

Lumley v. Gye
**THE AFTERMATH: AN INDUCEMENT TO
JUDICIAL REFORM?**

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This area of tort is well-traversed and more than adequately described. In order to embark on yet another discussion of the cases one needs a reason. Mine is that by means of such a discussion I am hopeful of demonstrating that the approved processes of judicial law-making are unsatisfactory. I will not be concerned to show that individual cases were wrongly decided but rather that, by adhering to the principle that all a court can do is to interpret the existing state of the law as found in the words used by some previous court, the judiciary is bound to bring the judicial process into disrepute. Attempts to be true to the notion that judges must not decide cases on the basis of social policy criteria but must instead decide cases by applying existing formulae to particular fact situations leads courts to use a strange form of logic in order that acceptable decisions can be reached by them while at the same time they cannot be accused of overly insulting the sacrosanct principle of precedent and consistency. But this distortion of logic¹ will create pigeonholes out of which a trial judge, bound by the doctrine of a "neutral" application of precedent, may find it hard to escape even though social logic demands that he should eschew the effects of the existing formulation of the law. The decision in *Lumley v. Gye*² and its well-known subsequent history is a good illustration of this undesirable aspect of our legal system.

This article will try to establish that *Lumley v. Gye* was not the forerunner of a new species of tort liability, but that it was a manifestation of

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¹ Judges are by no means unaware that the precedent doctrine may need to be "doctored". For instance, in *Quinn v. Leathem* [1901] A.C. 495, Lord Halsbury said at p. 506

"[E]very judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts . . . in which such expressions are to be found. . . . [A] case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all."

In this article it will be argued that failure to recognize these sentiments as home truths leads to difficulties.

² (1853) 2 E.L. & B.L. 216; 118 E.R. 749.

a general cause of action which protected certain interests against interference caused by certain kinds of conduct. Further, it will be demonstrated, the highly theoretical approach to case law interpretation by the courts both causes remedies to be given where they should not be available and remedies to be withheld where they should be granted. The value judgment inherent in the last point will be spelt out and made the basis for a recommendation as to how the courts ought to proceed in the future.

I

The plaintiff's declaration to which the defendant demurred in *Lumley v. Gye* contained three counts. Their combined effect was that the plaintiff, the proprietor of the Queen's Theatre and Her Majesty's Theatre, had engaged Miss Wagner to perform for him and only for him at his theatres for a specified period; that the defendant knew of this arrangement and with malicious intent, whilst the agreement between the plaintiff and Miss Wagner was in force, wrongfully and maliciously enticed Miss Wagner to refuse to sing or perform at the plaintiff's theatres, and to abandon her contract with the plaintiff, as a result of which the plaintiff suffered damage. It was held by the Queen's Bench (Coleridge J. dissenting) that the plaintiff had made out a good cause of action. Although it was a while before the full impact of the decision was accepted,³ it came to be regarded as the holding which established the law to be that, if a breach of contract was procured by the act of a stranger to the contract, whether "malicious" or not, the stranger would be liable to the promisee who had been injured by the breach of contract committed by the promisor. Another significant facet of the decision was that it seemed that the nature of the contract breached was of no relevance provided the conduct of the defendant had led directly to the breach.

The fact situation of *Lumley v. Gye* was peculiarly unsuited to give rise to the creation of a new species of tort as the result did not seem to fill in a lacuna in the legal protection for worthwhile rights, making it all the more remarkable that it became to be regarded in that way. After all what legal and/or social policy which was not already provided for was satisfied by deciding that the plaintiff had a cause of action against the defendant? The breach of contract by Miss Wagner plainly made her liable to the plaintiff. Why should the plaintiff be given an additional remedy? In his judgment in *Lumley v. Gye* Erle J. suggested that one reason would be that the measure of damages in contract might be inadequate.⁴ But this is

³ Thus in *Bowen v. Hall* (1881) 6 Q.B.D. 333, some 28 years later the Court of Appeal, whilst acknowledging that there was a cause of action for procuring a breach of contract (by a majority of two to one) did suggest that a finding of "malice" in the defendant was essential to the establishment of the tort. It was not until the decision in *Temperton v. Russell* [1893] 1 Q.B. 715, was handed down that the doctrine as set out in the text was fully accepted.

⁴ *Ibid.*, 234, 756.

not a satisfactory reply. The principle of contract law is that the parties have struck a bargain voluntarily. Hence, as the theory is that they do not have to enter into a contractual relationship with any particular person, they must be taken to have voluntarily taken the risk that, should there be a breach of contract, the ensuing loss might not be made good by the party in breach. The rationale for giving an additional remedy to the promisee who has suffered loss cannot be spelt out from the fact that he cannot recoup losses suffered by him when, it must be assumed, he was prepared to run the risk of such losses when he entered into the bargain.⁵ An alternative *raison d'être* for the granting of this remedy must be found.

Erle J. also relied on a general principle to justify his holding in *Lumley v. Gye*, viz. that

“the procurement of the violation of the right is a cause of action, and that, when this principle is applied to a violation of a right arising upon a contract of hiring, the nature of the service contracted for is immaterial.”⁶

Much later the same reason for imposing liability on a stranger to a contract was expressed as follows in a much-cited passage of Lord MacNaghten’s judgment in *Quinn v. Leatham*:⁷

“[A] violation of a legal right committed knowingly is a cause of action, and . . . it is a violation of legal right to interfere with contractual relations recognised by law if there be no sufficient justification for the interference.”

That is, *Lumley v. Gye* was seen as but one variant of a general principle.

Without just yet going into the nature of the kind of right that the law will not permit to be violated, it is clear from the above quotations that a remedy is granted to the possessor of such a right against violations because the law wishes the acknowledged right to be respected and to deter would-be violators by punishing actual violators. That is, inherent in the cause of action is the notion that certain modes of behaviour are not to be condoned and ought to be punished, even though the possessor of the right may well have adequate remedies for the losses resulting out of the violation of his right. That the tort action can be used to this effect is amusingly illustrated by the case of *Nash v. Copeland*.⁸ There the

⁵ To the argument that the promisor is not really in default in such circumstances, i.e. his conduct is not the real cause of the losses suffered by the promisee, and liability for the loss should therefore be imposed on the true procurer or cause of the loss, all that needs to be said is that the law does not accept this argument. As well as his action against the third party, the promisee can sue the promisor even though he would, in the absence of the third party’s inducement, have performed the contract as required.

⁶ *Ibid.*, 232, 755. See also the judgment of Wightman J. in which many instances of actions on the case are given which held that recovery could be had where an unjustifiable violation to the plaintiff’s interests had been committed, see particularly 238, 757-8.

⁷ [1901] A.C. 495, 510.

⁸ (1887) 4 W.N. (N.S.W.) 41.

plaintiff was a barrister-at-law who had bought a ticket entitling him to a particular sleeping berth on a train. When he went to this sleeping berth he found another man in occupation of it. This man turned out to be the Minister for Lands who, having been shown the plaintiff's ticket, refused to leave the sleeping berth "despite the plaintiff's remonstrances". The plaintiff sought the help of the train guard who, in reply to the plaintiff's questioning said that Mr Copeland had "no ticket for the berth or the train; but he's a Minister, and I can't do anything. . . . It is as much as my billet is worth to shunt him".⁹ The upshot was that the defendant, in strong language, told the plaintiff that he would not give up the berth and the plaintiff, his dignity hurt, had to sleep in a less comfortable place on the train. The plaintiff clearly had an action against the Commissioner for Railways in that there had been a breach by him of the contract between him and the plaintiff. But the plaintiff equally clearly was more interested in punishing the defendant. In charging the jury the Chief Justice told them that the plaintiff's allegations revealed a cause of action for were it not so

"it would be most disastrous to the public generally . . . for you would simply be governed by the strongest, and whoever was the strongest would prevail. . . . The law is that if a person commits a wrong of that sort he is liable to be mulcted in damages for that wrong, and if he commits a wrong of that sort under circumstances of insult and contumely the person so wronged is entitled to exemplary damages."¹⁰

But the courts do not like to indulge in decision-making on the basis of such criteria as the moral depravity or the social uselessness of the defendant's conduct when compared to the social merit of the plaintiff's activity. For so to do, apart from being devilishly difficult, would force them into openly evaluating the moral or social merit of people's behaviour, evaluations which cannot readily be made by reference to concrete, objective criteria such as breach of an existing contract and the independent illegality of the defendant's conduct. This is not to say that courts never have regard and, more importantly, that they never say that they do have regard, to such criteria as malevolence, malice, spite, lack of goodwill and the like. They do; but where it is at all possible they show their preference for being able to find that the applicable law does not require them to make value judgments. In the area under discussion they have felt themselves enabled to give rein to this preference ever since the House of Lords stated that a person may do an act which he is legally permitted to do, without fear of attracting liability for ensuing loss even if the

⁹ *Ibid.*, 41, 42.

¹⁰ *Ibid.*, 43. If it be thought that the plaintiff was motivated to sue in tort because he might be better off that way rather than for breach of contract, that is, that the measure of damages in contract were not likely to be adequate, note that the jury, after a quarter of an hour's consideration, returned a verdict for the plaintiff, damages one farthing.

act is done with malice.¹¹ From this pronouncement the judiciary extracted the proposition that the significance of the cause of action which emerged from *Lumley v. Gye* was that, where the right violated was a contract, the nature of the behaviour of the stranger who procured or induced the breach of contract did not have to be evaluated: liability would follow if the breach was the result of the defendant's conduct, whereas if the right interfered with was not a contract, the nature of the defendant's conduct might make him liable although mere malice would not. That is, in respect of breach of contract a different brand of tort liability had evolved, one in which the emphasis was on the existence and breach of a contract. By thus recognizing the inducing of a breach of contract as a separate, isolated head of tort liability the courts obscured the true reason for liability in cases such as *Lumley v. Gye* and eventually, therefore, were forced into unnecessarily awkward positions when faced with analogous cases which did not quite fit within the illogically created pigeonhole.

II

The view that a contract is the kind of right which will justify the imposition of liability upon a stranger should it be breached as a result of that stranger's conduct, is supported by the respect that the common law has evinced over the centuries for private contract-making. The contract is seen as the cornerstone of our individualistic society. The making of contracts depends on the ability of free activity of individuals to voluntarily treat and to negotiate with each other and to agree to be bound to each other on such conditions as they choose. Accordingly, its status should be protected by the law wherever possible, thereby promoting these manifestations of individual freedom and enterprise. Thus, another way of putting the argument (used in section I) that the reason for the *Lumley v. Gye* decision was that people such as the defendant in that case ought to be inhibited from conducting themselves so as to interfere with important rights, is that the ability to indulge in contract-making plays such an essential rôle in our society that it must be protected by the law. Hence, although in terms of actual losses incurred as a result of a breach of contract induced by a stranger, the remedies given by law and equity to the promisee against the promisor are all that are notionally required, public interest demands that such interference with contract-making be

¹¹ *Allen v. Flood* [1898] A.C. 1. This holding was to lead to the drawing of a very controversial distinction between the conduct of an individual and that of a combination, see *Quinn v. Leatham* [1901] A.C. 495 and *Sorrell v. Smith* [1925] A.C. 700. In order to hold the defendants' conduct actionable in those cases, the House of Lords not being able (or not wishing to in *Quinn v. Leatham*) to rely on a finding of malice in the defendants, because of the decision in *Allen v. Flood*, characterized combined activity as capable of constituting unlawful conduct in circumstances in which similar conduct by an individual would not be so characterized.

more positively discouraged and, therefore, an additional remedy is given to the promisee. Note that this gives this most fundamental of all personally created relationship—the contract—the status of a right in rem. Indeed, in a very important article, Professor Lauterpacht wrote that the doctrine of *Lumley v. Gye*

“marks another step in the recognition of the property character of the contractual right. And, in as much as it expressly recognizes a right of the promisee not only against the promisor but also, in a specific sphere, against the whole world, it is not without some effect on the traditional distinction between rights ad rem and rights in personam.”¹²

Thus there may be a good policy reason for treating breaches of a contract differently from violations of other rights. But it will be clear that if the rationale for this “tort” is to be found in awarding protection to a public interest then the results ought to differ when the public interest demands differing results; rigid adherence to objective criteria without regard for the public interest will lead to absurdities. Accordingly, while the courts have never openly resiled from their stated position that where a breach of contract is the result of a stranger’s act the stranger will be liable regardless of the nature of his act, they have in fact been forced to acknowledge many exceptions to that rule, suggesting thereby that the action known as “inducement of a breach of contract” may not be a new or even separate species of tort at all.

The need for a contract

*McKernan v. Fraser*¹³ is a case which exemplifies the judicial insistence on the existence of an enforceable contract before liability can be imposed on a defendant who interfered with the plaintiff’s interests but who did not commit an otherwise unlawful act. In that case Union A had been deregistered as an organization under the *Conciliation and Arbitration Act*. The plaintiffs had been members of Union A and wished it to be registered again. They refused to pay their membership fee until the Union was registered again. A rival association had been formed, Union B, which the plaintiffs joined. The Adelaide Steamship Company selected eight men, including the two plaintiffs, to work one of their ships. Officials of Union A told the company that its members would not sail with the plaintiffs, and, having spoken to the six members of their Union who had been selected at the same time as the plaintiffs, these six men announced that they would not sail with the plaintiffs. The plaintiffs sued the secretary of Union A for, amongst other things, maliciously procuring a breach of their contract with the company and, as an alternative, for maliciously coercing the company into not entering into contracts with the plaintiffs. The High Court found against the plaintiffs on the basis that no contract had been

¹² H. Lauterpacht, “Contracts to Break a Contract” (1936) 52 L.Q.R. 494, 506.

¹³ (1931) 46 C.L.R. 343.

formed at the time that the company was told by the Union A officials that its members would not sail with the plaintiffs. That is, in the absence of a contract, something more than an otherwise lawful act causing a plaintiff hardship had to be established. The case is particularly striking because it was not easy to decide whether or not a contract had been concluded between the shipping company and the plaintiffs.

The casual method of hiring, which was employed in this case, required men seeking work to come and make themselves available, creating a pool of employees from which the hirer could pick. In this case the company had men present their credentials and, when satisfied that certain men met their requirements, they asked them to stand on one side. This was the acknowledged means of indicating that men had been selected for engagement by the hirer. The High Court¹⁴ held that this picking-up process was merely a preliminary to a contract and that, therefore, there could not have been a procurement of a breach of contract. But the Supreme Court of South Australia (Full Court) had held¹⁵ that the only bar to holding that a contract had been entered into was that there was a statutory requirement that articles be signed by every seaman engaged and that these articles represented the contract of hire. The South Australian Court felt that, as the signing of the articles was, in fact, a mere formality after men had been selected following a pick-up, the action of the defendants was an actionable procurement of a breach of contract. In the light of these facts, the High Court's decision would seem to underline how fundamental the prerequisite of the existence of a contract is to the founding of the tort.

