[219] *Ibid.*

[220] R.S.B.C., 1960, c. 205.

[221] *Supra*, footnote 218, at pp. 192-193.

[222] *Ibid.*, at p. 200 where he remarks: "Assuming the torts of intimidation and inducing breach of contract (both torts now recognized in Canada) were committed."

[223] *Supra*, footnote 218.

sed and their willingness to accede to the lower court judgments must be taken as implicit approval of them by the members of the Supreme Court of Canada.

In the case of *Mintuck* v. *Valley River Band No. 63A*,[224] the plaintiff entered into a lease with the federal Crown for lands situated on an Indian reserve. After signing the lease the plaintiff began to encounter some difficulty. Several members of the band interfered with his farming operations and engaged in harassment of the plaintiff and his family. The harassment proved to be so severe as to force the plaintiff to cease farming the land. This serves as a study of two-party intimidation: the plaintiff being forced to submit to the unlawful threats of the defendant. Under the facts of this case, the plaintiff could well have had recourse to alternative causes of action,[225] and did in fact at the trial court level base his action primarily on the tort of interference with contractual relations.[226] On appeal and cross appeal, considerably more emphasis was placed on the intimidation issue.[227] Matas J.A. relied for the most part on the decision of the New Zealand Court of Appeal in *Huljich* v. *Hall*[228] in outlining his views of the scope and form of the tort and to summarize the relevant extant law on the tort:[229]

> The action for intimidation has had recent confirmation in the judgment of the House of Lords in *Rookes* v. *Barnard*, [1964] A.C. 1129, [1964] 1 All E.R. 367. *Rookes* v. *Barnard*, as is well known, was an example of the use of unlawful threats made to the plaintiff to interfere with the liberty of action of a third person with resulting damage to the plaintiff. But there can be intimidation by threats to interfere with the liberty of action of the plaintiff himself. As Salmond said (*Salmond on Torts* (14th ed.) 528) "Although there seems to be little authority on the point, it cannot be doubted that it is an actionable wrong intentionally to compel a person, by means of a threat of an illegal act, to do some act whereby loss accrues to him." But essential to the definition of this tort is the intention on the part of one person to compel another to take a particular course of action. "Threat" in this connection means "an intimation by one to another that unless the latter does or does not do something the former will do something which the latter does not like"; *Hodges* v. *Webb*, [1920] 2 Ch. 70, 89, per Peterson J. Two recent cases emphasise this requirement of an intention to compel a particular course of action: *J.T. Stratford & Son Ltd.* v. *Lindley*, [1965] A.C. 269, [1964] 2 All

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[224] *Supra*, footnote 123.

[225] The band, or members of it, may have committed the torts of assault, trespass to property, and nuisance.

[226] [1976] 4 W.W.R. 543.

[227] Of the three judges dealing with the appeal, only Guy J.A. dealt with it within the same framework used at the trial court level.

[228] *Supra*, footnote 209. Reference was made as well to Clerk & Lindsell, *op. cit.*, footnote 11, and to *Gershman* v. *Manitoba Vegetable Producers' Marketing Board*, *supra*, footnote 161.

[229] *Supra*, footnote 218, at p. 600. See also the concurring comments of O'Sullivan J.A., at pp. 605-606.

> E.R. 209, reversed [1965] A.C. 307, [1969] 3 All E.R. 102 (in the judgments of the members of the Court of Appeal), and more recently in *Morgan* v. *Fry*, [1968] 2 Q.B. 710, [1968] 3 All E.R. 452, where Lord Denning said:
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> "According to the decision in *Rookes* v. *Barnard* the tort of intimidation exists, not only in threats of violence, but also in threats to commit a tort or breach of contract. The essential ingredients are these; there must be a threat by one person to use unlawful means (such as violence or a tort or a breach of contract) so as to compel another to obey his wishes; and the person so threatened must comply with the demand rather than risk the threat being carried into execution. In such circumstances, the person damnified by the compliance can sue for intimidation" (*ibid.*, 724; 455).

Since the authorities cited are without exception English, and as they are cited with approval, Canadian law must of necessity be taken to mirror the English position.

But having generalized to this degree a qualification must be mentioned. This is contained in *Canadian Pacific Railway Company et al.* v. *Building Material Construction and Fuel Truck Drivers Union, Local 213*.[230] There the defendant union attempted to enforce certain collective agreements by the threat of strike action. As a result of this attempt, the corporate plaintiff suffered damage and later sought a declaration that these clauses were illegal and void for a variety of reasons. The plaintiff sought to base its action on the torts of interference with economic relations, conspiracy, and (apparently) intimidation. It is the trial court judge's remarks that add a novel element. Verchere J. considered:[231]

> Intimidation is said by the Oxford English Dictionary to be, in the modern meaning, the use of threats or violence to force to or restrain from some action, and it must accordingly be ruled out at once. I agree that the evidence did not go nearly as far as to show violence or threats of it. . . . Coercion is however a different thing. It bespeaks restraint or compulsion but not necessarily, of course, by the use of threats or violence. It was said by Lord Lindley in *Quinn* v. *Leathem*, [1901] A.C. 495, at 540, that "coercion by threats, open or disguised, not only of bodily harm but of serious annoyance and damage, is *prima facie*, at all events, a wrong inflicted on the person coerced". Accordingly in my view of the evidence, I am of the opinion that the ever present threat of a work stoppage . . . could and did constitute coercion. . . .

Verchere J. apparently perceives some distinction between intimidation and coercion. There exists no relevant post-*Rookes* v. *Barnard* decision that is authority for such a view.[232] What is disturbing is not

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[230] *Supra*, footnote 218.

