Is There or Should There be a Prima Facie Tort in New Zealand?*

by

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I. INTRODUCTION

It is the object of this article to show that *Allen* v. *Flood*[1] is the centre-piece of economic tort theory in the common law world and that as such it has restricted the development of any coherent and consistent prima facie tort doctrine.[2]

Economic torts developed originally from various actions on the case and so evolved gradually into the separate and nominate torts of passing off, injurious falsehood, inducing breach of contract, conspiracy and, most recently, intimidation. In *Allen* v. *Flood*, in 1898, there arose an opportunity to draw together the various nominate torts under one common denominator. However, the House of Lords, by a majority, concentrated on an "unlawful means" requirement and rejected the contention that motive was at all relevant.[3] In doing so, they limited any development of an all-embracing tort of "intentionally and unjustifiably causing loss".

[1] [1898] A.C. 1.

[2] E. R. D. Harrison points to *Allen* v. *Flood* as a case which "stands squarely in the way of any individual liability based on malice": *Trade Unions and the common law in New Zealand*, (1973), Ph.D. thesis, University of Auckland, 528.

[3] In a casenote in [1964] C.L.J. 225, 226 it is stated: "The law could (and should) have said that there must be 'fair play', but it has chosen instead the formalistic principle that intentional damage need be repaired only if it is inflicted by impermissible means, that is, by methods reprobated by the law of crime, tort and contract."

Subsequent developments in this area, however, as, for example, the cases of *Quinn* v. *Leathem*[4] and *Rookes* v. *Barnard*[5] have either strained or ignored this requirement of "unlawful means". In *Stratford (J. T.) & Son Ltd.* v. *Lindley*,[6] Viscount Radcliffe stated quite categorically that in his opinion the state of the law in this area, and its insistence upon "unlawful means" as a necessity before an action may be founded, was most unsatisfactory. He suggested that it is the substance of the defendant's action which should be had regard to, and not some accidental or incidental "unlawful means" which may have little to do with regulating trade affairs.[7] Towards the end of his speech he said:[8]

[4] [1901] A.C. 495. All their Lordships distinguished *Allen* v. *Flood* on the facts and so evaded the necessity of finding the requirement of "unlawful means". They held that a combination of two or more to injure a plaintiff, without justification or excuse, resulting in damage to him, is actionable. Having discussed *Allen* v. *Flood*, a case in which he himself had sat in the House of Lords, Lord Shand said at 515: "It is only necessary to add that the defendants here have no such defence as legitimate trade competition. Their acts were wrongful and malicious in the sense found by the jury—that is to say, they acted by conspiracy, not for any purpose of advancing their own interests as workmen, but for the sole purpose of injuring the plaintiff in his trade. I am of opinion that the law prohibits such acts as unjustifiable and illegal; that by so acting the defendants were guilty of a clear violation of the rights of the plaintiff, with the result of causing serious injury to him, and that the case of *Allen v. Flood*, as a case of legitimate competition in the labour market, is essentially different, and gives no ground for the defendant's argument." *Sed quaere?*

[5] [1964] A.C. 1129. It is clear that *Rookes* v. *Barnard* is not founded on "unlawful means" at all if the case is analysed from a contractual standpoint. A's threat to break his contract with B is no more than an oral or written renunciation of his contractual rights; it is an unaccepted repudiation having no effect at all. According to Asquith L. J. in *Howard* v. *Pickford Co.* [1951] 1K.B. 417 at 421 an unaccepted repudiation is "a thing writ in water." There is therefore nothing "unlawful" if A merely states his intention not to perform his contract. According to well-established contractual principles this is the situation found in cases of anticipatory breach and, until this is accepted by B (and in cases of intimidation B usually does not accept the repudiation), there is never any breach at all. It is clear from *Rookes* v. *Barnard* that, as J. D. Heydon points out in *Economic Torts* (1973), 52, "the House of Lords made it plain that what they really objected to was not the use of illegal means, but certain forms of intentionally caused economic loss. They could not give full effect to this because their hands were tied by the decision in *Allen* v. *Flood* that loss caused by means otherwise lawful was not actionable. So intimidation had to remain a tort parasitic upon some illegality judged by rules of law whose purpose might be quite different from that of regulating trade affairs." In order to be consistent with the principle laid down in *Allen* v. *Flood* the House of Lords had to make the threat to break a contract capable of being "unlawful means" for the purpose of this tort, although such a decision has irreconcilable difficulties with contractual principles. It is clear, however, that the "unlawful means" is not the gist of the action—it is the intentional and unjustifiable infliction of loss upon the plaintiff which is really being called in question.

[6] [1965] A.C. 269.

[7] See Heydon, op. cit., 53.

[8] [1965] A.C. 269 at 329-330.