In similar vein, the Victorian Supreme Court decided that a trade union official was entitled to cause an employer to replace a non-unionist employee with a union member. The trade union and the employer had a contract which provided that unionists should be given employment in preference to non-unionists whenever possible, and the Court accepted the trade union official's claim that when he caused the plaintiff non-unionist to be replaced by a unionist he was acting lawfully pursuant to that agreement. Therefore, the question before the Court was simply whether this otherwise lawful act had become actionable at the behest of the plaintiff because it had induced a breach of contract. It was held that it had not because the plaintiff was employed on an hour to hour basis and the employer had the right not to renew the contract after it expired. The plaintiff had worked to the end of one day and, when on the next day, a unionist was made available the plaintiff was simply not re-employed. In

¹⁴ Rich, Dixon, Evatt and McTiernan JJ. Gavan Duffy C.J. and Starke J. dissented on the basis that the defendants were liable in conspiracy, another allegation of the plaintiffs; they did not concern themselves with the question of whether or not a contract had been formed.

¹⁵ [1930] S.A.S.R. 364.

coming to this decision Madden C.J. stated that a mere interference with a reasonable expectation of employment was not sufficient to found a right of action.¹⁶

As a final illustration, consider *Doust v. Godbehear*.¹⁷ There, one Bower had a contract for the conveyance of post office mail. The plaintiff entered into a contract with Bower to take the running of the said mail over from him. Bower was at all times in the employ of the defendant. The defendant, having come to the conclusion that the plaintiff should not reside in the neighbourhood, told Bower that unless he terminated his contract with the plaintiff, the defendant would terminate its contract with Bower. Bower thereupon dismissed the plaintiff who sued the defendant for procuring this breach of contract. It was held that the plaintiff had not made out a cause of action because his agreement with Bower was not enforceable as a contract. The reason for its non-enforceability was that, as the agreement between the plaintiff was to be performed for a period of more than one year, it had to be in writing (which it was not) to comply with the *Statute of Frauds* requirements.

These cases demonstrate how the judiciary's preoccupation with verbal formulae rather than with the conceptual underpinning of the law will sometimes lead it to make decisions which, although according to the legal logic employed may be regarded as eminently sound, are in contradiction to the aims on which these verbal formulae are postulated. Thus, if one of the possible rationales for the existence of the tort of inducement of breach of contract is that, by making inducers of a breach liable, such conduct will be deterred, thereby preserving the hallowed position of contract-making in our society, it is hard to see how a finding against the plaintiffs in the cases discussed will aid that desideratum. If a legal technicality deprives people of this protection against interference by strangers, it is not easy to understand how people will feel encouraged to enter into the negotiations and agreements which are part and parcel of free contract-making. In as much as people need to be deterred, wilful, malicious people will not be deterred by an action which cannot be brought against them if their reprehensible tactics are successful in that no contract is ever formed.

Similarly, in as much as the existence of the tort is said to be justified because the remedies that the promisee has against the promisor are inadequate, *Doust v. Godbehear* reveals that strict insistence that there be an enforceable contract which is broken ere liability can be imposed will deny an additional remedy where it is most needed. In a case such as that one the promisee will not have an action against the promisor at all.¹⁸ But let us return to the main theme.

¹⁶ *Bond v. Morris* [1912] V.L.R. 351, 356.

¹⁷ (1925) 28 W.A.L.R. 59.

¹⁸ Contrast the situation in the U.S.A. where the action against the inducer is permitted in cases like *Doust v. Godbehear*; see *Seitz v. Michel*, 148 Minn. 474, 181

McKernan v. Fraser, *Bond v. Morris* and *Doust v. Godbehear* suggest that the courts have treated *Lumley v. Gye* as having created a new kind of tortious liability, viz. that where the right which a plaintiff claims has been violated is a contract, liability will be imposed on the violator even though his conduct would not otherwise be held to be tortious. This explains the need the courts felt to spell out an enforceable contract in those cases. If there is in fact such a separate action one would expect that

- (i) as the results in those cases suggest, there would never be an action by a plaintiff against a person like the defendants in those cases unless the plaintiff could show that the defendant's conduct had induced a breach of an enforceable contract concluded between the plaintiff and another; and
- (ii) if the plaintiff could show that his contract with another had been breached as a result of a stranger's conduct, the plaintiff would automatically have an action in tort against the stranger.

Neither of these expectations are fulfilled by the court's decisions.

(1) *No contract, but defendant made liable for his otherwise lawful act*

In *Ratcliffe v. Evans*,¹⁹ the plaintiff had, upon his father's death, continued to run the business of his father as an engineer and a boilermaker under its established name of "Ratcliffe & Sons". The defendant was a newspaper publisher who had published a statement to the effect that "Ratcliffe & Sons" were no longer in business. It was found as a fact that the defendant knew this statement to be false and had published it because he wished to damage the plaintiff. The plaintiff proved a general loss of business after the publication of the statement although he was unable to prove the loss of any particular customers or orders as a result of the publication. It was held that, even though the publication did not amount to a defamatory statement or libel, the plaintiff should succeed and he received damages. The name given to this cause of action is injurious falsehood.²⁰ Comparing it to the so-called *Lumley v. Gye* action, some obvious points can be made.

The first of these is that there is no insistence that the plaintiff's right which has been violated be an enforceable contract. The plaintiff in *Ratcliffe v. Evans* recovered because his potential contracts were interfered with. Can this be explained away by the fact that in *Ratcliffe v. Evans* the defendant's conduct had been reprehensible, whereas it need not be so for an action in inducement of breach of contract to succeed? The answer is "NO". Although one might condemn the defendant's conduct in

N.W. 106 (1921); *Miles Medical Co. v. J. D. Park & Sons Co.* 220 U.S. 373, 31 Sup. Ct. 376 (1911).

¹⁹ [1892] 2 Q.B. 524.

²⁰ This was the label attached by Salmond to various causes of action which had as their common ingredient the telling by the defendant of a falsehood which indirectly caused the plaintiff to suffer damage. The prototype of this kind of action was slander on title.

Ratcliffe v. Evans as unworthy of a gentleman, or as having no redeeming social intent, the fact remains that the defendant's false statement was in itself lawful. In this respect it is on all fours with the defendant's conduct which leads to the imposition of liability when it induces a breach of contract. What supposedly distinguishes that tort from all other causes of action is that the defendant's conduct need not itself be actionable if it leads to the breach of an enforceable contract. In the same way, the falsehood in *Ratcliffe v. Evans* would not have been actionable unless the damage of which the plaintiff complained had ensued.

Ratcliffe v. Evans does not stand alone. Many similar decisions have been made. Thus, in *Casey v. Arnott*²¹ the court accepted that the plaintiff who was the owner of a ship had a good cause of action against the defendant who by telling people that the ship was unseaworthy had caused the ship's crew to refuse to go to sea in her. Consequently a negotiation (not a contract) for the sale of the ship by the plaintiff to another fell through. Again, when a journalist under the heading "The Poet's Experience" wrote rather graphically about the hearing of rappings, footfalls, the opening and shutting of doors, and of the noiseless turning of door handles in a house in which he stayed and then attributed all these phenomena to a ghost, the newspaper proprietors were sued by the owner of the house who claimed that his opportunity to rent the house at a good rental had been diminished. The plaintiff only failed because he could not prove that the article had so damaged him, many previous articles to the same effect having been published before.²² In *Riding v. Smith*²³ the plaintiff claimed that his business as a grocer and draper had fallen off ever since the defendant had stated in public that the plaintiff's wife, who assisted in the business, had committed adultery. Although he could not prove that a particular contract was breached, it was held that a general diminution in business was sufficient to ground a cause of action, even though the defendant's statement did not amount to actionable slander. Kelly C.B. stated:

"It appears to me, as to the first point, that if a man states of another, who is a trader earning his livelihood by dealing in articles of trade, anything, be it what it may, the natural consequences of uttering which would be to injure the trade and prevent persons from resorting to the

²¹ (1876) 2 C.P.D. 24.

²² *Barrett v. Associated Newspapers (Limited)*, (1907) 23 T.L.R. 666. See also *Manitoba Free Press Co. v. Rachel Miriam Gomez Nagy* (1907) 39 S.C.R. 340. Other cases of injurious falsehood include *Hargrave v. Le Breton* (1769) 4 Burr. 2422; 98 E.R. 269; *Hall-Gibbs Mercantile Agency Limited v. Gibbs* (1910) 12 C.L.R. 84. In some of the Australian States, the Defamation Code has made imputations which are likely to injure a person in his profession or trade, or likely to induce such persons to be shunned, avoided, ridiculed or despised, defamatory. This means that statements which at common law would amount to injurious falsehoods are statutorily actionable. See J. G. Fleming, *The Law of Torts*, (4th ed., Sydney: Law Book Co. 1971) p. 422.

²³ (1876) 1 Ex. D. 91.

place of business, and it so leads to loss of trade, it is actionable. . . . Supposing the statement made not to be slander, but something else calculated to injure the shopkeeper in the way of trade, as for instance a statement that one of his shopmen was suffering from an infectious disease, such as scarlet fever, this would operate to prevent people coming to the shop; and whether it be slander or some other statement which has the effect I have mentioned, an action can, in my opinion, be maintained on the ground that it is a statement made to the public which would have the effect of preventing their resorting to the shop and buying goods of the owner."²⁴

The affinity between these cases and the tort of inducement of breach of contract is manifest: the act of which the plaintiff complains is, of itself, not actionable; it only becomes so if the plaintiff can establish that he suffered damage. But if he can establish that, the lack of an enforceable contract between him and another is no bar to recovery. The existence of this general area of recovery, so conveniently labelled "injurious falsehood", does suggest that the cause of action known as an inducement of breach of contract is not a newly emerged head of tort liability at all.

Returning to a point made a little earlier, it could be argued that, as injurious falsehood requires that the defendant's conduct be classed as malicious,²⁵ the tort is different to the action of inducement of breach of contract. But it has already been shown that liability will be imposed under the rubric of injurious falsehood even though the defendant's act was lawful. Thus to say that the defendant's act must have been done with malice appears to add little to the description of the tort. Indeed, in some cases it has been held that malice means without just cause or excuse.²⁶ The sixteenth edition of Salmond²⁷ states that the malice required is some dishonest or otherwise improper motive possessed by the defendant. For this proposition the learned author cites *London Ferro-Concrete Co. Ltd. v. Justicz*,²⁸ which case, in turn, relied upon (amongst other authorities) the seventh edition of Salmond as authority for that proposition. In any event, it does not seem important whether malice is defined as conduct without just cause or excuse or as conduct which is improper or dishonest. Assume that the latter is the accepted formulation: in what way were the defendants' motives in the cases discussed improper or dishonest? Did those defendants' acts do any more than reveal that they intended to harm the plaintiff and (in some cases) perhaps to gain some advantage for themselves out of causing such harm? And is this not also the motivation which has spurred on the defendants in the cases examined who were made

²⁴ *Ibid.*, 93-4.

²⁵ *Royal Baking Powder Co. v. Wright, Crossley & Co.* (1901) 18 R.P.C. 95.

²⁶ *Royal Baking Powder Co. v. Wright, Crossley & Co.* (1901) 18 R.P.C. 95, *Joyce v. Motor Surveys* [1948] Ch. 252.

²⁷ *Salmond on the Law of Torts* (16th ed., London: Sweet and Maxwell 1973) by R. F. V. Heuston, p. 407.

²⁸ (1951) 68 R.P.C. 261.

liable for inducing a breach of contract? Thus, even though malice is said to be an essential ingredient of the tort of injurious falsehood, this does not serve to differentiate that tort from that of inducing a breach of contract.

Passing-off is another head of tort liability which bears a remarkable resemblance to the tort of inducing a breach of contract. There will be an action against a person who pretends that "his goods or services are those of the plaintiff or associated with him or sponsored by him".²⁹ There are many variants of the tort, but a typical example is provided by *Sparks v. Harper & Co.*³⁰ The plaintiff and defendants were both coffee merchants. The plaintiff manufactured a special mixture of coffee and chicory, the recipe for which was secret. It was marketed in tins which bore the label "Finest French Coffee, as prepared and used in the principal towns of France—Cafe Parisien. Sole holder of the receipt in Queensland, B. Sparks, Brisbane". The tins were coloured red, white and blue. The defendant subsequently marketed a brand of coffee in tins coloured red, brown, white and blue which looked just like the plaintiff's tins, and the label on which prominently included the words "French Coffee". It was held that the defendants had wished to deceive the public into thinking that their product was that of the plaintiff, that the public was likely to have been deceived and the plaintiff would have suffered damage. Accordingly, the plaintiff was awarded an injunction restraining the defendants from using the name and format of marketing they had used.³¹

The essence of the tort is that the defendant's conduct would probably deceive a pertinent sector of the public and that this is likely to cause the plaintiff some damage because his custom will fall off as a consequence of

²⁹ J. G. Fleming, *The Law of Torts*, op. cit. p. 626. *Salmond on the Law of Torts*, p. 409 sets out the various forms that the tort may assume:

- "(1) A direct statement that the merchandise or business of the defendant is that of the plaintiff.
- (2) Trading under a name so closely resembling that of the plaintiff as to be mistaken for it by the public.
- (3) Selling goods under a trade name already appropriated for goods of that kind by the plaintiff, or under any name so similar thereto as to be mistaken for it.
- (4) Selling goods with the trademark of the plaintiff or any deceptive imitation attached thereto.
- (5) Imitating the get-up or appearance of the plaintiff's goods so as to deceive the public."

³⁰ (1890) 3 Q.L.J. 201.