[231] *Ibid.*, at pp. 45-46.

[232] There does exist a distinction between a threat and a warning. Though the distinction necessitates some difficulty in application, it is well founded on authority. See *Stratford* v. *Lindley, supra*, footnote 8, per Pearson L.J., at p. 292 and per Lord Denning M.R., at p. 283. See also *Allen* v. *Flood, supra*, footnote 61, per Herschell L.J., at p. 129; *Conway* v. *Wade*, [1909] A.C. 506, per Loreburn L.J., at p. 510 and per James L.J., at p. 514; *Pratt* v. *British Medical Association*, [1919] 1 K.B. 114, per McCardie J., at p. 261.

so much the learned judge's attempt to arbitrarily draw such a distinction, but rather his view that the term "intimidation" is of such limited scope. It is his narrow perception of the word "intimidation", declining to give it any meaning beyond that of "a threat or violence" that is difficult to justify. In failing to give "intimidation" its established, broader meaning, Verchere J. appears to have ignored a significant body of case law. Perhaps his narrow view of intimidation is confined to cases involving the application of section 3(2) of the Trade Unions Act. This provision was crucial to that case, but is in no way relevant to the broader framework of the tort of intimidation. Even this line of reasoning, however, does little to reduce the significance of Verchere J.'s *obiter* comments. But the force of the distinction drawn by the learned judge is perhaps reflected in the fact that it has not been applied in any subsequent case.

The *Canadian Pacific* case is also significant because of Verchere J.'s recognition of the defence of justification.[233] This defence was, however, as it normally is, rejected on the facts.

IV. *Causing Harm by Unlawful Means: An Emergent Tort?*

In the past, commentators have frequently attempted to construct some general formulation that would encompass the various economic torts. But we have seen that each of the individual torts we have dealt with, inducement of breach of contract, interference with contract short of breach, and intimidation, has unique ingredients. Each unquestionably has certain elements that it shares with no other. The real question is whether there exists some common denominator that might serve to unify these individual torts. Is there some vein common to all of them? There are at least two viable formulations that would encompass the general area of intentionally caused economic loss, one being intentionally caused loss by unlawful means, the other intentionally caused loss without justification.

(1) *Intentionally Causing Loss by Unlawful Means.*

Each of the torts we have considered can be viewed as an illustration of liability being imposed on the basis of causing harm by unlawful means and it is suggested that they are but instances of the application of the wider principle.[234] To be liable, a defendant must

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[233] *Supra,* footnote 218, at p. 50.

[234] Compare this view with the comments of Hughes, *op. cit.,* footnote 11, at p. 198, where it is stated that "for practical purposes the wider principle of deliberate interference with business by unlawful means represents no more than a rationalization of the specific cases and cannot be taken as a basis for the creation of further

interfere with a contractual relationship, or with an expectancy, by unlawful means. Such interferences can take place within the framework of two different fact patterns: (i) Where A acts against B with the intention of causing him harm and uses unlawful means in this endeavour.[235] (ii) Where A acts against C with the intention of causing harm to B and uses unlawful means in the attempt.[236]

It becomes evident from these formulations that there are three essential elements to the tort of causing harm by unlawful means: (a) an intent by the defendant to harm the plaintiff, (b) subsequent injury or economic loss, (c) the presence of unlawful means in the defendant's conduct.[237]

The intent and causation issues remain unchanged in scope or essence from the discussion undertaken earlier for the individual nominate torts. The key to understanding this "new tort of uncertain ambit",[238] lies in defining the third element—the use of "unlawful means".

"With minor exceptions, concerning breaches of contract, the scope for the application of the 'unlawful' criterion is equal under each head of liability whether it be conspiracy by unlawful means, intimidation, or 'unlawful interference' on the part of the individual."[239] It follows then that fraud,[240] actual violence, and any other tortious behaviour will be deemed conduct from which liability can be imposed. It would also appear that a breach of statute will often satisfy the unlawful means requirement.[241] For the most part, however, the determination of what constitutes unlawful means has been made on an *ad hoc* basis. Consequently an exhaustive definition

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heads of liability". Stevens, on the other hand, considers "if interference short of breach is not sufficient to render the defendant liable in tort, such interference will certainly found liability where unlawful or illegal means are employed by the defendant". *Op. cit.*, footnote 20, at pp. 619-620.

[235] See, for example, the cases of *Chapman* v. *Honig*, [1963] 2 All E.R. 514, 2 Q.B. 502; *Acrow* v. *Rex Chainbelt Inc.*, [1971] 3 All E.R. 1175.

[236] See *Daily Mirror Newspapers Ltd.* v. *Gardner, supra,* footnote 8.

[237] Stevens, *op. cit.*, footnote 20, at p. 620 suggests that "the absence of justification for the conduct of the defendant" forms a fourth important element to the tort. It has been noted, however, that the issue of justification for unlawful acts is still a controversial one.

[238] Clerk & Lindsell, *op. cit.*, footnote 11, p. 425.

[239] Mitchell, Liability in Tort for Causing Economic Loss, *etc.* (1975), 5 Adel. L.Rev. 428, at p. 442.

[240] *National Phonograph Co. Ltd.* v. *Edison, Bell Consolidated Phonograph Co. Ltd., supra,* footnote 6.

[241] *Hargraves* v. *Bretheron,* [1958] 1 Q.B. 45; *O'Connor* v. *Isaacs,* [1956] 2 Q.B. 288.

of the term "unlawful" has not been judicially undertaken,[242] but it presumably includes conduct that can be described as criminal, tortious, in breach of contract or in breach of statute.