> What puts the defendants in the wrong in legal analysis is that they have used the procuring of breaches of contract to enforce their policy of attacking Stratford. I cannot say, when I look at the facts of the case, that this strikes me as a satisfactory or even realistic dividing line between what the law forbids and what the law permits. There is a special point here about the existence of a trade dispute, but that is possibly an accidental specialty: one can see that with a small shift in the facts, which the full trial of the action may itself achieve, there could easily be a trade dispute to be contemplated or furthered. Then there would remain only the hiring contracts: and one sees again how easily a slight difference in the framing of the embargo order might have avoided incitement to breach of contract, while still achieving a virtual cessation of the plaintiff's business. I cannot see it as a satisfactory state of the law that the dividing line between what is lawful and what is unlawful should run just along this contour. The essence of the matter is that the defendants, conceiving themselves to be acting in the interests of their union, decided to use the power of their control of that union to put the plaintiffs out of business for the time being. When and upon what conditions they would be allowed to resume their business was left in the air. In my opinion, the law should treat a resolution of this sort according to its substance, without the comparatively accidental issue whether breaches of contract are looked for and involved; and by its substance it should be either licensed, controlled or forbidden.
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> The current textbooks list many different economic torts with separate specifications, wholly lacking in principle, and therefore difficult and unprofitable to master.[9]

The need for an "umbrella" tort, incorporating all nominate torts and certain miscellaneous cases, is also shown by such cases as *Bollinger* v. *Costa Brava Wine Co. Ltd.*,[10] which one is unable to fit neatly into the ambit of existing nominate torts. Lack of space precludes any detailed examination of the somewhat separately developed torts of passing off and injurious falsehood,[11] therefore this article will concentrate upon the torts of conspiracy, inducing breach of contract and intimidation.

It will therefore be necessary to re-examine in the light of subsequent developments the case of *Allen* v. *Flood*,[12] the basis of many of the economic torts, in order to find out whether or not a prima facie tort exists.

L. H. Hoffmann states the position in his article "*Rookes v. Barnard*", where he says:[13]

> This leads to the final point, which is whether it is not yet too late to distinguish *Allen* v. *Flood* on its facts and reassert the nineteenth-century doctrine that, whatever the means employed, all loss deliberately caused

[9] [1964] C.L.J. 225, 226.
[10] [1960] Ch. 262.
[11] These torts will be covered by the basic formulation of the prima facie tort; the defence of the prima facie tort; the defence of justification would be equally applicable. It would then be clear that the reason that "confusion" is an important element in one limb of the tort of passing off is to show that loss has been suffered. The formulation of a prima facie tort would also include those cases forming the second limb of the tort of passing off, which have always been difficult to explain, where there is no possibility of "confusion" arising but there is an appropriation of an economic advantage (e.g., *Harrods Ltd.* v. *R. Harrod Ltd.* (1923) 40 T.L.R. 195).
[12] [1898] A.C. 1.
[13] (1965) 81 L.Q.R. 116, 140-141.

for an improper purpose is actionable. Writing extra-judicially in 1962, Lord Devlin said: "There is no going back now on *Allen* v. *Flood*."[14] But in *Rookes* v. *Barnard*,[15] perhaps with a malicious pleasure in espousing what Lord Dunedin had called "the leading heresy,"[16] he said that the point was still open.[17] Dogmas apparently even more impregnable have been overthrown in recent years.[18]

II. Difficulties Caused by an Insistence upon "Unlawful Means"

It should be noted from the outset that the majority of the various forms of these torts do not reply upon a requirement of "unlawful means" as their foundation, despite the speeches of their Lordships in *Allen* v. *Flood*.[19]

In that celebrated case, Lord Macnaghten expounded the opinion of the majority:[20]

> I do not think that there is any foundation in good sense or in authority for the proposition that a person who suffers loss by reason of another doing or not doing some act which that other is entitled to do or to abstain from doing at his own will and pleasure, whatever his real motive may be, has a remedy against a third person who, by persuasion or some other means not in itself unlawful, has brought about the act or omission from which the loss comes, even though it could be proved that such person was actuated by malice towards the plaintiff, and that his conduct if it could be inquired into was without justification or excuse.
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> The case may be different where the act itself to which the loss is traceable involves some breach of contract or some breach of duty, and amounts to an interference with legal rights. There the immediate agent is liable, and it may well be that the person in the background who pulls the strings is liable too, though it is not necessary in the present case to express any opinion on that point.