³¹ Other illustrations of this wide-ranging tort are: *Lord Byron v. Johnston* (1816), 2 Mer. 29, *Routh v. Webster* (1847), 10 Beav. 561, 50 E.R. 698. *Maxwell v. Hogg* (1867), L.R. 2 Ch. App. 307, *Dixon v. Holden* (1869), L.R. 7 Eq. 488; *Day v. Brownrigg* (1878), 10 Ch. D. 294; *Walter v. Ashton* [1902] 2 Ch. 282; *McCulloch v. Lewis A. May (Produce Distributors) Ltd.* [1947] 2 All E.R. 845, *Spalding Bros. v. Gamage Ltd.* (1915) 84 L.J. Ch. 449, *Sales Affiliates v. Le Jean* [1947] 1 All E.R. 287, *Ramsay v. Nicol* [1939] V.L.R. 330; *Totalization Agency Board v. Turf News* [1967] V.R. 605, *Ronson Ltd. v. J. Ronson Ltd.* [1957] V.R. 405, *Henderson v. Radio Corporation* (1960) 60 S.R. (N.S.W.) 576. See also generally W. L. Morison, "Unfair Competition and Passing-Off" (1956) 2 Syd. L. Rev. 50 and J. G. Fleming, *The Law of Torts*, op. cit. pp. 626-31.

this deception. It is not necessary that the defendant's conduct which caused the deception was the result of a fraud practised by the defendant.³² Thus, once again, conduct is made actionable which would, in the absence of this head of tort, not be actionable. Once again, the rights violated are not possessed because of the existence of an enforceable contract, suggesting, once again, that there is no reason to believe that there is a separate tort designed to protect contractual relationships. It might be argued that as in the passing-off area the defendant's conduct must be likely to deceive, it is of such a reprehensible nature that liability ought to be imposed even though no contract was breached and that, therefore, one can still say that contractual relationships are given protection by tort when other relationships are not. But, as in injurious falsehood, the reprehensible behaviour of the defendant is not independently unlawful. It has already been seen that where the defendant's conduct is such that it amounts to an injurious falsehood, there will be actionability whether the interest interfered with was a contract or not.³³ Now, it transpires that, where there is conduct likely to deceive and damage ensues, there will be liability imposed for that conduct whether the interest interfered with was a contract or not. Hence the potential kinds of acts and modes of conduct against which contracts are protected and other interests are not, include one less group, viz. acts and conduct calculated to deceive. The three cases used in the previous section, *McKernan v. Fraser*, *Bond v. Morris* and *Doust v. Godbehear* are illustrations of the fact that in some situations liability will be imposed for conduct which, in the absence of an enforceable contract which was breached as a result of such conduct, would be legally excusable. But the discussion of the area of injurious falsehood and passing-off suggests that such cases might well be explicable on other grounds than that a special area of tort liability has been developed to protect the status of contract and contractual relations. If indeed, it is true that there is nothing conclusive about the existence of a contract or lack thereof, one would expect to find that the converse is true, viz. that conduct which induces breaches of contract will not necessarily be actionable.

(ii) *Contract breached as a consequence of the defendant's conduct, but defendant not liable*

Liability will not be imposed on a person whose conduct induced a breach of contract between two other people unless it was the intention of the actor that there should be such a breach of contract. This does not mean, as has been noted, that the actor need to have borne the plaintiff spite or

³² *Spalding Bros. v. Gamage Ltd.* (1915) 84 L.J. Ch. 449.

³³ Note the case of *Petree v. Knox* (1917) 17 S.R. (N.S.W.) 505, where it was held that a fraudulent misrepresentation which led an employer to lawfully dismiss its employee, gave the employee a right of action against the misrepresenter if he could prove damages. That is, just as the lack of an enforceable contract does not bar an action for a false statement leading to economic loss, the existence of an enforceable contract, which is not breached, does not erect such a bar.

ill-will, but rather that it is required that, in engaging in the conduct which induced the breach of contract, the actor desired this consequence to eventuate. Hence, if the most that the plaintiff can show is that he lost the benefit of an enforceable contract because of negligent conduct by the defendant, there will usually be no actionability. Thus, in *La Société Anonyme de Remorquage à Hélice v. Bennetts*,³⁴ the plaintiffs were the owners of a steam tug, which, under contract, was towing a ship when a steamship, operated by the defendant, as a result of the operators' negligence, collided with and sank the towed ship. The plaintiffs sued the defendants for the amount of money lost because the towing contract could not be performed. They failed. This decision was, of course, consistent with the principle that, in order to recover economic loss caused by the negligence of another, a special relationship had to exist between the plaintiff and the defendant, or the economic loss had to be associated closely with a physical property loss.³⁵ Any expansion on this principle, so it was and still is thought, would lead to recovery for losses which spread far and wide throughout the community, imposing an unwonted burden on individuals, and inhibiting desirable enterprises and activities. But where the economic loss arising out of the breach of contract is intentionally inflicted, liability will often be imposed because such intentional conduct is to be discouraged. For instance, if in *La Société Anonyme v. Bennetts* the defendant had deliberately rammed the towed ship in order to stop the plaintiffs from completing their contract there can be no doubt that the plaintiffs would have recovered.³⁶ So far the nature of the conduct of the inducer of the breach of the contract has been treated as being of little importance in the sense that it has been assumed that if it brought about the breach of contract, liability could be imposed regardless of its nature. But from the foregoing it is plain that the law, by insisting that it must have been the intent of the actor to induce the breach of contract, demonstrates that it is concerned with more than whether or not a contract was breached; how the breach was engineered is of significance, denoting that a judgment is exercised between competing interests, namely protection of the contract and freedom of action by the inducer of a breach of contract.³⁷ The remainder of this section is concerned with showing how the courts have been engaged in making this kind of policy choice.

³⁴ [1911] 1 K.B. 243.

³⁵ *Cattle v. Stockton Waterworks Co.*, (1875) L.R. 10 Q.B. 453; *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] A.C. 465, *M.L.C. v. Evatt*, [1971] A.C. 793, *Spartan Steel & Alloys Ltd. v. Martin & Co. (Contractors) Ltd.*, [1972] 3 All E.R. 557, *S.C.M. (United Kingdom) Ltd. v. W.J. Whittall & Son Ltd.* [1971] 1 Q.B. 337.

³⁶ *D. C. Thomson & Co. Ltd. v. Deakin*, [1952] Ch. 646, 695, 702.

³⁷ Where there is a special relationship between an adviser and the plaintiff, the adviser will be liable for the economic loss that the plaintiff will suffer as a result of relying on that advice if it was carelessly given. Careless conduct will therefore have the same effect as intentional conduct where a relationship "equivalent to contract" exists. That is, here too, the law acknowledges that the nature of the

If the imposition of liability requires an intention on behalf of the actor to induce the breach, it follows that the actor must have known that there was a contract between the plaintiff and another. Indeed, Lauterpacht³⁸ argues that the requirement of intent means no more than that the defendant should have had knowledge that his conduct would lead to a breach of contract between the plaintiff and another. The earlier cases of inducement of breach of contract put no onus on the actor to make inquiries as to whether or not there were contractual relations with which his conduct might interfere. In *British Industrial Plastics Ltd. v. Ferguson*³⁹ the plaintiffs had employed D for many years. When D left their employ he agreed, by an enforceable contract, not to enter into a business concerned with the manufacture and sale of chemicals used in a secret process the plaintiffs used. Thereafter D approached the defendant and told him that he had knowledge of a process that might be of use to him and his company. The defendant was interested but did not want to interfere with anyone else's rights, so he sent D to his company's patent agents, in the belief that if D's idea was patentable his company could then apply for a patent and that if this was obtained there could be no question of unlawfully interfering with a trade secret. The patent agent duly informed their clients that the process proposed by D was patentable. An application was made by the defendant's company for a patent; the plaintiffs sued him and his company for inducing a breach of the contract between them and D. The Court of Appeal held that, although the defendant's belief that there could be no violation of a trade secret if D's process was patentable was stupid, it had been honestly held, and the defendant (or his company) could not be fixed with constructive knowledge of the existence of the contract he had allegedly induced. Having no knowledge, actual or constructive, the defendants could not be made liable.

Recent decisions, however, have imposed liability after imputing knowledge of the terms of an existing contract to the defendants. The outstanding pronouncement along these lines is to be found in Lord Denning's judgment in *Emerald Construction Co. Ltd. v. Lowthian*:⁴⁰

conduct is more reprehensible in some circumstances than in others, although the damage inflicted by the conduct is identical no matter what the circumstances. For instance, although there is much debate about what a special relationship is, the overruling of the decision in *Candler v. Crane, Christmas & Co.* [1951] 2 K.B. 164 in *Hedley Byrne v. Heller*, *ibid.*, means that, where accounts are prepared specifically for a prospective investor, even in the absence of an intentionally false statement, or in the absence of an intent to cause loss, the preparer of the accounts will be liable to the prospective investor if the preparation was careless and the prospective investor invested and lost. But if the accounts were not prepared for a specific person, that is, in the absence of a special relationship or fraud (which is becoming less restrictively defined) and the same investor lost his money for the same reason, there may be no recovery. That social policy considerations—such as limiting the area of recovery—give rise to this distinction is clear.

³⁸ Op. cit.

³⁹ [1940] 1 All E.R. 479.

⁴⁰ [1966] 1 All E.R. 1013, 1017.

"The parties . . . had a right to have their contractual relations preserved inviolate without unlawful interference by others; . . . If the officers of the trade union knowing of the contract deliberately sought to procure breach of it, they would do wrong; see *Lumley v. Gye*. Even if they did not know of the actual terms of the contract, but had the means of knowledge—which they deliberately disregarded—that would be enough. Like the man who turns a blind eye. So here, if the officers deliberately sought to get this contract terminated, heedless of its terms, regardless whether it was terminated by breach or not, they would do wrong. For it is unlawful for a third person to procure a breach of contract knowingly, or recklessly, indifferent whether it is a breach or not."

This attitude widens the ambit of protection for contractual relationships. In *J.T. Stratford & Son Ltd. v. Lindley*⁴¹ it was held that, as the defendants knew that barges were always returned promptly on the completion of the job for which they were hired, "it must have been obvious to them that this was done under contracts between the appellants and the large hirers".⁴² The requirement of intent for the application of the principle of *Lumley v. Gye* was therefore held to be satisfied. In that case the defendants were unionists and it can readily be seen how this extension of liability—by imputing knowledge to a defendant and thus satisfying the intent requirement—could be disastrous for trade unions. Every time that a trade union causes its members to strike it is likely that there will be an interference with the performance of contracts by the struck employer. That, like the defendants in *Stratford v. Lindley*, they must know of the existence of such contracts although not of their precise terms, is self-evident. And if one need not know of the exact terms of the contract, liability should be imposed on the trade union (and its striking members) if a promisee of the struck employer sues it (and them) for inducing a breach of contract.⁴³ The potential danger this presents to trade unions is well-illustrated by a fact situation suggested by the case of *Director of Posts and Telegraphs v. Abbott*.⁴⁴ There a lawyer had applied to have a telephone installed in new offices he was to occupy on a certain date. He had advised the Posts and Telegraphs offices of the special need he had

⁴¹ [1965] A.C. 269.

⁴² Per Lord Reid, at 323.

⁴³ *Torquay Hotel Co. Ltd. v. Cousins* [1969] 1 All E.R. 522 is a dramatic illustration of how the English courts have come to impute knowledge to defendants in inducing breach of contract cases, whether or not the defendants have any actual knowledge of the provisions of the contract. There a union having some idea that there was a contract between the plaintiffs and an oil company under which the oil company would supply fuel to the plaintiffs, took action to stop such supply. It was held that the unionists were liable for interfering with the contract despite the fact that there was no breach of contract. There was no breach because the contract, unbeknown to the unionists, had a force majeure clause which relieved the oil company from the obligation of supplying fuel if a labour dispute should make it impossible to do so. The mere fact that the defendants intended that a breach of contract be induced was sufficient to found liability, even though the defendants had no way of knowing whether their conduct would cause a breach.

⁴⁴ [1974] 2 A.L.R. 625.

to have the telephone available from the very first day of his occupation of his new offices, telling them that, if they could not guarantee installation by the date scheduled for the opening of his new offices, he would delay the date of such opening to a day on which they could guarantee installation. The Posts and Telegraphs people assured the lawyer that he would have his telephone on the required date. In fact they failed to install the telephone on that day because of a strike called by their employees. These employees had no particular knowledge of the lawyer's dealings with their employer, nor of their employer's acquiescence to his request. The Supreme Court of South Australia held that there had been no binding contract between the Posts and Telegraphs offices and the lawyer; but let us assume that there had been such an enforceable contract: could the strikers be made liable to the lawyer for inducing a breach of that contract? If the doctrine of "turning a blind eye" were taken to its logical conclusion, liability ought to follow. Such a result would seriously inhibit trade union activity and, unsurprisingly, the courts have indicated that they will attempt to lessen the impact which would result from taking the doctrine to its logical conclusion. In *Torquay v. Cousins* Lord Denning M.R. clearly saw the perils for trade unionism if he mathematically were to apply the "turning a blind eye" principle:⁴⁵

"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. . . . This distinction [between direct and indirect interferences] must be maintained, else we should take away the right to strike altogether. Nearly every trade union official who calls a strike . . . knows that it may prevent the employers from performing their contracts. He may be taken even to intend it. Yet no one has supposed hitherto that it was unlawful; and we should not render it unlawful today."

Here we have a straight-forward expression by Lord Denning that even though the defendant intended to induce a breach of a contract the existence and general terms of which he will be assumed to have known, he will not be liable if his conduct did not directly induce such a breach and was not otherwise unlawful. Although the intended result of the defendant's conduct is the same as in *Lumley v. Gye* itself there is to be no liability. As the violated contract in the excepted situation is just as valid and just as socially valuable (presumably) as the one in *Lumley v. Gye*, the distinction between the cases lies in the merit of the defendant's conduct. The social policy consideration offered by Lord Denning in the

⁴⁵ [1969] 1 All E.R. 522, 530. The reference to calling a strike on proper notice is a reference to the situation which arose in *Morgan v. Fry* [1968] 2 Q.B. 710, where such notice having been given, it was held that the ensuing strike was not unlawful. This point will be adverted to below.

passage quoted is clear proof that the courts will not automatically make a defendant liable because he intentionally, that is, with actual or imputed knowledge of the contract and the effect of his conduct on it, procures a breach of a contract. To clinch the argument, note that the qualification or liability for indirectly inducing a breach of contract was not just a reaction necessitated by the unwarranted increase in the ambit of the tort by the decision in *Emerald Constructions v. Lowthian*. Long before the holding there that knowledge of a contract and its terms could be imputed to the defendant, it had been authoritatively held that indirectly inducing a breach of contract was not actionable unless the defendant's conduct was independently unlawful; at that time it was also held that the defendant must also have had actual knowledge of the contract whose breach he induced.⁴⁶ The effect of removing *both* these limitations—which arose out of policy considerations—gave rise to the fear Lord Denning expressed.