But does a tort that can be called "deliberately inflicting economic harm by unlawful means" exist at all? There is some English and Canadian authority that seems to support such a view.

The case of *Rookes* v. *Barnard* is known primarily as a decision which provides authority for the existence of the tort of intimidation. But it is also thought to implicitly support the proposition that there exists a more encompassing tort based on the use of "unlawful means".[243] An Australian commentator has made persuasive argument for this view.[244] It was, however, an extrapolation from the fact patterns of various historically significant decisions; and was not based on any explicit judicial statement of support. Such judicial support is found, though, in post-*Rookes* v. *Barnard* determinations and prudence demands that the case for the existence of the tort rests heavily on these later decisions.[245]

The first acknowledgement of the new tort was in *Stratford* v. *Lindley*.[246] There the plaintiffs were owners of two companies, while the defendants were members and officials of the Waterman's Union. The defendants had over an extended period of time attempted to secure certain rights for their members working in the employ of the plaintiffs. Eventually, however, the plaintiffs recognized not the Waterman's Union, but rather a rival union—the Transport and General Workers' Union. Following this rejection the defendants placed an embargo upon the activities of the plaintiff companies. As a result of the embargo the plaintiffs' business was brought to a standstill, and an injunction was ultimately sought. The plaintiff's action was founded on the torts of inducing a breach of contract, and intimidation. Both Lord Reid and Viscount Radcliffe

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[242] An examination of the major texts of torts provides a catalogue of individual decisions dealing with the unlawful means issue. See, for example, Heydon, *op. cit.*, footnote 93, at p. 172-177.

[243] See Weir, Chaos or Cosmos? *Rookes, Stratford* and the Economic Torts, [1964] Camb. L.J. 225, at p. 226; Hoffman, *op. cit.*, footnote 212, at p. 140; Mitchell, *op. cit.*, footnote 239.

[244] Mitchell, *op. cit., ibid.*, at pp. 432-436.

[245] For a discussion of any pre-*Rookes* authority that supports the emergence of the "unlawful means" tort see Mitchell, *op. cit., ibid.* A very early illustration is revealed in dicta by Sim J. in *Fairburn Wright & Co.* v. *Levin & Co.* (1914), 34 N.Z.L.R. 1 (C.A.), at p. 29, where he held: "[I]n the war of competition between rival traders use must not be made of unlawful weapons, and that if, for the purpose of advancing his own interests, a trader uses against a rival weapons that are unlawful and thereby causes him injury, the latter has a good cause of action for damages."

[246] *Supra*, footnote 8.

suggested, however, that an alternative basis upon which to found liability was the use of "unlawful means" by the defendants. Lord Reid opined that: "In addition to interfering with existing contracts, the respondents' action made it practically impossible for the appellants to do any new business with barge hirers. It was not disputed that such interference with business is tortious if unlawful means are used."[247] The unlawful means referred to in this context consisted of the tortious inducement of breach of contract.

The views expressed by Viscount Radcliffe and Lord Reid were applied and reinforced by the Court of Appeal in the decision of *Torquay Hotel Co. Ltd.* v. *Cousins*.[248] The facts of that case have already been dealt with in considerable detail.[249] Once again it was Lord Denning who was willing to undertake a substantial expansion of the economic torts. He stated that:[250]

> I must say a word about unlawful means, because that brings in another principle. I have always understood that if one person deliberately interferes with the trade or business of another, and does so by unlawful means, then he is acting unlawfully, even though he does not procure or induce any actual breach of contract. If the means are unlawful, that is enough.

Lord Denning then went on[251] to cite authority which has apparently utilized the "unlawful means" principle in various fact situations. Among the decisions relied upon were *Rookes* v. *Barnard*,[252] *J.T. Stratford* v. *Lindley*,[253] and *Daily Mirror Newspapers* v. *Gardner*.[254] Lord Denning's dictum effectively highlighted several key features of the tort:

(i) He suggested that a tort based on unlawful means is a distinct cause of action. Lord Denning clearly felt that the principles espoused within this tort are unique to itself—that the tort provides an independent cause of action.

(ii) Lord Denning apparently adopted this somewhat novel tort without reservation stating that it exemplified the law as he has "always understood it". In his eyes then, the principles of law contained in this segment of his judgment do not purport to proffer a

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[247] *Ibid.*, at p. 324; for similar comments by Viscount Radcliffe see at pp. 328 and 330.

[248] *Supra*, footnote 1.

[249] See the earlier part of this article that deals exclusively with the *Torquay* decision and its ramifications.

[250] *Supra*, footnote 1, at p. 139. See also his dicta in *Island Records Ltd. et al.* v. *Corckingdale*, [1978] Fleet Street Rep. 505, at pp. 514-515.

[251] *Ibid.*

[252] *Supra*, footnote 2.

[253] *Supra*, footnote 8.

[254] *Supra*, footnote 8.

novel cause of action, do not constitute an expansion, but rather are aimed at achieving consistency with an explication of precedent.

(iii) Lord Denning expressly pointed out that unlike the tort of inducing a breach of contract, for example, there is no need to prove an actual breach under the new tort. As long as the court is able to find an intent to injure, some damage, and the use of unlawful means, that is enough.