There are other situations where there is both an intent to induce a breach of contract and an ensuing breach of contract where no liability is imposed on the person who induced the breach. Thus, the defendant will be held not liable if he merely induced a breach of contract because the promisor could not perform his part of the bargain without breaching a prior contract that he had made with the defendant.⁴⁷ If the rationale underlying inducing a breach of contract as a cause of action in tort is the protection of private contract-making, it is easy to see why the defendant's conduct is not actionable in cases like this. Note that the second innocent promisee will have an action for breach of contract against the common promisor, because the second contract was, by definition, an enforceable contract. If the enforceability of the first contract is deemed to be worthy of protection to the extent that the promisee to that contract may defend it by conduct which in another would be tortious, it ought to follow that it would be sufficiently worthy of protection where the second promisee knew of the prior contract and its inconsistency with his own, yet still sought to have the second contract performed. But what will be the situation where the second promisee enters into the second contract without knowledge of the first and, having acquired such knowledge, continues to perform the second contract? In *Thomson v. Deakin* Jenkins L.J. thought such a person would have committed an actionable interference.⁴⁸ But a recent Victorian case shows, once again, that the principle of protecting validly made contracts against intentional interference is by no means immutable.

In *H. C. Sleight Ltd. v. Blight*,⁴⁹ the plaintiff was an oil company who had made an agreement with the Blights, proprietors of a service station,

⁴⁶ *Thomson v. Deakin* [1952] Ch. 646.

⁴⁷ *Smithies v. National Association of Operative Plasterers* [1909] 1 K.B. 310, 337.

⁴⁸ [1952] Ch. 646, 694.

⁴⁹ [1969] V.R. 931.

under which the plaintiff was to supply the Blights with fuel products. The Blights agreed to buy their total requirements in fuel products from the plaintiff and not to sell anyone else's products during the term of the agreement. They further agreed not to assign their interest in the service station during the continuance of the agreement to any but an assignee approved of by the plaintiff. In breach of this agreement the Blights entered into a contract for sale of their business to the Bishops. It was a sixty-day contract. Prior to the execution of the contract, the would-be purchasers obtained from the Blights a written statement to the effect that the Blights had at no time entered into an agreement with an oil company. The contract was then signed and a deposit paid. Before the balance of the purchase money was to be paid, the plaintiff oil company heard of the purported sale and informed the Bishops of the existence of the plaintiff's agreement with the Blights. The Bishops nonetheless completed the contract. Amongst other actions, an action was brought against them by the plaintiff oil company for wrongful interference with the plaintiff's contractual rights. Adam J. held that the plaintiff should fail. He could see no reason why the defendant should give up the benefit of his innocently obtained contract, even though that contract was voidable at the behest of the defendant when he was informed of the Blights agreement with the plaintiff; that is, because of the misrepresentation made to them, the Bishops could at that time have refused to complete and have their deposit reimbursed. This is yet another case, then, in which a breach of contract was intentionally induced by the defendant but in which the defendant was not made liable.

Sometimes the very nature of the contract breached will prevent the inducer of the breach from being made responsible for the breach. The standard illustration is breach of a contract of promise to marry. Where a father induces his impressionable daughter to break such a contract, it has been suggested that the father will not be liable in tort to the disappointed promisee because "the father's justification arises from a moral duty to urge [his daughter] that the contract should be repudiated".⁵⁰ The policy consideration which prevents a defendant of this kind from being sued in tort is manifest. Note that Viscount Simon envisaged a situation in which the disappointed promisee is a "scoundrel". Presumably the defence of justification would be available whether or not the promisee was in fact a scoundrel (or even if the advice was given to a son rather than a daughter), as long as the adviser had an honest belief that he had good reason to advise his child to break a contract of a promise to marry. In any event, it is clear that the merit of the defendant's conduct is to be taken into account for this kind of conduct to be rendered non-actionable. This is a marked departure from the stated judicial position

⁵⁰ *Crofter Handwoven Harris Tweed Co. v. Veitch* [1942] A.C. 435; per Viscount Simon L.C. at 443.

in respect of the contractual relationships so far examined. It may well be that the defence of justification should also be available where relationships analogous to those of parent-child are involved; for instance, where a medical practitioner advises a patient who has entered into a contract that he should not perform the contract and thereby induces a breach, or a solicitor who advises his client to break an existing contract and pay the damages rather than go on with an unfortunately struck bargain. If courts are permitted to look at the moral worth of the defendant's conduct, the medical and legal advisers in these examples ought to be free to induce breaches of contracts when they act in good faith. But the reluctance of the courts to indulge in this kind of value judgment-making is manifested by the fact that there are very few cases in which they have actually held that the defendant's conduct, even though plainly engaged in with the most worthy of motives, was not actionable by a promisee to the contract which had been breached as a result of the defendant's conduct.

Thus, in *Camden Nominees, Limited v. Forcey*,⁵¹ the chairman and secretary of a tenants' association were held liable for inducing breaches of contract between tenants and the landlord. The association had been specifically formed with the object of forcing the landlord to abide by his obligations under the tenancy agreements, in particular the cleaning of passages and stairways and the provision of heating. When the landlord refused to co-operate, the chairman and secretary of the association counselled other tenants not to pay their rent. The motive of the association might well be considered laudable, nonetheless the defendants were held liable. *South Wales Miners' Federation v. Glamorgan Coal Co.*⁵² is probably the low watermark for the availability of justification as a defence. There the miner's union had called planned "stop-days" during the year. These were in breach of the miners' contracts of employment. The union had called the "stop-days" because it feared that the activities of merchants and middlemen would bring down the price of coal and, therefore, its members' wage rates. There was no animosity towards the employers, or a dispute with them. Indeed, the union believed that it was also acting in the best interests of the colliery-owning employers. The House of Lords accepted that the unionists acted without any spite or ill-will, and truly to protect the interests of their members and, to a lesser extent, of the employers. Nonetheless, the advice which led to the breaches of contract was held to be an actionable inducement.⁵³

*Brimelow v. Casson*⁵⁴ is a rare instance of a case in which the motive of

⁵¹ [1940] Ch. 352.

⁵² [1905] A.C. 239.

⁵³ This result is probably based on the same notion which caused Porter J. to say that "the justification must, I think, involve an action taken as a duty, not the mere protection of the defendants' own interests" in *De Jetley Marks v. Greenwood* (Lord) [1936] 1 All E.R. 863, 873.

⁵⁴ [1924] 1 Ch. 302.

the defendant was recognized as justifying his conduct which induced a breach of contract. There the plaintiff was a theatre manager who paid his chorus girls less than the minimum wage an actors' union had prescribed. A committee representing theatrical employees wished to stop this behaviour and induced theatre owners who had entered into contracts with the plaintiff to have the plaintiff's company perform at their theatre to break such contracts and induced others who might enter into such contracts with him not to do so. It was held that this committee could not be made liable to the plaintiff. The Court was moved to this holding by the fact that at least one chorus girl of only eighteen years of age had been forced, because of her poor wages, to live "in immorality" with another member of the company. The impact of this on the Court was not lessened by the fact that the man she lived with "in immorality" was "a tiny, deformed creature, a dwarf" who "was an abnormal man".⁵⁵ Apart from this case, there are no other instances where the courts have held that the conduct of the defendant was so morally worthwhile that the breach of contract it induced did not make the defendant liable.

One other kind of situation in which the defendant's acts lead to a breach of contract, yet does not make him liable, is noteworthy. *James v. The Commonwealth*⁵⁶ presented the circumstances very well. There it was alleged by the plaintiff that common carriers, who had a common law duty to carry his goods, had refused to do so because they were afraid that a Commonwealth Department might seize the goods and, as the officers of that Department had intimated to the carriers, that they would be prosecuted under the existing law. Such provisions of law did exist at the time of these intimations, but when challenged, they were held to have been part of unconstitutionally enacted law, and, therefore, invalid.⁵⁷ The High Court held, in the words of Dixon J.:

"An intention to put the law in motion cannot be considered a wrongful procurement or inducement, simply because it turns out that the legal position maintained was ill-founded."⁵⁸

His Honour did point out that the Commonwealth officers' belief in the validity of the law they were invoking must have been bona fide.

It is clear that this case is yet another illustration of the judiciary's desire to protect some modes of behaviour at the expense of the hallowed private contract. After all, the tort of inducing a breach of contract is supposedly made out if the intentional act of the defendant led to the breach of contract of which the plaintiff complains.⁵⁹ The words chosen by

⁵⁵ *Ibid.*, 305.

⁵⁶ (1939) 62 C.L.R. 339.

⁵⁷ *James v. The Commonwealth*, (1936) A.C. 578; 55 C.L.R.I.

⁵⁸ 62 C.L.R. 339, 373.

⁵⁹ The High Court treated the "*Lumley v. Gye* tort" as being applicable to interferences with the carrying out of public duties as well as to contractual relationships.

Dixon J. in the passage quoted are, if that is the true position, misleading in that they hint (although His Honour probably did not intend them to) that there must be something "wrongful" about the defendant's act. That, it has been noted, is only necessary where there is an indirect inducement of a breach of contract. The nature of the defendant's conduct does not matter where the inducement is directly effective; all that is needed is the causing of the breach with knowledge of the contract. But, if the nature of the defendant's conduct is to be weighed against the interests of the plaintiff in some cases, (as seems to have been the case in *James v. The Commonwealth* and other cases discussed in this section) it can be posited that, even though there are very few decisions to support this tenet, the courts have never truly accepted the view that the limitations which restrict the area of recovery when rights other than contracts are infringed do not also apply to cases of inducement of breach of contract. All that can be said is that where the interest interfered with is an enforceable contract it is much easier to establish that a tort has been committed than if there was no such contract.

III

Lumley v. Gye was eventually seen as creating a new area of torts liability because the decision itself was seen as an enlargement of a peculiarly narrow head of tort liability, namely, liability for causing a breach of a contract of service. And the development of this tort was, in turn, regarded as being based on a false premise. Thus Sayre⁶⁰ describes how in the first place a master had an action if his servant was interfered with because this was meddling with the property of the master and, therefore, a personal offence was committed against the master; but, the narrative goes on, the master was given an action only if he lost the services of his servant as a result of violence being used against the servant. The next major development that Sayre notices is the passing of the *Ordinance of Labourers* in 1349. Its purpose was to ensure the availability of labour which had become a rare commodity after the Great Plague. The statute made it an offence to entice servants away from another's employ. This was an enlargement of the existing common law remedy for the loss of a servant's services due to a violent attack upon him. The two remedies "were swept into the capacious maw of the action on the case"⁶¹ and by the time *Lumley v. Gye* came to be decided, it was an actionable wrong to entice away a servant from his employ. *Lumley v. Gye* was a major new departure because Miss Wagner was not engaged under a contract of service by the plaintiff.⁶² This was regarded as a dramatic breakthrough, one which could well lead to liability in circumstances where

⁶⁰ F. B. Sayre, "Inducing Breach of Contract" (1922-1923) 36 Harv. L.R. 663.

⁶¹ *Ibid.*, 666.

⁶² For a very thorough description of this interesting history see the judgment of Coleridge J. in *Lumley v. Gye*.

the common law had never imposed it. As late as 1896 Rigby L.J. thought that *Lumley v. Gye* should not be read as giving a right to sue to every promisee to a contract whose breach had been induced by a third party:

“[I]t is not, as I understand the law, every procuring of a breach of contract that will give a right of action. The nature of the contract broken must be considered.”⁶³

Other courts, however, did not see anything remarkable or objectionable in this “development” of the law. As we have seen,⁶⁴ Lord MacNaghten in *Quinn v. Leathem* thought that the gist of the action in *Lumley v. Gye* was the accepted principle that to knowingly cause a violation of another’s right was an actionable wrong and that a contract was such a right which could not be violated. Prior to that, in *Bowen v. Hall*,⁶⁵ it was held that the action in *Lumley v. Gye* was merely a particular application of the principle laid down in *Ashby v. White*.⁶⁶ That principle was that, whenever a person did an act which in law and in fact was a wrongful one and which had as its natural consequence the infliction of injury on another, the act would result in the imposition of liability. In *Lumley v. Gye* the act of the defendant had been wrongful (and therefore attracted liability) because it had been malicious, although not against the law. In *Temperton v. Russell*,⁶⁷ the Court of Appeal thought not only that contractual interests would be protected by giving a cause of action against a third party who interfered with them, but also that to maliciously induce people not to enter into contractual relationships with the plaintiff should be actionable.

Then came *Allen v. Flood*.⁶⁸ There it was held by the House of Lords that to do an act which was lawful and which caused another person to be injured did not render the actor liable to the injured person, even if the act which inflicted the injury was done with malice. To be actionable the conduct must have been unlawful and the injury must have been one to a recognized right. In relation to the area of actionability under discussion these general principles were held to have the following applications:

- (i) An act which induced another to break a contract was actionable; it followed that such an act was regarded as unlawful regardless of the motivation of the actor; and
- (ii) whereas an induced breach of contract was the kind of injury for which redress could be had in torts, inducing persons not to enter into contracts with the plaintiff was not.

The result was that the ambit of actionability was both enlarged and restricted. It meant that, once and for all, it had been established that

⁶³ *Exchange Telegraph Company Limited v. Gregory & Co.* [1896] 1 Q.B. 147, 157.

⁶⁴ *Supra* fn. 7.

⁶⁵ (1881) 6 Q.B.D. 333.

⁶⁶ (1703) 1 E.R. 417.

⁶⁷ [1893] 1 Q.B. 715.

⁶⁸ [1898] A.C. 1.

direct inducement of a breach of contract was actionable without more. No questions of the nature of the inducement or of the contract broken were to be of importance. At the same time, the House of Lords drew a distinction between breach of contract and other related violations of interests. Both *Bowen v. Hall*, which emphasized the element of malice, and *Temperton v. Russell*, which equated inducing breaches of contract with inducements not to enter into contract were, therefore, held to be wrong. That is, the notion that *Lumley v. Gye* was but one aspect of general liability principles was denied. It was inevitable, therefore, that courts, after *Allen v. Flood*, would view the decision in *Lumley v. Gye*, the result in which had not been called into doubt by the House of Lords, as a case which established that an inducement of a breach of contract was an actionable tort in its own right to which the qualifications and limitations pertinent to related areas did not apply.

Yet the holding in *Allen v. Flood* does not deserve the respect that it has sometimes been accorded. After all, at trial level, the judge found for the plaintiffs who had been dismissed—without breach of contract—as a result of the malicious conduct of the defendant, which had been intended to have the plaintiffs dismissed and to prevent them being re-engaged. The three Court of Appeal judges found the defendant liable for violating both these interests. In the House of Lords, six of the nine judges found for the defendant on the basis set out above. Of eight other judges who had heard the argument in the House of Lords after being summoned to attend, only two wrote opinions in favour of the defendant. Thus, of the twenty-one judges who wrote opinions, thirteen found for the plaintiffs and only eight for the defendant.⁶⁹

At the very least, it is warrantable to pose the question whether the judicial pronouncements of the majority of the House of Lords in *Allen v. Flood* should have been treated as if they were precise commandments in the nature of unambiguous legislative provisions. That they have been accorded this treatment is possibly due to the elaborate judicial consideration that was given to the case which, consequently, gave the majority opinion more status than it might otherwise have received. The head-counting exercise engaged in above suggests that this is not a good reason. Another reason might be the emphatic language used by members of the majority. In this light, note one of the most frequently quoted passages of this much-quoted decision. Lord Herschell had noted that in *Temperton v.*

⁶⁹ The trial judge was Kennedy L.J. The Court of Appeal judges were Lord Esher M.R., Lopes and Rigby L.J.J.; [1895] 2 Q.B. 21. The House of Lords judges who found in favour of the defendant were Lords Watson, Herschell, Macnaghten, Shand, Davey, James of Hereford; the three judges in the House of Lords who found for the plaintiffs were Lord Halsbury L.C., Lords Ashbourne and Morris. Of the additional judges, Wright and Mathew J.J. found for the defendant; Hawkins, Cave, North, Wills, Grantham and Lawrence J.J. found for the plaintiffs.

Russell it was thought that, if inducing a breach of contract was actionable, then an inducement not to enter into a contract should be actionable. His Lordship then stated:

“It seems to have been regarded as only a small step from the one decision to the other, and it was said that there seemed to be no good reason why, if an action lay for maliciously inducing a breach of contract, it should not equally lie for maliciously inducing a person not to enter into a contract. So far from thinking it a small step from the one decision to the other, I think there is a chasm between them. The reason for a distinction between [them] appears to me to be this: that in the one case the act procured was the violation of a legal right, for which the person doing the act which injured the plaintiff could be sued as well as the person who procured it, whilst in the other case no legal right was violated by the person who did the act from which the plaintiff suffered: he would not be liable to be sued in respect of the act done, whilst the person who induced him to do the act would be liable to an action.”⁷⁰

It is pertinent to ask whether the law had always recognized the chasm whose existence Lord Herschell found so self-evident.

It has already been seen that the old action of slander or disparagement on title has spawned causes of action in injurious falsehood which give recovery for violation of interests other than enforceable contractual ones, even though the injury-inflicting acts are not, in the absence of the injury, unlawful. This suggests that these causes of action are of the same genus as the action which, in *Allen v. Flood*, was thought to be peculiarly associated with direct interference with contractual relationships. This genus could be that a wrongful interference which resulted in injury was always actionable, and that “wrongful” for these purposes did not require independent unlawfulness but had to have, at the least, a quality which was referred to as “malice”. Lord Halsbury L.C. in *Allen v. Flood*, after an exhaustive review of the cases formed the opinion (that twelve other judges may be assumed to have shared) that

“in denying these plaintiffs a remedy we are departing from the principles which have hitherto guided our Courts in the preservation of individual liberty to all. I am encouraged, however, by the consideration that the adverse views appear to me to overrule the views of most distinguished judges, going back now for certainly 200 years, and that up to the period when this case reached your Lordships’ House there was a unanimous consensus of opinion.”⁷¹

⁷⁰ [1898] A.C. 1, 121. The distinction between an enforceable and a non-enforceable right Lord Herschell drew is easy to understand. But note that if this is a distinction which supports the tort of inducing a breach of contract it removes one of the possible rationales for the cause of action hypothesised at the commencement of this article. If the plaintiff recovers from the defendant because he can also recover against another person, lack of an adequate remedy can hardly be the reason for the existence of the tort.

⁷¹ [1898] A.C. 1, 90.

*Keeble v. Hickeringill*⁷² was most heavily relied upon by Lord Halsbury. There the plaintiff who kept decoy ducks in his pond in order to trap ducks for profit was permitted to recover damages against a neighbour who had allegedly frightened away his prey by letting off a shotgun. Holt C.J. held that "when a violent or malicious act is done to a man's occupation, profession, or way of getting a livelihood; there an action lies in all cases".⁷³ The case law relied on by Holt C.J. for this principle (which did not differentiate between existing contractual relationships and potential contractual relationships, between interference with such relations and actual breaches of contract, and which did not state that malicious acts had to be breaches of the law in some independent way) included the *Gloucester schoolmasters' case*.⁷⁴ Holt C.J. suggested that if a rival of an existing school kept prospective students away from that school by frightening them by shooting, the existing school's owners would have an action against the rival. Such a fact situation did arise in *Tarleton v. M'Gawley*⁷⁵ and recovery was allowed, as Holt C.J. had predicted. And note that the High Court of Australia, after a careful review of the history of the cases, some two hundred and sixty years after Holt's C.J. pronouncement said:

"[I]t appears that the authorities cited do justify a proposition that, independently of trespass, negligence or nuisance but by an action for damages upon the case, a person who suffers harm or loss as the inevitable consequences of the unlawful, intentional and positive acts of another is entitled to recover damages from that other."⁷⁶

This decision has been widely discussed and criticized. The major criticism has been that, the way the High Court framed its proposition, the decision meant that whether or not a defendant intended to injure the plaintiff, the plaintiff would recover and that this was akin to creating a strict liability principle of actionability for too wide a range of injuries.⁷⁷ But if one reads "intention" as meaning "done with knowledge", in the *Emerald Construction v. Lowthian* sense, it is perhaps, not too large a leap to go on and say that intention as used by the High Court is in reality a modern version of malice as used by Holt C.J. in *Keeble v. Hickeringill*; when that is done, the principle enunciated by the High Court in 1966 is the same as the one propounded in the 1706 case. The point will not be taken further here; it suffices to note that the High Court's review of the cases did lead it to the conclusion that the action upon the case was, at one

⁷² (1706) 103 E.R. 1127.

⁷³ *Ibid.*, 1128.

⁷⁴ 29 E. 3, 18.

⁷⁵ (1794) 170 E.R. 153.

⁷⁶ *Beauesert Shire Council v. Smith*, (1966) 120 C.L.R. 145, 156.

⁷⁷ See G. Dworkin & A. Harari, "The Beauesert Decision—Raising the Ghost of the Action upon the Case" (1966-1967) 40 A.L.J. 296, 347, 348. See also, G. Dworkin, "Intentionally Causing Economic Loss—*Beauesert Shire Council v. Smith Revisited*" (1974) 1 Mon. L.R. 4.

point of time, large enough to encompass injuries suffered wherever “intentional” interference with an enforceable contract or another recognized (but not necessarily enforceable) interest occurred. With that in mind, let us return to the case of *Lumley v. Gye*.

Two cases relied on by the majority in *Lumley v. Gye* are of some interest. The first is *Green v. Button*.⁷⁸ There the defendant claimed that he had a lien on goods that the plaintiff had contracted to receive from a third person. As a result of this claim, which had been “maliciously and wrongfully” made, the third person broke his contract with the plaintiff and did not deliver the goods. The plaintiff was held to have a good cause of action against the defendant. This case could be classed as a slander or disparagement on title type case and if the point made is that those cases form a very special category of liability rather than being manifestations of a general cause of action such as action on the case, *Green v. Button* does not advance the advocated argument much. But note that the majority in *Lumley v. Gye* which, after all, held that to maliciously procure a breach of contract was an actionable wrong, relied upon this case as authority for that widely stated principle. The second case is *Winsmore v. Greenbank*.⁷⁹ There the plaintiff complained that his wife had left him and that this was unlawful; further, that the defendant had enticed her to so stay away from her husband and had harboured her secretly; and that, as a result, the plaintiff had lost the benefit and advantage of a large estate that the wife had inherited while she was away from her husband. Willis C.J. agreed that the loss of the comfort and assistance of his wife was the result of the wife’s unlawful act but went on to hold that this would not mean that the plaintiff could maintain an action against the defendant unless the defendant’s action could also be classified as unlawful. He then went on to say that if “the defendant persuaded the plaintiff’s wife to do an unlawful act, it was unlawful in the defendant”.⁸⁰ This was relied on in *Lumley v. Gye* where the unlawful act of the wife in *Winsmore v. Greenbank* was equated with Miss Wagner’s breach of contract. There was no thought that liability should be restricted to cases where the conduct of the defendant was independently unlawful or that there was a restricted number of interests which would be protected against interference by a stranger. For instance, Wightman J. a member of the majority in *Lumley v. Gye*, opined that “upon the authority of the two cases referred to, of *Green v. Button* and *Winsmore v. Greenbank*, as well as upon general principles, that an action on the case is maintainable”.⁸¹

Thus, despite the conclusions to which the views expressed by the majority in *Allen v. Flood* pointed, there are more than sufficient strands

⁷⁸ 150 E.R. 299, 2 C.M. & R. 707.

⁷⁹ (1745) 125 E.R. 1330.

⁸⁰ 125 E.R. 1330, 1333.

⁸¹ 118 E.R. 749, 757.

of authority to suggest that inducing a breach of contract was but a species of a general cause of action. It is suggested that the gist of this cause of action was that unlawful conduct leading to injury was to be actionable, as well as lawful conduct which interfered with a certain number of interests. That is, it was one whose essence was a balancing of interest against interest and/or interest against conduct. The question that has to be put is whether a reasonable formulation of this balancing test can be devised for the judiciary's use in modern times and, if this can be done, whether it would be advisable to have the courts openly apply such a balancing test.

IV

The guidelines to be provided hereunder are framed on the basis that our society wishes the law to uphold the free enterprise creed in as much as it does not conflict with other known social objectives. The thesis of this section is that, in effect, the courts have already employed this underlying philosophy, but that because they have not done so openly or consciously, they have created anomalies in the state of the law and have caused lawyers to lose faith in the system of technical precedent as well as caused certain sections of the community to be cynical about the law's ability to achieve justice.

The starting point for the suggested guidelines is that interference with commercial relationships will be actionable if license to interfere with them would detract from the ability of free enterprise to flourish. The question of liability can, therefore, not be determined by drawing artificial distinctions between the interests violated on the basis that these interests are or are not enforceable as contracts. Free enterprise is promoted by giving as many people as possible as much opportunity as possible of entering into business relationships with one another. Thus an interference with such an opportunity might well give rise to a cause of action.

On the other hand, free enterprise is not just seen as a means to maximize productivity and efficiency. At its core is the notion that, by holding out the carrot to each individual that if he uses his initiative he will be rewarded, the development and freedom of the individual will be enhanced. This means that the right to engage in commerce with whomever one likes about whatever one chooses has, according to this theory, as its corollary, the right not to engage in commerce with particular people or about particular subjects of commerce. Inevitably, then, there will be conflicts arising when one group of people claim that they have a right to engage in certain conduct and others claim that they have a right not to be forced to engage in that conduct with the first claimants, or that they have an equal right to that of the claimants in obtaining rewards for such conduct and should, therefore, be permitted to prevent the claimants from

engaging in the said conduct. In the face of such disputes, the aim of promoting free enterprise makes it permissible and logical for the courts to make their decision between the rival claims on the basis of whether or not one claimant already had a right recognized by the law as an enforceable right. Thus, if A, an employee of B, induces B to dismiss C in breach of C's contract of employment with B, because A wishes to exercise his "free enterprise" right not to work with C, it is reasonable for a court to say that C has an action against A because his contractual right was violated as a result of A's conduct. Now A has done no more than give effect to his free choice, and it has been seen that the exercise of free choice is justifiable when free enterprise is the ideal that is sought to be promoted. But C also pursued his free choice when he entered into employment with B. The means used by the law to encourage free enterprise is to say to people that if, in pursuit of their aim, they seek to establish relationships to their advantage by negotiating and bargaining, the law will help them (once the negotiating and bargaining has led to a certain relationship) enforce the promises that other people have made to them; that is, once the law recognizes that a contract has been formed protection will be given. Prima facie, therefore, C ought to be given a cause of action against A, because the best way to support the free enterprise model by law is for the law to protect free enterprises's ultimate legal product.

The courts' decisions demonstrate that they have—subconsciously perhaps—adopted this policy. In as much as the foregoing discussion of the cases has revealed that the courts have made the so-called *Lumley v. Gye* tort apply when breaches of contract have been induced, they have been on philosophically sound ground. And not only will the law help a promisee to such a contract recover against the inducer of the breach, it will also permit him to defend the position he has attained by allowing him to interfere with other people's later acquired inconsistent interests. It has been seen that the existence of a prior contract permits a promisee to it to induce a breach of a subsequent inconsistent contract.⁸² The courts have gone further at times and permitted a promisee to an existing contract to induce a breach of a subsequent inconsistent contract even though the first promisee acted in defence of a right which his contract did not give him. In *Short v. The City Bank of Sydney* the plaintiff had put his wheat in storage with a company which provided free storage. In addition, the storage company offered advances to those people who stored wheat with it. For these services the company was entitled to a commission on any wheat it sold out of storage. In order to make the advances it did make the storage company obtained loans from the City Bank of Sydney and, by way of security, it gave the Bank, in respect of advances for which a loan was obtained, a certificate which said that the company held

⁸² *Supra*, fn. 47.

a certain number of bags of wheat which they would deliver to the Bank's order on return of the certificates. The plaintiff, as was his right under the storage agreement, sold some of the wheat he had given to the company for storage and he requested that it be delivered to his purchaser. By then the company was in financial difficulties. The plaintiff, whose wheat had not been specified when in storage (as was none of the stores' wheat) asked that the Bank release its claim on the wheat so that it could be consigned as requested. The Bank refused, saying that it had a property right in the wheat. The company consequently refused to consign any wheat, as it considered that the Bank had proprietary rights over all the wheat it held. The plaintiff lost the benefit of his contract for sale and sued the Bank. He failed on the basis that all that the Bank did was to insist on what it honestly believed its right to be; it had no intention that such an insistence should lead to a breach of any particular contract, and even though its belief that it had a proprietary interest turned out to be wrongly based in law the Bank could not be made liable for the breach of contract it caused. Although the holding suggests that perhaps one of the reasons for the decision was that the defendant had no intent to induce a breach of the contract because it had no knowledge of its existence or of its terms, it is difficult to so rationalize the decision as the plaintiff had actually written to the Bank, detailing its contract of sale to explain its request for the Bank's release of the wheat stored by the company.⁸³

The fact that to give a cause of action or a right of self-help when a breach of contract is induced is justifiable on the basis of the guidelines provided does not mean that the principle underlying these guidelines requires that every existing contract should attract such protection. Thus *Sleigh v. Blight*⁸⁴ can best be rationalized on the ground that the second contract, having been entered into without knowledge of the first (at least by the purchaser) was just as good an exercise of free enterprise—and therefore deserved as much protection—as the first, existing contract.