The "unlawful means" principle was applied by the English Court of Appeal in *Acrow Ltd.* v. *Rex Chainbelt Inc.*[255] In this case the plaintiff manufactured a product under licence for S.I. Handling Systems Inc.—an American firm. An implied term of the agreement was that Rex (another American company) was to supply Acrow with chain necessary for the manufacturing process. Following a dispute between Acrow and Systems, Systems attempted to unlawfully revoke the licence. Acrow later obtained an injunction restraining Systems from any such interference. Systems then directed Rex to cease supplying Acrow with the necessary chain, and Rex complied. Acrow subsequently sought and was granted, by the Court of Appeal, an injunction requiring Rex to use "all reasonable endeavours to supply chain".

In essence the decision reiterated the proposition that interfering with the trade of another by unlawful means is unlawful. The decision also succeeds, however, in illustrating some rather novel points:

(i) The case suggested that contempt of court, as well as aiding and abetting such contempt is unlawful for the purposes of this tort.[256]

(ii) The court acknowledged that for the purposes of this tort, an omission to act would constitute an interference. In this instance, the omission was Rex's failure to provide Acrow with the promised chain.[257]

(iii) The plaintiffs themselves apparently recognized that the use of "unlawful means" constituted a tort.[258] The *Acrow* decision may well be the first case that recognized the tort other than tangentially. In this case the tort formed the primary cause of action

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[255] *Supra,* footnote 235.

[256] See Wedderburn, Interference with Business (1972), 35 Mod. L.Rev. 184; Stevens, *op. cit.*, footnote 20, at p. 622. This suggestion runs contrary to the discussion in *Chapman* v. *Honig, supra,* footnote 235, which held that contempt of court does not constitute unlawful means for the purposes of the tort. The *Acrow* decision makes no mention of the earlier case.

[257] *Supra,* footnote 235, per Denning M.R., at p. 1181.

[258] *Ibid.,* at p. 1180.

and was not merely noted as an alternative in the judgments of the court. The language of the plaintiffs and that of the court, and the authorities cited and relied on all serve to signify that the tort forms a recognized part of England's law.[259]

But what is the position of the tort in the courts of Canada? It is suggested that Canadian judges have embraced the "unlawful means" doctrine with a vigour equal to that of their English counterparts. A few illustrations will serve to support this contention.

In the case of *Gershman* v. *Manitoba Vegetable Producers' Marketing Board,*[260] the defendant provincial marketing board, in a blatant abuse of power, attempted to drive the plaintiff out of business. The tactics used consisted of threats that ultimately constituted two-party and three-party intimidation situations. Thus, without question, the gist of the case is the intimidation issue. Nevertheless, O'Sullivan J.A. had some pertinent remarks to make about the "unlawful means" tort. These remarks found expression by relying on the following quote from *Clerk & Lindsell on Tort*: "There [also] exists a tort . . . which consists in a person using unlawful means with the object and effect of causing damage to another. In such cases, the plaintiff is availed of a cause of action which is different from those so far discussed."[261]

O'Sullivan J.A. then went on to reiterate, with approval, the earlier comments of Lord Reid and Viscount Radcliffe in the *Stratford* decision. If one reads still further portions of O'Sullivan J.A.'s judgment, it is clear that the learned judge recognises the existence of the "unlawful means" test, agrees that this tort provides a separate and distinct cause of action, and is willing to adopt this doctrine as representing the law of Canada. In *Mintuck* v. *Valley River Band No. 63A,*[262] whose facts have already been reviewed, Matas J.A. cited the same portion of *Clerk & Lindsell* referred to in the *Gershman* case.[263]

In the Supreme Court of Canada decision, *Roman Corp. Ltd. et al.* v. *Hudson's Bay Oil and Gas Co. Ltd.,*[264] the plaintiffs had

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[259] Mitchell, *op. cit.*, footnote 239, makes a pointed criticism of one aspect of the decision. He questions how Rex was acting unlawfully when it did "something it had a perfect right to do, namely, to cease a non-contractual business relationship with another company". The author points out that the reasoning of the court, to some extent, conflicts with the principle "that a bad motive cannot make a lawful act unlawful": *Allen* v. *Flood, supra,* footnote 61.

[260] *Supra,* footnote 161.

[261] *Ibid.*, at p. 413.

[262] *Supra,* footnote 123.

[263] *Ibid.*, at p. 601.

[264] *Supra,* footnote 202.

agreed to sell a substantial portion of the shares in a uranium mine to a company controlled by non-Canadian shareholders. Upon hearing of this agreement, a defendant—the Minister of Energy, Mines and Resources—made statements in the House of Commons that foreshadowed the Government intention to prohibit the sale. Due to those statements, the transaction was never completed, and the plaintiffs sought an action in damages. In one portion of his judgment, Martland J., speaking for the court said: "The appellants seek a declaration that the respondents committed a tort of unlawful interference with the appellant's economic interest."[265] From this portion of the judgment alone, it is difficult to discern whether the learned judge was referring to the *Torquay Hotel* principle—of interference with contract short of breach—or to the "unlawful means" tort. If the statement is taken in the context of the judgment and of the facts, it is suggested that Martland J. was referring to the latter. The fact that the sought-after declaration was refused is not significant. What is of importance is Martland J.'s recognition of the tort's existence.

The Supreme Court of Canada had earlier recognised this tort in *International Brotherhood of Teamsters, Etc. Local 21* v. *Therien*[266] where it was considered by Locke J.:[267]

> [Even] though the dominating motive in a certain course of action may be the furtherance of your own business or your own interest, you are not entitled to interfere with another man's method of gaining his living by illegal means.

Individually, these judgments might well be regarded as mere isolated instances of nominate torts being applied in a somewhat unorthodox fashion. When viewed in unison, however, it seems that they represent a wider principle—a principle whose crux is the deliberate infliction of economic harm through unlawful means.

But what is the social utility of such a general tort? Does its emergence give rise to substantial operational difficulties? If there are relative advantages and disadvantages to the tort, which appears to predominate?

The obvious advantage of the "unlawful means" tort is its capacity for bringing a variety of discrete causes of action under one head. Such uniformity, if efficiently undertaken, would facilitate "brevity, logic and elegance".[268] The separate nominate torts of intimidation, conspiracy by unlawful means, indirect inducement of breach of contract, and indirect interference with contract[269] all

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[265] *Ibid.*, at p. 421.

[266] (1960), 22 D.L.R. (2d) 1. [267] *Ibid.*, at p. 13.

[268] Clerk & Lindsell, *op. cit.*, footnote 11, p. 427.

[269] One must bear in mind that direct inducement of breach of contract and direct interference with contract are unlawful *per se*—they do not necessitate the existence

focus on the presence or use of unlawful means by the defendant. Consciously or not, the courts have seized upon this feature and used it as a foundation upon which to shift their emphasis from the distinct nominate torts to the broader principles of the "unlawful means" tort. Such a shift would not require much movement away from the trends set under the earlier torts. The courts' willingness to impose liability for omissions as well as for acts and for economic loss with breach as well as without breach is an advantage as is the fact that the tort removes the necessity of proving a conspiracy or combination.[270] It would seem that the courts have embarked on a rationalizing process designed to remove some of the problems that tended to reduce the efficiency of the nominate torts. But there are also peculiar problems inherent in this "unlawful means" tort. As the gist of the tort is the use of unlawful means, it is natural that difficulties tend to focus around this concept.

The new tort shares a fault common to the individual nominate torts in that it is parasitic[271] on illegalities whose functions were originally unrelated to matters of trade regulation.[272] Also, there are many inconsistencies amongst the illegalities themselves. Conduct not actionable in itself may be viewed as "unlawful" for the purposes of the tort. Furthermore, the type of conduct that constitutes "unlawful means" for the nominate torts is not entirely consistent. An act deemed as unlawful for the tort of intimidation may, for example, be considered as harmless conduct in a conspiracy action.[273] Even if the existing inconsistencies were resolved, new uncertainties would arise with the growth of additional forms of unlawful conduct.[274]

Finally, as with all the intentional economic torts, the "unlawful means" tort has not properly taken into consideration the concept of justification. The tort has considerably expanded the range of

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of unlawful means. See *Thomson* v. *Deakin, supra,* footnote 8; *Torquay Hotel Co. Ltd.* v. *Cousins, supra,* footnote 1. For a discussion of the tort of civil conspiracy, not dealt with in this article, see Clerk & Lindsell, *op. cit.,* footnote 11, pp. 430-439.

[270] See Heydon, Economic Torts (1978), pp. 123-124.

[271] Stevens, *op. cit.,* footnote 20, p. 623.

[272] Heydon, *op. cit.,* footnote 270, pp. 67-70, 123-124.

[273] For example, the tort depends "on what standards contracting parties have stipulated for each other, or on torts which protect bodily safety, freedom of movement, regulation, or the integrity or enjoyment of property, or on general procedural rules like those of natural justice, or on statutes dealing with some other subject matter, or the *ultra vires* doctrine in its application to public officials, or on the duties attached to the common calling". Heydon, The Future of Economic Torts (1975), 12 U.W.A.L. Rev. 1, at p. 10.

[274] *Ibid.* The writer gives several examples of such inconsistencies. Stevens, *op. cit.,* footnote 20, p. 623, points out that not all wrongs amount to unlawful means for the purposes of this tort.

liability that one can incur, without a concurrent expansion of available defences. This may develop in the future, but judicial direction is currently lacking.

It would appear that the first two of these deficiencies stem from the haphazard manner in which the new tort has developed. Inducing a breach of contract follows the rules developed from *Lumley* v. *Gye* and *Thomson* v. *Deakin* and interference short of breach of contract follows the explicit guidelines of the *Torquay Hotel Co. Ltd.* v. *Cousins* decision, whereas actions based on the tort of intimidation parallel the directions established in *Rookes* v. *Barnard*. But the tort of interference by unlawful means has no similar authoritative indicia to follow. It has emerged through extrapolation from a dozen precedents and stands as a mélange of economic tort principles. Assuming the tort to exist at all, what is desirable is a high judicial determination of its limits and functions that would establish its operational range.

(2) *The Prima Facie Tort Doctrine.*

The second formulation that might encompass the general area of economic torts focuses on the defendant causing harm to the plaintiff intentionally and without justification. The antecedents of such an action are well-established. In *Keeble* v. *Hickeringill* (1706),[275] it was stated by Holt C.J., that: "He that hinders another in his trade or livelihood is liable to an action for so hindering him." This decision is regarded by many as having set the groundwork in the United States for a tort based on the intentional violation of another's economic interests known as the *prima facie* tort doctrine. In 1889 Lord Bowen laid down the dictum that is now regarded as the classic statement of the *prima facie* tort doctrine: "Now intentionally to do that which is calculated in the ordinary course of events to do damage, and which does in fact damage another in that person's property or trade, is actionable if done without cause or excuse."[276]

The doctrine received further recognition in the famous case of *Tuttle* v. *Buck*,[277] where a well-to-do banker was found liable for attempting to maliciously drive the plaintiff barber out of business. The seal of acceptance of the doctrine by American courts was set by

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[275] 11 East 574 n. Prosser describes the doctrine as one "whereby proof of the interference and resulting damage establishes what the New York courts have called a *'prima facie'* tort, casting upon the defendant the burden of avoiding liability by showing that his conduct was privileged". Law of Torts (3rd ed., 1964), p. 978.