⁸³ (1912) 15 C.L.R. 148. Note also, *Blackmore v. Gas Employees' Union* (1916) 16 S.R. (N.S.W.) 323. There a trade union had insisted on the dismissal of an employee who had not become a member of the union within the required period. This requirement was imposed by an agreement between the union and the employer. The dispute had arisen because the dismissed plaintiff was a member of another union which had obtained a preference clause in its favour in an award. The Court, after some very sophisticated reasoning, came to the conclusion that the agreement and the award were not inconsistent because they could both operate if a person such as the plaintiff obtained preference and then changed his union membership. Hence, the union, having acted bona fide in its own interest, was not liable to the plaintiff. Quære: what would have happened if the Court had taken the view that despite its bona fide belief in the legal right it was exercising, the union had been wrong? Or if, in *Nash v. Copeland* (1887) 4 W.N. (N.S.W.) 41, the defendant had held the bona fide but mistaken belief that Ministers for the Crown had a right to any sleeping berth in which they chose to sleep in a government operated train? See also *Slattery v. Keirs* (1903) 20 W.N. (N.S.W.) 45 where such a point was taken but not followed through.

⁸⁴ [1969] V.R. 931, supra, fn. 49.

Indeed, the Court in that case strongly suggested that this was its view, even though, with typical judicial restraint, it did not say so expressly. Adam J. stated that “on principle” the tort of wrongful interference with contractual relations should not be extended to cover cases such as the one before him. His Honour continued:

“Where, as in the case of a contract to purchase property, a purchaser being unaware of his vendor’s personal obligations under a prior contract with another, that party thereby innocently acquired contractual rights against his vendor, but subsequently learns that by completing his vendor would break his contract with another party, on what rational principle is he to be denied his . . . right to insist on completion of his own contract? Although no doubt the case may be clearer where the subsequent purchaser has no legal escape from his contract, again on principle it should make no difference, I consider, that his contract may happen to be voidable by him. After all, a voidable contract is valid and enforceable, unless, and until avoided at the election of a party entitled to avoid it, and why should it be considered an unlawful act on his part if, preferring his own contractual rights, he elects to affirm the contract rather than forego them for the benefit of another? In the conflict in such a case between the third party’s own contractual rights lawfully acquired, and those of the plaintiff, on what principle are the contractual rights of the plaintiff to be preferred, and the third party’s action in asserting his own contractual rights to be deemed as unlawful acts?⁸⁵

Having discovered no authority for a principle which would make him decide otherwise, the learned judge found for the defendant. At no stage did he state the principle on which the defendant was legally permitted to intentionally induce the breach of the plaintiff’s contract, but there can be little doubt that it was in fact the principle underlying the guidelines proffered in this section.

That same principle does make it more difficult to base an action where the injury to the plaintiff occurs because of some induced commercial disappointment, rather than as a result of an induced breach of contract. In such a situation it will not be so easy (but not impossible) to establish that the free enterprise ideals will be promoted by giving a cause of action to the injured party, the less so when the conduct of the defendant might itself require protection as being worthwhile conduct in light of the free enterprise ideal. This was the difficulty in *Independent Oil Industry Limited v. The Shell Company of Australia Limited*.⁸⁶ There the plaintiff had had an arrangement with retail petrol sellers whereby petrol would be supplied by the plaintiff provided that the retailers sold it at a price fixed by the plaintiff. The defendants also sold petrol to the same dealers. Their arrangement was that the retailers had to sell all petrol they sold at a price which

⁸⁵ [1969] V.R. 931, 936.

⁸⁶ (1937) 37 S.R. (N.S.W.) 394.

bore a fixed relation to the defendants' price to them; the defendants reserved the right not to supply any further petrol whenever the price agreement was not honoured. The defendants put up the price of the petrol supplied by them; according to the agreement the retailers who bought from both the plaintiff and the defendants had to sell both sets of petrol at the defendants' new price. But the plaintiff refused to put up the price of its petrol. The defendants intimated that they would supply no more petrol to non-cooperating dealers, and some dealers then told the plaintiff they would sell no more of the plaintiff's fuel. The plaintiff brought an action against the defendants for procuring breaches of contract and failed. On principle this is supportable: both sets of arrangement appear to have been of equivalent merit in terms of the free enterprise goals of society and in such a situation it was perhaps best to leave the plaintiff with its contractual remedy against the dealers in default.⁸⁷ The Supreme Court of New South Wales held that the plaintiff failed because the defendants had not procured the actual breaches. This was so because the dealers could legitimately have refused to accept any further supplies from the plaintiff because there were no binding contracts in respect of such future supplies, merely an understanding that they would continue. This way out of the dilemma may have been convenient, but is analytically not too convincing. To come to its decision the Court had to make two points, neither of which was very persuasive. The first was that, although there were contracts breached in as much as some dealers refused to sell petrol at the plaintiff's price although such petrol had already been bought by them to sell at this price, the plaintiff was not entitled to an injunction in respect of such breaches because it would be too difficult to know whether such plaintiff petrol had been bought before or after the defendants' petrol was affected by the defendants' new pricing policy. The second point was that, in any event, all that the defendants had done was to declare their intention to enforce their contract; they had not endeavoured to procure breaches. To make a result depend on this kind of sophistry is not very satisfactory.

⁸⁷ But this is not necessarily so; see below. For an interesting variant see *Vickery v. Taylor*, (1910) 11 S.R. (N.S.W.) 119. The defendant, a director of a company had managed to conclude a contract with the plaintiff under which the plaintiff agreed to sell 300 shares in the company to the director at any time within six months that the director might wish to purchase them, such a sale to be made at sixteen shillings a share. The plaintiff had no shares at the time he entered into this contract. The defendant subsequently exercised his right under the contract, the price of the shares having risen substantially. This meant that the plaintiff had to buy the shares at more than sixteen shillings and sell them to the defendant at sixteen shillings. The plaintiff alleged that this had happened because the defendant and his company had by unethical means caused the share price inflation. The Court held he had no cause of action as no right of his had been violated; that is, there had been no procurement of a breach of contract. If the model advocated had been used the same result would have been reached on the basis that a gambling contract of this nature (it was so described by the Court) did not do much for free enterprise and the dubious conduct of the defendant should, despite its lack of merit, not be treated as if it was contrary to an important mode of conducting business.

Although a weighing of the relative merits of the plaintiff's and the defendant's enterprises makes it more likely that an existing contract will be protected by a cause of action than other kinds of commercial interests, it does not follow that only contractual relationships will be protected if this test is used. Further, the test does not require that, if it is a contractual relationship which the plaintiff wants protected, a breach of the contract has been procured by the defendant; an interference with the contractual relationship might justify the maintenance of a cause of action in tort. And again it is found that the test which it is suggested ought to be applied is not very different from the notions that have implicitly governed the judiciary's decision-making. Thus there has been liability imposed (without acknowledgment that the philosophy of promotion of free enterprise is to be promoted by such imposition) where the interference does not amount to the procurement of a breach of contractual relations and also where there has been an interference with relations which do not amount to a contract.

In *Rookes v. Barnard*⁸⁸ the House of Lords decided that a certain type of conduct which resulted in a contractual relationship being ended legally was actionable at the behest of the disappointed contracting party. To enable it to do so in the approved manner the House of Lords had to rely on precedents which had been ignored for a long time. If the test propounded herein had been used much of the bitterness which that decision has caused (and is still capable of creating in Australia) could have been avoided. Thus, if the question the House of Lords has asked itself had been whether or not the causing of injury without breach of contract was actionable, (i.e. if the causing of such injury did in fact detract from the ultimate goal of the promotion of free enterprise), the answer would have been "Yes", but that in the particular circumstances of *Rookes v. Barnard* there would have been no liability because the aim of promoting free enterprise was not sufficiently undermined by the conduct of the defendants in *Rookes v. Barnard* when the injury was compared to the need for protection of the defendants' conduct. Leaving that for the moment, the courts freed by the House of Lords from the straitjacket in which they had put themselves, were quick in asserting the principle that interferences which did not result in breach of contract could be actionable. But because of the formal way that the House of Lords was forced to come to its holding, the law has once again become inelastic: bad social results may be produced because the courts are not likely to feel themselves at liberty to inquire into the social merit of the conduct of the defendant in these cases; so far, they have assumed that the defendant's conduct will be actionable if it is unlawful.⁸⁹

⁸⁸ [1964] A.C. 1129.

⁸⁹ *Sid Ross Agency Pty. Ltd. v. Actors and Announcers Equity Association of Australia* [1971] 1 N.S.W.L.R. 760, where unlawful picketing causing the plaintiff not to enter into further contracts with the plaintiff was held actionable. The trade

As to the other point, it has already been seen that the law gives a remedy if the tort of passing-off is committed, that is, although the plaintiff cannot complain of either a breach of or interference with an enforceable contract, he does complain of lost business opportunities. In the proposed formula's jargon, he complains that the interference with his interest will, if not deterred, detract from the law's efforts to promote free enterprise in society. The position that the plaintiff wishes to have protected by an action, he will argue, he has only achieved after participating in free enterprise activities as society and the law would have him do; accordingly he deserves the help of the law against interferers who seek to gain a benefit from his work without having participated in free enterprise in the same useful way. Once again it may be noted that our courts have acted in accordance with some such notions. It is no accident, surely, that the defences available in passing-off actions are in fact defences which promote free competition. Hence, if a person uses his own name which is the same or similar to the name used by another who is already associated with a particular product, he will not be liable in passing-off because he must be encouraged to enter into business; the wrong is committed only if he uses the name in order to profit from the goodwill another's efforts have obtained for him. The motive of the defendant is, therefore, determinative of liability.⁹⁰

Another area that the courts have been forced to handle illogically because of their adherence to the contract-oriented formula is created by the following kind of circumstance. Assume that A has heard that B has contracted to deliver a certain number of power points to C, and A for business reasons, does not want C to reap the benefit of this contract. A buys up all the available power points on the market, knowing full well that B will consequently not be able to discharge his obligation to C. Should the law protect C by giving him a cause of action against A?

The free enterprise promotion formulation does not make the answer to this question obvious: it may or may not be to the advantage of free enterprise to permit A to corner the market to this extent. A great many more facts would have to be known to make that decision, and a resolution

union motive for so attacking the plaintiff's business was not the subject of judicial argument. In *J.T. Stratford & Son Ltd. v. Lindley*, [1965] A.C. 269, unlawful acts procuring breaches of contract and which also interfered with future business dealings of the plaintiff were held actionable in respect of both sets of injuries.

⁹⁰ *Jay's Limited v. Jacobi* [1933] Ch. 411. There have been some commentators who have doubted whether the plaintiff and defendant actually have to be in competition; see D. L. Mathieson, (1961) 39 Can. B. Rev. 409, and C. L. Pannam, "Unauthorized Use of Names or Photographs in Advertisements" (1966) 40 A.L.J. 4, but these writers argue that pecuniary loss needs to be shown. That is, if the plaintiff can show that the use of his name, likeness, "get-up" or whatever, could, if used by himself, net him a profit, he may recover although he can show no loss of business or that he was in competition with the defendant in any real sense; see *Henderson v. Radio Corporation Pty. Ltd.* (1960) 60 S.R. (N.S.W.) 576.

without argument or evidence, that A should be enabled to forestall C, have modified the law relating to inducing breaches of contract by holding that an indirect inducement of a breach of contract will not be actionable unless the defendant's conduct was unlawful.⁹² But an unlawful act which of the problem would differ in differing times.⁹¹ The courts, assuming, interferes with a contract may often not be as inimical to the aims of free enterprise as a lawful act which so interferes. This will be especially so where the unlawful act in fact furthers another acceptable social objective such as the viability of a trade union.

It is natural enough that the courts, in cases of an indirect procurement of a breach of contract, have reached for a "neutral" criterion such an unlawful act being determinative of actionability. In this way they have had to make no comparison between the value the law places on the protection of the contract and any value it might place on the conduct of the defendant. They merely have had to see whether a contract was breached as a result of the defendant's unlawful act. And in most cases this will bring the same result as the balancing test proposed. Typically, if A physically restrains B from delivering goods to C so that C cannot perform his contract with D, which result A wished to achieve when he restrained B, there can be no doubt but that this kind of interference ought to be actionable on the "promotion of free enterprise" test. It is, of course, actionable on the "unlawful act indirectly procuring a breach of contract" test.⁹³ But it goes too far to say, as Jenkins L.J. said in *Thomson v. Deakin* that there is

"no distinction in principle for the present purpose between persuading a man to break his contract with another, preventing him by physical restraint from performing it, making his performance of it impossible by taking away or damaging his tools or machinery, and making his performance of it impossible by depriving him, in breach of their contracts, of the services of his employees."⁹⁴

In this section the suggestion, so far, has been that the test the courts ought to use is whether or not the plaintiff's interest is worthy of protection because it is an interest consonant with the aims of free enterprise and, if

⁹¹ For instance, in mediaeval England it was thought intolerable that dealers and middlemen should manipulate supplies in order to artificially inflate prices. Prices were regulated and there were strict laws against the practices of engrossing, forestalling and regrading: See E. Lipson—*The Economic History of England* (9th ed.) pp. 299-307. As this tolerance to "free market" operations waxes and wanes, the result of the hypothetical case will vary if the kind of test advocated herein is utilized.

⁹² *D. C. Thomson & Co. Ltd. v. Deakin* [1952] Ch. 646. The example used in the text is taken from the judgment of Lord Evershed M.R., at 680.

⁹³ *Williams v. Hursey* (1959) 103 C.L.R. 30 in which physical force was used to stop the plaintiffs to enter into contracts. See also *Keogh v. The Australian Workers' Union* (1902) 2 S.R. (N.S.W.) 265 where unionists waylaid non-unionists who were on their way to take up employment with an employer with whom the union were disputing.