[276] *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (1889), 23 Q.B.D. 598, at p. 613, aff'd. [1892] A.C. 25.

[277] (1909), 107 Minn. 145. The Supreme Court of Minnesota in arriving at this decision made extensive use of the *Keeble* v. *Hickeringill* case.

Oliver Wendell Holmes[278] who suggested that, ". . . *prima facie*, the intentional infliction of temporal damage is a cause of action, which as a matter of substantive law . . . requires justification if the defendant is to escape".[279]

Ironically, English and Canadian courts have not followed this evolutionary process. Indeed, in the case of *Allen* v. *Flood*,[280] the possible growth or emergence of any similar doctrine was effectively stifled. That decision, it will be recalled, held that the commission of an act which is in itself lawful, will not be made unlawful because of any intent to injure, or malice on the part of the defendant, without something more. Lord Watson, for example, considered:[281]

> The existence of a bad motive, in the case of an act which is not in itself unlawful, will not convert that act into a civil wrong for which reparation is due. A wrongful act, done knowingly and with a view to its injurious circumstances, may . . . be malicious, but such malice derives its essential character from the circumstances that the act done constitutes a violation of the law.

It is unfortunate that the House of Lords rejected the doctrine so perfunctorily. It has the potential for providing a broad tort principle that could accommodate a variety of situations that legitimately call for legal support and yet do not fit into any of the recognised economic torts. But what are the limits of the doctrine? In the light of the American practice there are basically three elements of the doctrine, the same three that recur so consistently amongst the English and Canadian nominate economic torts: intent; harm; lack of privilege.

(i) *Intent.*

To incur liability, the plaintiff must clearly intend to do the act

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[278] See Holmes, Privilege, Malice, and Intent (1894), 8 Harv. L. Rev. 1.

[279] *Aikens* v. *Wisconsin* (1904), 195 U.S. 194, at p. 204. For similar remarks see: *Moran* v. *Dunphy* (1901), 177 Mass. 485, 59 N.E. 125; *Plant* v. *Woods* (1900), 176 Mass. 492, at p. 504, 57 N.E. 1911.

[280] *Supra*, footnote 61. There have been instances of judicial statements that closely proximate the *prima facie* tort doctrine. In a recent decision of the Manitoba Queen's Bench, Soloman J., in a loosely-worded judgment, held: ". . .a violation of a legal right committed knowingly is a cause of action, and it is a violation of a legal right to interfere with contractual relations recognized by law if there is no justification for such interference." *Gershman* v. *Manitoba Vegetable Producers' Marketing Board*, [1976] 2 W.W.R. 432, at p. 441.

In this case reliance was placed on *Temperton* v. *Russell, supra*, footnote 7, without reference to the restrictions placed on that case by the House of Lords in *Allen* v. *Flood, supra*, footnote 61, and *Sorrell* v. *Smith, supra*, footnote 177. In any event, in this case, there was a breach of an existing contract and liability was held per *Lumley* v. *Gye*, so the above statement can be treated as *obiter* dictum.

[281] *Ibid.*, at p. 92; see also the comments of Lord Macnaghten, at pp. 151-152 and those of Lord Herschell, at p. 132.

complained of, though he need not intend to cause actual harm.[282] It follows, then, that "because reference to the results expected or achieved is obviated, no more than voluntary conscious action or non-action is needed".[283]

It goes without saying that while an intention to do injury is not a condition precedent to the invocation of the doctrine, its absence may in certain instances preclude the imposition of liability upon the defendant. Conversely, the existence of some positive malevolence on the part of the defendant may be determinative of his liability: that is to say, a man's motives frequently weigh heavily on the outcome of any action based on the doctrine,[284] particularly in respect of the defendant's ability to rely on the defence of privilege. It is suggested that the failure of English courts to adopt the doctrine is intimately related to the role of "malice" or motive in determining legal responsibility in the law of torts generally. The tendency of courts to balk when faced with these concepts is not surprising in light of the notorious difficulties inherent in their utilization. What is surprising, is the preference of those same courts to concentrate instead on the basic legality or illegality of the defendant's conduct—issues equally complex and fraught with hazard.[285]

(ii) *Damage.*

As the *prima facie* tort doctrine "is an outgrowth of the action on the case, its primary purpose is remedial and damage is a necessary element of the cause of action".[286] The *prima facie* tort doctrine, in its emphasis on the incurrence of some sort of harm, closely parallels in scope the English economic torts that were discussed earlier.

(iii) *Absence of Privilege.*

Under Mr. Justice Holmes' statement of the doctrine, one incurs liability if the intention causes harm or loss to another. Holmes goes

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[282] There is some controversy as to the accuracy of this proposition, but the better view appears to be as stated: The *Prima Facie* Tort Doctrine (1952), 52 Colum. L. Rev. 503, at pp. 505-508. See also Fridman, Protection of Business Relations by The Law of Torts, Studies in Canadian Business Law (1971), p. 469, at p. 499; and Forkosch, An Analysis of the *"Prima Facie"* Tort Cause of Action (1957), 42 Cornell L.Q. 465, at p. 476.

[283] The *Prima Facie* Tort Doctrine, *op. cit., ibid.*, at p. 505.

[284] See Ames, How Far an Act May Be a Tort Because of the Wrongful Motive of the Actor (1905), 18 Harv. L. Rev. 411.

[285] See Fridman, *op. cit.*, footnote 282, p. 500.

[286] The *Prima Facie* Tort Doctrine, *op. cit.*, footnote 282, at p. 508. In the same article numerous cases are cited wherein the "damage" requisite was emphasized.

on, however, to add an additional factor, a factor that limits the range of conduct deemed tortious. This factor is usually spoken of as "privilege" or "just cause" and is the American counterpart of the English concept of justification. Conceptually the two notions, that of privilege and justification, fulfill the same role. At this point all similarity ends. Because of the substantial importance that the privilege element plays in the *prima facie* tort doctrine, it has undergone considerable evolutionary development.

Everything depends on the quality and nature of the defendant's conduct. In the words of one author: "The nature of the act is a judicial characterization, and it is from this characterization that wrongfulness does or does not flow."[287] What criteria are used to make such a characterization? It has been suggested that privilege "will vary with the nature, degree, and proximity of the harm inflicted, and of the benefit sought, as well as the means employed".[288] There is no question that each case still turns on its own special facts, but there has been a conscious judicial attempt to establish some definitive legal framework.

It has been noted that: "The interest of the parties and that of society form the matrix out of which the decision is rendered".[289] It has also been suggested that privilege will be granted if "the invasion is in furtherance of a social interest of greater public import than is the social interest invaded".[290] Still another writer has suggested that "the law will weigh one policy against the other and apply that which is more conducive to the public weal".[291] As long as the courts are willing to be influenced by prevalent social mores, their decisions cannot help but be flexible. If some consistency is forsaken on a grand scale because of this "au courant" influence it is more than compensated for on a temporal scale, namely, consistency in the sense of consonance with successive social and economic developments.

Having painted an idyllic picture of the doctrine as it originated and as it still appears to exist in the minds of many academics,[292] it should be pointed out that the doctrine has recently been substan-

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[287] Forkosch, *op. cit.*, footnote 282, at p. 471.

[288] The *Prima Facie* Tort Doctrine, *op. cit.*, footnote 282, at p. 509.

[289] *Ibid.*

[290] Carpenter, Interference with Contract Relations (1928), 41 Harv. L. Rev. 728, at p. 745.

[291] Forkosch, *op. cit.*, footnote 282, at p. 472.

[292] For additional discussion of the *prima facie* tort doctrine, see Hale, *Prima Facie* Torts, Combination and Non-Feasance (1946), 46 Colum. L. Rev. 196; Prosser, *op. cit*, footnote 275, pp. 954 *et seq.*; Brown, The Rise and Threatened Demise of the *Prima Facie* Tort Principle (1959), 54 N.W.U.L. Rev. 563.

tially modified and that many of its key features and advantages have been considerably diluted.

The New York courts, in particular, have limited the doctrine as a general basis for imposing liability. For the doctrine to now be invoked it is necessary to show that the defendant has been directed by some personal malice. In addition, the pleading must allege that this malevolence was the only motivation for the act complained of.[293] The plaintiff must also establish that no other existing tort is available to the plaintiff, be able to plead and prove some special damage,[294] and be able to prove that the defence of privilege does not lie—thus effectively reversing the burden of proof.[295]

The cumulative effect of these changes has been to restrict the growth of the *prima facie* tort doctrine. However, such changes are of little import in the context of the present discussion. What is of immediate concern are the potential benefits available through the use of the doctrine in its conceptually perfect form.

The most obvious advantage of the *prima facie* tort doctrine lies in its ability to create novel causes of action when the plaintiff's claim does not ascribe to the limits of any recognised tort. The doctrine can also adapt and conform to the needs of an ever-changing business world—this being so particularly because of the doctrine's unreserved reliance on policy factors. It is suggested that any conceptual tool willing to openly acknowledge the relevant competing interests, both public and private, of ordinary business competition, is of potential benefit. The failure to explicitly acknowledge the role of social conventions and other policy considerations as significant decisional factors is a failing common to all the nominate torts discussed. Only by open reliance and acceptance of policy as an important factor in the decision-making process can one combat the criticism that judges "are ill-equipped to deal with sophisticated commercial disputes involving intricate economic agreements".[296]

The *prima facie* tort doctrine would also be of benefit in a number of concrete ways. It would permit the courts to provide protection to one whose contractual interests have been interfered

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[293] Apparently some other jurisdictions (*e.g.*, Massachusetts) are willing to distinguish between primary and secondary motivation; see *Reinforce Inc.* v. *Birney* (1954), 308 N.Y. 164, 124 N.E. 2d 104.

[294] The allegation of special damage "must state specifically and with particularity the item of loss claimed by the plaintiff". *Faulk* v. *Aware Inc.* (1956), 155 N.Y.S. 2d 726, at p. 732.

[295] For more detail on these changes see Forkosch, *op. cit.*, footnote 282; Brown, *op. cit.*, footnote 292; Heydon, *op. cit.*, footnote 270, pp. 94 *et seq.*

[296] Dawson, Is There or Should There Be a *Prima Facie* Tort in New Zealand? (1974), 2 Auckland U.L. Rev. 1, at p. 17.

with regardless of whether a breach resulted or not. It would also enable the courts to extend the range of liability beyond interference with existing contracts to interferences with potential or prospective business relations.[297]

Finally, the doctrine could place the entire matter of liability under the economic torts on a firmer theoretical basis. The intention of a defendant is a relevant consideration in a number of torts. An interference with one's physical integrity as well as with one's lands or chattels is actionable if such interference is intentional. It seems anomalous that interferences with one's economic interests should be based on an entirely different footing.