⁹⁴ [1952] Ch. 646, 696.

it is, whether or not the defendant's conduct deserves to be sanctioned because it does not further those aims as well as does the plaintiff's enterprise. But there was a qualification added to the basic guidelines, namely that the law is expected to uphold the free enterprise creed "in as much as it does not conflict with other known social objectives". There are other social objectives which the law is to protect and uphold and hence Jenkins L.J. overstated the case when he said that the means of indirect interference with a contract was of no consequence as long as it was unlawful. Just as the promotion of free enterprise requires that non-contractual as well as contractual relationships ought to be protected, it will be necessary to protect certain kinds of conduct even if they could be detrimental to efforts to promote the free enterprise ideal.

The courts recognize this need and have permitted the defence of justification or privilege to succeed in circumstances where there has been an intentional procurement of a breach of contract. It has been seen that a father may advise his daughter to break her promise to marry with impunity. Sometimes it is sought to demonstrate that this is not an attempt by the courts to inquire into the motive for, and reasonableness of, the conduct of the inducer at all; after all, if the courts did openly engage in such inquiries, tortious liability would not depend on such objective criteria as "breach of contract" or "unlawful act". Thus, Salmond argues that there is a difference between advising and inducing. For a father to advise his daughter not to marry a person to whom she is contractually bound so to do is not actionable if she heeds his advice, for he merely gave her reasons, which already existed, for breaking the contract. An inducement differs in that the inducer creates reasons to cause another to break a contract.⁹⁵ With the greatest of respect, this line of argument cannot be accepted. As Willes C.J. said as far back as 1745 "procuring" is certainly 'persuading with effect'.⁹⁶ The result cannot turn on the manner in which the defendant caused another person to break a contract; as long as he intentionally caused the contract to be breached, one of the elements of the tort is made out.⁹⁷ Whether or not liability ought to follow ought to depend on other factors, in particular, on the social merit of the advisor's/inducer's conduct.

Similarly, the courts have determined that a defendant will be justified in inducing a breach of contract where his conduct was lawful in the sense

⁹⁵ *Salmond on the Law of Torts*, op. cit. p. 379.

⁹⁶ *Winsmore v. Greenbank* (1745) 125 E.R. 1330, 1332.

⁹⁷ See also Payne, "The Tort of Interference with Contract" (1954) 7 *Curr. L. Probs.* 94. As the author says at p. 103: "Moreover, if the distinction between inducement and advice is accepted, what is to be said of the mere advisor who, though he does not threaten the person advised or actually created new reasons for the breach he advocates, is nevertheless in a position to visit his displeasure upon the person advised should his advice not be followed. If causation can in fact be shown responsibility should follow." Yet the courts have drawn the distinction between advice and inducement from time to time. Contrast *Thomson v. Deakin* [1952] Ch. 646 with *Stratford v. Lindley* [1965] A.C. 269 on this point.

of having been engaged in under the umbrella of statutory authority. *James v. The Commonwealth*⁹⁸ is an illustration of this attitude. It is worth pointing out that the action of inducing a breach of contract is made out when the defendant's act is the direct inducement of the breach even though the defendant's act is otherwise lawful. That is, statutory authority ought not to differentiate this lawful act from other lawful acts which are actionable. Therefore it may be concluded that the courts (in cases like *James v. The Commonwealth*) are making a judgment that the defendant's reliance on a positive enactment of the law indicates that he acted in furtherance of a social objective which may be assumed to be at least as worthy of protection as the plaintiff's contract or commercial interest. That is, they are balancing social objectives.

And again, in cases like *Brimelow v. Casson* the defendant was excused because of the plaintiff's exploitation of his employees, but in the *Glamorgan Miners'* case the union's attempt to look after employees' interest was held not to be justified. This has brought the sharp comment from Professor Wedderburn that "[s]exual corruption 'justifies' inducing breach; but starvation wages alone would not".⁹⁹ And the reason for this anomaly is clear: because the courts do not openly apply a balancing test, it is potluck whether or not the defendant's interest and conduct will be held to have been worthwhile. Thus, the social objective is supporting trade unions in their activities is not brought into the balance when weighed against the plaintiff's commercial interest, or if it is, it is often found to be of little countervailing weight, because the failure to openly apply this balancing test permits courts to ignore important social evidence. If the plaintiff's commercial interest, however, is tainted by being associated with conduct which the courts recognize as something the law clearly will not support, e.g. causing girls to live "in immorality with a dwarf", then the balance is weighed in favour of trade union-type activity. This brings us to the point that all articles on inducing a breach of contract must eventually discuss: the rôle this area of tort has played in industrial relations.

The judicial approach to industrial law has often and excellently been detailed by many writers and it would be superfluous to deal with it again in this brief space.¹⁰⁰ Suffice it to say that trade unionism was seen as a

⁹⁸ (1939) 62 C.L.R. 339, above at tgn 43. See also *Williams v. Metropolitan & Export Abattoirs Board* (1953) 89 C.L.R. 66; *Stott v. Gamble* [1916] 2 K.B. 504, and see *Whitfeld v. De Laurent & Co. Ltd.* (1920) 29 C.L.R. 71 where it was held that, where a State government wheat scheme indirectly prevented shippers from obtaining a carrying permit from the Commonwealth, the State government had not caused the loss of which the plaintiff complained. But that, on general principles, evidence as to what would happen to the wheat crop if the State had not put its scheme into operation could be given as tending to establish reasonable cause or excuse for doing the acts complained of.

⁹⁹ K. W. Wedderburn, *The Worker and the Law* (2nd ed. London: Macgibbon and Kee) p.350.

¹⁰⁰ *Citrine's Trade Union Law* (3rd ed., London: Sweet and Maxwell 1967);

social evil by both legislature and judiciary in England until the early part of the nineteenth century. Then the legislature came to recognize that trade union activity served some accepted social purpose and gave trade unions some legal protection. The judiciary assumed that, in as much as the legislature had not expressly given protection, trade union activity was still to be discouraged and they made trade unions liable for engaging in their collective conduct. The legislature, bit by bit, overcame these legal barriers to full-blooded trade union activity and, by 1906, the trade unions were expressly protected from all known tortious causes of acting which could be used against them.¹⁰¹ Note that the legislature insisted that this protection only be provided when the social objectives of the trade union conduct which led to the plaintiff's injury was of a particular type, namely when it went to enhance the trade union cause in furtherance of a trade dispute. That is, the courts were being told quite specifically that there was a certain kind of social objective which was more worthy of support than the promotion of competitive enterprise. Where the legislation had not offered its express protection, the courts restricted trade union activity considerably. After *Allen v. Flood*, as has been seen, to act to the detriment of another was not actionable, even if the harm was intended. Apparently an independent, unlawful act had to be committed. In *Quinn v. Leatham*¹⁰² it was held that, if otherwise lawful acts by a trade unionist were committed in concert with other individual trade unionists, these lawful acts were translated into actionable conduct. The tort was known as a civil conspiracy. This contrasted strangely with the decision in *Mogul Steamship Co. v. McGregor, Grow & Co.*¹⁰³ where it was held that businessmen's concerted action, consisting of lawful acts, taken to protect their competitive interests was not actionable at the behest of an individual competitor who was intentionally injured by the combined activity of the other businessmen. The cases are only distinguishable on the basis that the social objective of the trade union in *Quinn v. Leatham* was not acknowledged to be worthy of legal support, whereas the free enterprisers' aims in *Mogul* were. As time went by and the legislature in England made it clear that combined activity of trade unions in certain contexts was

C. Grunfeld, *Modern Trade Union Law* (London: Sweet and Maxwell 1966); K. W. Wedderburn, *The Worker and the Law*, op. cit.; E. I. Sykes, *Strike Law in Australia* (Sydney: Law Book Co. 1960); E. I. Sykes and H. J. Glasbeek, *Labour Law in Australia* (Sydney: Butterworths 1972); are but a few of the texts which have dealt with this topic at length.

¹⁰¹ Highlights of this development included the *Combination Acts* of 1799 and 1800-1839 Geo. 3 C. 81 and 39 & 40 Geo. 3. C. 106; partially repealing statutes of 1824-1825, 5 Geo. 4., C. 95, 6 Geo. 4, C. 119; cases like *Hornby v. Close* (1867) 2 Q.B. 153, *Walsby v. Anley* (1861) 3 E. & E. 516, *R. v. Rowlands* (1851) 5 Cox C.C. 466; *Royal Commission on Trade Unions* 1867, 1871-1876 statutes—*Trade Union Acts*, 39 & 40 Vict., C. 22; *Taff Vale Railway v. Amalgamated Society of Railway Servants* [1901] A.C. 426, *Trade Disputes Act* 1906.

¹⁰² [1901] A.C. 495.

¹⁰³ [1892] A.C. 25.

socially acceptable, the courts came to terms with this attitude. Thus in *Crofter Hand Woven Harris Tweed Co. v. Veitch*,¹⁰⁴ the House of Lords held that, if the trade union's reason for collective action was to further its own legitimate interests, the trade union could not be liable in tort for any injury it had intentionally inflicted by such combination. This formula recognized that trade unions had legitimate interests to further and it required the courts to inquire into the motive of the defendants. The balancing between promoting the plaintiff's right to trade against the desirability of certain kinds of trade union activity was, in this context at least, openly condoned. But the judiciary refrained from taking this approach to its logical conclusion. It is still the law that if the combiners commit independently unlawful acts no further inquiry into the social desirability of their combination will be made; it will be actionable if it causes injury. The underlying reason for this is that if the acts are unlawful in themselves they must be socially undesirable. Such arbitrary line-drawing is not very appealing to those who would like the legal system to attain a measure of justice when resolving disputes.

Let us return to the main theme. The very brief discussion of the development of trade union law in England demonstrates how the courts had accepted the promotion of free enterprise as worthy of legal support but at no stage willingly accepted the furtherance of trade union aims as being so worthy. How did *Lumley v. Gye* and its offspring fare in the industrial relations' area?

When the 1906 *Trade Disputes Act* was passed it contained a clause making inducement of a breach of contract or any other interference with the trade, business, or employment of some other person, or with the right of some other person to dispose of his capital or his labour as he wished, not actionable provided that such inducement or interference occurred in the furtherance of a trade dispute.¹⁰⁵ This clear expression of parliamentary will made trade unions safe from harassment by actions in *Lumley v. Gye*. But, as has been seen, in *Rookes v. Barnard*¹⁰⁶ the House of Lords reached back and found that there was a cause of action analogous, but not quite the same, as inducement of a breach of contract. They called it the tort of intimidation and held that it was made out when a threat of an unlawful act intentionally caused interference with another's interests, regardless of whether or not that other's interest was a breach of contract or not. This made it both more limited (in that it required an unlawful act) and wider than the tort of inducing a breach of contract (in that it required no breach of contract), these differences permitting the House of Lords to say that the statutory protection did not apply. The House of

¹⁰⁴ [1942] A.C. 435.

¹⁰⁵ S. 3, *Trade Disputes Act* 1906 (U.K.).

¹⁰⁶ [1964] A.C. 1129; see *supra* at p. 219.

Lords ignored the second limb of the statutory protection by reading it as surplusage.

The case has been much discussed and criticized, and very often the criticism takes the form of alleging that the House of Lords' bias against trade unionism caused it to invent brand new tort liability.¹⁰⁷ This is not easily proved, but what can be shown is that the ability of courts to hide behind rationalization techniques enables them to achieve results which the open application of a balancing test would not permit them to do. Thus, part of the burden of this article is that there always was a general cause of action of interference with trade and like interests, and that the restriction of *Lumley v. Gye* as a cause of action to the inducement of breaches of contracts was historically erroneous and wrong in principle. In *Rookes v. Barnard* the House of Lords reached back to the general cause of action, but feeling itself bound to do so in the normal judicial manner, it created profound discontent.

The courts, prior to *Rookes v. Barnard*, had reduced the various forms of tortious liability to specific verbal formulae. The precedent theory gave these formulations the status of unchallengeable rules: if the criteria spelt out were established, liability would ensue; it was not the courts' task to look behind the criteria and seek to satisfy social needs. That, so went (and goes) the theory, was the legislature's function. The legislature, in fact, responded by giving protection against the whole of the range of actions that the verbal formulae had made available against trade unions and which, if the theory of precedent was honoured, delimited the possible causes of action. Then the House of Lords held that the legislature had not covered all contingencies because the known verbal formulations had not exhaustively listed all the contingencies. The House of Lords was right in its finding that there was an historical base for its decision, but the law was once again seen as being far from evenhanded. There would have been no, or considerably less, furore if the unlawful act threatened in *Rookes v. Barnard* had been that the employer's machinery would be smashed, or management members attacked unless the offending non-unionist employees were dismissed. But, in fact, the unlawful act threatened was to break the contract of employment two of the defendants had with the employer by striking in defiance of a term of their employment contract. If the balancing

¹⁰⁷ Professor Wedderburn has contributed a great deal to the discussion, see, "The Right to Threaten Strikes" (1961) 24 M.L.R. 572; "The Right to Threaten Strikes II" (1962) 25 M.L.R. 513; "Intimidation and the Right to Strike" (1964) 27 M.L.R. 257 and also in the text *The Worker and the Law*, op. cit. Other commentaries include Hamson, "A Note on *Rookes v. Barnard*" [1961] C.L.J. 159; Weir, "Rookes, Stratford and the Economic Torts" [1964] C.L.J. 225; Cameron, "Conspiracy and Intimidation, An Anti-Metaphysical Approach" (1965) 28 M.L.R. 448; Smith, "Rookes v. Barnard. An Upheaval in the Common Law Relating to Industrial Disputes" (1966) 40 A.L.J. 81; Hoffman, "Rookes v. Barnard" (1965) 81 L.Q.R. 116, (who also adopts the stance that intimidation is part of an old and wider action); Thomson (1963) 41 Can. Bar Rev. 110.

test suggested herein had been used, the House of Lords could not possibly have made the decision it did make in *Rookes v. Barnard*.