While the operational advantages of the doctrine are obvious, some difficulties are apparent as well. It has for instance been suggested that such a wide formulation might "open the floodgates", and the courts would be buried by unmeritorious claims. But, there are two reasons why such an outcome would be unlikely. First, the fact that costs tend to follow the cause would deter or prevent plaintiffs from suing rashly. Second, in the light of the recent American trends, the burden of "disproving the defence of justification raised by the defendant should be upon the plaintiff. The necessity of discharging the legal and evidential burden will . . . deter unmeritorious claims".[298]

Another objection, closely in line with the first, is that there exists the danger of requiring all who enter business relations to account for their motives. That is to say, it has been suggested that under such a generalized head of liability as the *prima facie* tort doctrine, many acts of ordinary business competition would be deemed unlawful. Once more there are rebuttals to this criticism. The first, that of "costs following the cause" has already been made. The second focuses on the wide scope of the defence of privilege under the doctrine. Clearly, if a defendant can easily justify his conduct and thus extricate himself from liability, the stifling results envisaged on business relations would be avoided.

It is suggested that the arguments in favour of adopting the *prima facie* tort doctrine outweigh those against such a course. But can such a view be given legal weight in the current state of the authorities? Do the decisions of *Lumley* v. *Gye* and *Allen* v. *Flood* present insurmountable obstacles of precedent? Do the courts, both English and Canadian, appear to be in favour of a shift from emphasis on the use of unlawful means to emphasis on the intention of the defendant?

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[297] See Fridman, *op. cit.*, footnote 282, pp. 504 *et seq.*, for a detailed discussion of interference with "projected contracts".

[298] Dawson, *op. cit.*, footnote 296, at p. 18.

Since it was the decision of *Allen* v. *Flood* that effectively stifled the emergence of any coherent *prima facie* tort doctrine, can the influence of this critical case be somehow circumvented? American courts have used two classic tools for restricting the significance of this decision. They have suggested that the relevant portions of the case constitute only *obiter* dicta and thus are not binding and that the points of law determined by the court are to be restricted to the specific facts of the decision.[299] *Allen* v. *Flood* holds too important a position in English and Canadian law to be dealt with and distinguished on such simplistic grounds. If one wishes to undermine the significance of *Allen* v. *Flood,* one must look elsewhere for more weighty objections to it.

These are found in the judgment of Viscount Radcliffe in *Stratford* v. *Lindley*[300] where he stated:[301]

> I cannot see it as a satisfactory state of law that the dividing line between what is lawful and what is unlawful should run along this contour.... In my opinion, the law should treat a resolution of this sort according to its substance, without the comparatively accidental issue whether breaches of contract are looked for and involved.

Viscount Radcliffe then went on to express dissatisfaction with the haphazard development of the nominate torts and implicitly suggested that what was needed was a more general "umbrella" tort. Can his dissatisfaction with the requisites to liability established in *Allen* v. *Flood* be viewed as approval of the *prima facie* tort doctrine? Clearly not. Criticism of one mode of judicial analysis is in no way approval of another.

Some writers[302] refer to the acknowledgment of the problems inherent in using the unlawful means requisite, by the court in *Rookes* v. *Barnard,*[303] as tacit approval of a movement away from *Allen* v. *Flood*. But such reasoning is not persuasive. No better opportunity could have presented itself for refuting the principle of *Allen* v. *Flood* than in the *Rookes* case. The difficulties in deciding that a threatened breach of contract was unlawful were manifest. The Court of Appeal had expressly and unanimously rejected such an extrapolation. The direction for the House of Lords was open. They, instead of endorsing a shift of emphasis to some concept other than unlawful means, chose to follow the path of *Allen* v. *Flood*. To suggest that they were hesitant in following this path is of little value

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[299] See *Aikens* v. *Wisconsin, supra,* footnote 279, particularly at p. 204.

[300] *Supra,* footnote 8.

[301] *Ibid.*, at pp. 329-330.

[302] See Hoffman, *op. cit.*, footnote 212; Dawson, *op. cit.*, footnote 296; Heydon, *op. cit.*, footnote 273.

[303] *Rookes* v. *Barnard, supra,* footnote 2, at p. 1169, per Lord Reid.

because the House of Lords delivered a judgment wholly consistent with *Allen* v. *Flood*, and there is no reason to suspect that our courts will not also continue to do so.

The reliance on "unlawful means" by the courts is also shown in the case of *Torquay Hotel Co. Ltd.* v. *Cousins*[304] where there appeared an opportunity for expansion within the economic torts. Lord Denning M.R. unhesitatingly undertook that expansion. He did so, however, by relying on all the classically significant decisions. His expansion was, in a sense, a conservative elaboration of extant principles—not a revision. Lord Denning does not in the least waiver from relying on the "unlawful means" principle. In fact, the presence of unlawful means plays an intrinsic role in the Denning formulation of actionable interferences short of breach.

In summary, the *Allen* v. *Flood* decision has clearly had a restrictive effect on subsequent development of the economic torts. But there appears no real suggestion in recent judicial pronouncements of a movement away from reliance on the principles of that judgment. So long as Canadian and English courts display a reluctance to move outside of the framework of *Allen* v. *Flood,* there will be no adoption of the *prima facie* tort doctrine.

One is left with the tort of wilfully inflicting economic loss by unlawful means as the vehicle of developing a general principle of liability in this area. Although still relatively inchoate the judicial winds are favourable and, given the same direction of our courts, this tort should shortly evolve in a comprehensive form.

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[304] *Supra,* footnote 1.