As a matter of logic there is nothing wrong in regarding a breach of contract as an unlawful act, but what is wrong is to regard the cause of action now known as intimidation as being founded irrespective of the nature of the unlawful act. As has been seen, inducements of breaches of contract intentionally procured have been held non-actionable by courts where they felt the defendant's conduct was justifiable. The failure to assess the social merits of the defendants threat to breach their contract in *Rookes v. Barnard* shows that the House of Lords either did not believe that trade union aims were worthy of legal support over and above that already given by legislation, or else it believed that the cause of action it had discovered was so well-established that a court could not inquire into the social effects a literal application of the verbal formula it had just devised would have. But the literal approach cannot be maintained for long by the judiciary in any given area because such rigidity inevitably puts the law out of step with social desires.¹⁰⁸ The House of Lords made it virtually impossible by its decision in *Rookes v. Barnard*, for trade unions to threaten to call a strike, a weapon that it is essential for trade unionists to have and the legislature decided not to wait for the courts to invent qualifications to the tort of intimidation.¹⁰⁹

For another instance of how, in recent years, the courts' theoretical belief that they need to adhere to verbal formulae without inquiring into the social merit of people's conduct can cause the legal system to become anti-social let us consider the short history of *Daily Mirror v. Gardner*¹¹⁰ in the industrial relations' area. In that case, Lord Denning, as the House of Lords had done in *Rookes v. Barnard*, thought that the tort of inducing a breach of contract was but a manifestation of a general principle of liability. In particular, he thought that *Thomson v. Deakin* had stated the law too narrowly when it was decreed there that an indirect inducement of a breach of contract would only be actionable if the defendant's act was independently unlawful. His Lordship said:

"It seems to me that if anyone procures or induces a breach of contract, whether by direct approach to the one who breaks the contract or by indirect influence through others, he is acting unlawfully if there be no sufficient justification for the interference."¹¹¹

¹⁰⁸ Hence the development of defences like justification and the requirement that where there is an indirect inducement of a breach of contract the defendant's act will not be actionable unless it was independently unlawful.

¹⁰⁹ The legislature stepped in and partially relieved the position, indicating that the social objectives of trade unionism as practised in *Rookes v. Barnard* were acceptable to the public—*Trade Disputes Act 1965*.

¹¹⁰ [1968] 2 Q.B. 762.

¹¹¹ [1968] 2 Q.B. 762, 781.

But in *Torquay Hotel v. Cousins*,¹¹² as has been seen,¹¹³ Lord Denning, faced with a trade union's indirect procurement of interference with commercial relations held that he must have been wrong in the *Daily Mirror* case. He thought that he must have been wrong because if he had not been wrong trade union officials would be prevented from calling strikes, even lawful ones, because these strikes would always lead to some breach of contract. This was an unacceptable thought. Hence Lord Denning said that his verbal formulation had gone too far in opening up liability in *Daily Mirror v. Gardner*.¹¹⁴ It is interesting to note that Lord Denning held himself to be wrong in law because of the results that might ensue from a *literal* application of his words appalled him. Yet his Lordship did not have to castigate himself so harshly. As has been seen, liability ought not to depend on the arbitrary distinction between the legality or otherwise of the defendant's act; a lack of legality may be good evidence that the defendant's conduct promoted an anti-social aim,¹¹⁵ but it ought not be conclusive on this issue and it is this issue—of whether or not the defendant's conduct was anti-social—which ought to be determinative of liability. After all, Lord Denning finished the passage quoted with the qualifying phrase "if there be no sufficient justification for interference", which meant that not all procurements or inducements ought to be actionable. By rejecting the *Daily Mirror* formulation he freed trade unions' conduct from some harassment where their procurement of a breach of contract was indirect, but he emphasized that unlawful inducement and procurements would lead to liability regardless of the nature of the unlawful act or the motive for doing it. That is, although Lord Denning saw the need for protecting some kinds of conduct at the expense of the free enterprise goals of society as promoted by the making of contracts, he did not feel free to say that a balancing on the basis of social evidence ought to occur in such cases. Rather he put his faith in a categorization of the kind which had led to the unpalatable result in *Rookes v. Barnard*.

In the same way Lord Denning had to retrace his steps in *Morgan v. Fry*.¹¹⁶ In *Stratford v. Lindley*¹¹⁷ Lord Denning himself had said that whenever men gave notice that they were going to go on strike, they were giving notice that they were going to break their contracts. This was so because they intended to pressurize their employer by threatening to not honour their contractual obligation to work but did not intend to resign. This meant that when a strike was threatened, an unlawful act was

¹¹² [1969] 2 Ch. 106.

¹¹³ *Supra*, p. 202.

¹¹⁴ His Lordship also suggested that the procurement of a breach of contract in *Daily Mirror* had been the direct result of the defendant's conduct and that, therefore, the result had been sound, even if his dictum had not been.

¹¹⁵ Just as lack of an enforceable contract will be good evidence that the plaintiff's interest should be upheld because its support promotes a socially desirable aim.

¹¹⁶ [1968] 2 Q.B. 710.

¹¹⁷ [1965] A.C. 269.

threatened, (for although inducing a breach of contract was not actionable because of the statute, it was still unlawful) and, therefore, actionable intimidation had taken place if there was a violation of the plaintiff's interest. In *Morgan v. Fry* Lord Denning said that it was "difficult to see the logical flaw in that argument. But there must be something wrong with it: for . . . it would do away with the right to strike in this country."¹¹⁸ He then went on to hold that, as the strike notice was lawful in the case before him, no unlawful act had been threatened. Further, Lord Denning suggested that proper notice of a strike was merely a notice to suspend the contract. This is wrong in principle. As Professor Sykes has said "If all socio-political reasoning inducing legal phenomena has to have some front of lawyers' reasoning, here the front becomes the merest facade".¹¹⁹ But the adoption of this "front of lawyers' reasoning" enabled Lord Denning to come to the right result without openly using the kind of balancing test of the kind offered in this article.

In England the heat has momentarily been taken out of the common law debate. In 1971 the *Industrial Relations Act* took away from unregistered trade unions the legislative protection previously granted against actions in conspiracy and inducing breach of contract, but all registered trade unions were to have immunity against all possible common law actions, provided that they had acted in furtherance of an industrial dispute as defined in the Act. That is, the legislature clearly said to the courts: for unregistered trade unions to act in a particular way is anti-social and you must deter them; for registered trade unions so to act during industrial disputes is a desirable form of conduct and you must leave them alone. The balancing had been done by statute. In 1974 a Labor government came to power and has stated that it will repeal the *Industrial Relations Act* of 1971 and in its place extend the former legislative protection (and more) to trade unions. Past experience should make the legislature wary about how to draft this legislation.

Whatever the position in England is to become, Australia is, and will remain for the foreseeable future, a dramatic example of how much out of step a legal system can get with social requirements when the judiciary does not accept the responsibility of inquiring into the relative social merit of the plaintiff's and defendant's enterprise and conduct. This is so because only Queensland of all the states in Australia has extended the legislative protection afforded to English trade unions by the *Trade Disputes Act 1906*. In all the other states trade unions are wide open to actions in conspiracy and inducing breach of contract. As the Australian judiciary has accepted the law as stated in England and uses the same technique, (namely, merely looks to see whether the technical requirements of the

¹¹⁸ [1968] 2 Q.B. 710, 725.

¹¹⁹ Sykes & Glasbeek, *Labour Law in Australia*, op. cit. p. 353.

tort are fulfilled), it would be very easy to completely hamstring all union activity. The more so because in all states but Victoria strikes are made illegal to a greater or lesser extent by statute. And, at federal level, strike action may be made a breach of an award by the insertion of a bans clause. That is, the unlawful act necessary to found conspiracy by unlawful means, indirect inducement of breach of contract and intimidation will be easily established.¹²⁰

To merely inquire into whether or not the technical criteria have been established is particularly short-sighted in the Australian context. For the judiciary could hardly be furnished with more evidence than is available to come to the view that trade union activity is very much desired by our community. Thus, at the federal level, registration of trade unions has been encouraged to such a marked degree that we have become one of the most unionized countries in the world. These unions are required because the industrial relations' system we have developed is dependent on having entities which can be made parties to enforceable, imposed awards. At the same time we urge the participants in industrial relations to collectively bargain. This necessitates the use by these participants of economic force and thus, by trade unions, of conspiring to hurt the employer and to induce breaches of his contracts or generally to interfere with his commercial interests. Four of the states have systems analogous to the federal one and in the remaining two, Victoria and Tasmania, the role of trade unions is also seen as significant. That is, right along the line there is, for everyone to see, an encouragement to trade unions to make themselves stronger numerically and to use their power to withhold labour when engaging in the desirable activity of bargaining.

In this framework it is difficult to applaud courts for just looking at a dispute between a trade union and an employer as if it were a dispute which can simply be symbolized by using letters as substitutes for the parties involved, disregarding the characters of the disputants. That is, if a union seeks to make an employer employ trade unionists only, an aim that is in keeping with the encouragement of trade unionism, it is simply not good enough to say that this is a dispute between A who persuaded B not to perform his contract with C unless D dismissed X, and that, where A used unlawful means, he will be liable in tort on one of several counts (conspiracy if A is more than one, intimidation or inducement of breach of contract). The question ought to be whether the union's aim is a desirable one, and if so, whether the means used to achieve it were of the kind which ought to be protected from legal action, taking into account the need to protect the rights violated. But the courts will not do this, as the recent case of *Woolley v. Dunsford*¹²¹ demonstrates. There a decision

¹²⁰ See generally Sykes & Glasbeek, *Labour Law in Australia*, op. cit.; Sykes, *Strike Law in Australia*, op. cit.

¹²¹ [1972] 3 S.A.S.R. 243.

was made that the union, by imposing a black ban on an employer's goods in order to cause that employer to get his employees to join the union, had induced a breach of contract. The employer's contracts were breached because a shipping company refused to handle his wool when informed of the black ban. An order was made against the union. Most of the report of the case is made up by the Court's careful evaluation of mountains of evidence about whether the defendant's conduct caused the shipping company to breach the contract and whether or not there was a contract. It is suggested that it would not have been any more arduous for the court to take the position that the decision should be made on the basis of the relative merits of the enterprise and conduct of the parties, the social value of the trade union activity being well-documented and other relevant social evidence being readily available.¹²²

A brief point is to be made in respect of the earlier comment that if the judicial approach presently employed persists, the position will not alter. This will be so despite the present federal government's announced intention to provide protection on the English legislative model basis.¹²³ Even if such legislation is enacted, and even if it is held to be constitutionally valid,¹²⁴ it will apply to federally registered trade unions acting in the federal sphere of labour regulation. At the State level, no immunity will have been created.

Should the courts be permitted to consider the difficulties arising out of the use of power by trade unions as if they were no different from the actions of an individual who, for private gain or malice, seeks to interfere with the legitimate interests of another? Is the value of having the judicial system appear to be bound by rules and, therefore, objective, not outweighed by the inevitable creation of the kinds of problems outlined in this section if this judicial method is adopted?

A Summation

1. The courts should be asked to strike a balance between competing interests on the basis of the social desirability of those aims. An acceptable starting point at this moment in time is that endeavours which promote free enterprise activity should be supported by the law by imposing liability on those who interfere with such endeavours. It follows that, although the existence of a contract will be strong evidence that the plaintiff's interest

¹²² Other cases which were decided by artificial criteria included *McKernan v. Fraser*, *Bond v. Morris* and *Williams v. Hursey*, discussed supra. In all three cases the court spent a good deal of time discussing whether or not it was a contract which had been interfered with.

¹²³ In 1973 such legislation was offered but was not passed into legislation.

¹²⁴ It can only be valid if it is adjudged incidental to the power of conciliation and arbitration. The registration of trade unions is permissible as being incidental to that power, that is, to make implementation of that power more efficient. Quære: whether the granting of immunity to tort actions in order to make registered trade unions more efficient is incidental (within the meaning of the Constitution) to the conciliation and arbitration power.

should be protected, not only contractual interests will be protected, nor will actual breaches of contract be necessary. In any event, the *Lumley v. Gye* "tort" has been wrongly restricted to inducing breaches of contract.

2. Not all interferences with endeavours which promote free enterprise should attract liability. There should be no such liability if the interference is the natural result of the promotion of a socially desirable aim. The courts will need to obtain evidence to enable them to decide between the relative desirability of the two conflicting aims. Whether or not the interference is the result of an independently unlawful activity is not determinative of this issue; but if the conduct is truly reprehensible, e.g., the use of violence to achieve a socially desirable aim, this must be taken into account in applying the balancing test.

3. The courts have clearly accepted that endeavours which promote free enterprise are worthy of being protected by the law especially by making an action available where there is no inducement of a breach of contract. They have also recognized that some countervailing objectives may override such protection. In view of this it can legitimately be said that they assume certain social facts and desiderata when facing the kinds of dispute discussed in this article. It is therefore not legitimate to argue that they should not take their position to its logical conclusion; nor should they be permitted to continue to hide behind the pretence that only the legislature can and does build policy into the law.

4. There is no question but that to balance competing interests and conflicting social aims will be very difficult. It will be difficult to get the right kind of evidence before the courts. For example, it was seen that in *Independent Oil Industries Ltd. v. The Shell Co. of Australia Ltd.*¹²⁵ there was no convincing reason why either one of the parties should be favoured on policy basis. But this is no reason for saying that the courts should decide cases without regard to policy reasoning of the kind advocated. If they do so, the results will only *look* more objectively reached; they will not *be* more objective, nor more just. To say that it is not proper for the courts to delve into social data is to say that the lady who represents justice is blind-folded because she wants to make her decisions in ignorance, rather than by treating disputes on their real merits.

This is not a new-fangled thesis advocated only by academics who do not have to deal with the realities of administering a legal system. It was stated, much better than I have been able to do it, eighty years ago, by one of the greatest common law judges of all times. Thus spoke Oliver Wendell Holmes:

"But whether, and how far, a privilege shall be allowed is a question of policy. Questions of policy are legislative questions, and judges are shy of reasoning from such grounds. Therefore, decisions for or against the

¹²⁵ (1937) 37 S.R. (N.S.W.) 394.

privilege, which really can stand only upon such grounds, often are presented as hollow deductions from empty general propositions like *sic utere tuo ut alienum non laedas*, which teaches nothing but a benevolent yearning, or else are put as if they themselves embodied a postulate of the law and admitted of no further deduction. . . . When the question of policy is faced it will be seen to be one which cannot be answered by generalities, but must be determined by the particular character of the case. . . . I do not try to mention or to generalize all the facts which have to be taken into account; but plainly the worth of the result, or the gain from allowing the act to be done, has to be compared with the loss which it inflicts. Therefore, the conclusion will vary, and will depend on different reasons according to the nature of the affair."¹²⁶

¹²⁶ O. W. Holmes, "Privilege, Malice and Intent" (1894) 8 Harv. L.R. 13.