Lord Watson, in the same case, puts the point more succinctly:[21]

> But the existence of a bad motive, in the case of an act which is not in itself illegal will not convert that act into a civil wrong for which reparation is due. A wrongful act, done knowingly and with a view to its injurious consequences, may, in the sense of law, be malicious; but such malice derives its essential character from the circumstance that the act done constitutes a violation of the law.[22]

[14] *Samples of Lawmaking* (1962), 12.
[15] [1964] A.C. 1129.
[16] *Sorrell* v. *Smith* [1925] A.C. 700 at 719.
[17] [1964] A.C. 1129 at 1215-1216.
[18] Hoffmann cites the treatment of *Derry* v. *Peek* (1889) 14 App. Cas. 377 in the case of *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.* [1964] A.C. 465 and the treatment of *Duncan* v. *Cammell Laird & Co. Ltd.* [1942] A.C. 624 in *re Grosvenor Hotel, London (No. 2)* [1965] 1 Ch. 1210.
[19] [1898] A.C. 1.
[20] Ibid., 151-152.
[21] Ibid., 92.
[22] Hoffman, loc. cit., 139 says: "In a sense, therefore, *Allen* v. *Flood* was a political decision in which the need for justice to individuals, outside the sphere of labour disputes, was sacrificed to the particular needs of the trade unions. In 1897, when the trade unions were politically weak, this may have been a proper attitude for the House of Lords to take. There seemed at the time little prospect that Parliament would intervene to help the unions, and the damage which they were likely to suffer from a contrary decision outweighed the interests of the occasional individual who would have to go without a remedy for loss caused to him for an improper motive."

This approach of the majority in *Allen* v. *Flood*,[23] insisting upon the necessity of independent "unlawful means", has been adopted in cases of "third party" inducing breach of contract (as opposed to the primary form of the tort exemplified in *Lumley* v. *Gye*[24]). However, it may be said that the issue of whether "unlawful means" had been employed by the defendants at all in the case of *Stratford (J. T.) & Son Ltd.* v. *Lindley*[25] was dealt with somewhat summarily by their Lordships due, perhaps, to the fact that this was an application by the plaintiffs for an interlocutory injunction. Without actually stating whether or not "unlawful means" were required, Lord Reid implied that they were:[26]

> Accordingly I am of the opinion that the appellants have made a prima facie case that the respondents threatened to induce the men of their union to break their contracts and thereby threatened to use unlawful means to interfere with the appellant's business.

There exists a second form of the tort of conspiracy which arises where two or more persons combine to injure the plaintiff by "unlawful means". In *Rookes* v. *Barnard*,[27] threats by certain employees of B.O.A.C., to break their contracts of employment unless the plaintiff was dismissed, were held to be "unlawful means" for the purpose of founding an action for conspiracy (as well as for an action for intimidation). In order to found an action on the basis of the principle in *Allen* v. *Flood*,[28] the House of Lords had to construe the threats to break contracts of unemployment as "unlawful means". This was, clearly, an innovation.[29]

Lord Reid justified this conclusion thus:[30]

> It must follow from *Allen* v. *Flood* that to intimidate by threatening to do what you have a legal right to do is to intimidate by lawful means. But I see no good reason for extending that doctrine. Threatening a breach of contract may be a much more coercive weapon than threatening a tort, particularly when the threat is directed against a company or corporation, and, if there is no technical reason requiring a distinction between different kinds of threats, I can see no other ground for making any such distinction.

It may, therefore, be deduced from such cases that the courts have tended to insist upon the requirement of "unlawful means" for these particular economic torts. However, the anomalies created by the decision in *Allen* v. *Flood*[31] with respect to the requirement of "unlawful means" are many. It has been said many times that whether or not "unlawful means" have been employed is often quite incidental

[23] [1898] A.C. 1.
[24] (1853) 2 El. & Bl. 216.
[25] [1965] A.C. 269.
[26] Ibid., 325.
[27] [1964] A.C. 1129.
[28] [1898] A.C. 1.
[29] Ante, n. 5.
[30] [1964] A.C. 1129 at 1169.
[31] [1898] A.C. 1.

to the action and that the courts should look instead to the actual substance of the matter.

Talking of the decision in *Rookes* v. *Barnard*,[32] this point is made in reference to the field of industrial disputes, an area where it is clear that the application of economic torts involves certain difficulties, by Salmond:[33]

> But the difficulties of the decision are such that it has been plausibly suggested that Parliament might, in the limited field of industrial disputes, make the dividing line one between physical and economic pressure and not one between lawful and unlawful coercion. It is often incidental whether breaches of contract have been committed, and attention should be paid to the substance of the matter.

In Rookes v. Barnard,[34] Lord Devlin commented:[35]

> The essence of the difficulty lies in the fact that in determining what constitutes the tort of intimidation your Lordships have drawn the dividing line not between physical and economic coercion but between lawful and unlawful coercion. For the universal purposes of the common law, I am sure that that is the right, natural and logical line. For the purpose of the limited field of industrial disputes which is controlled by statute and where much that is in principle unlawful is already tolerated, it may be that pragmatically and on the grounds of policy the line should be drawn between physical and economic pressure. But that is for Parliament to decide.

It has, therefore, clearly been recognised that the insistence upon a requirement of "unlawful means" in certain economic torts leads to serious anomalies and inconsistencies, at least as far as industrial disputes are concerned. But the anomalies mentioned are by no means found only in cases of industrial disputes, in the sense of employer/employee relations.

In *Brekkes Ltd.* v. *Cattel*,[36] the plaintiff company sought injunctions against two associations to prevent them acting in accordance with a certain resolution to the detriment of the plaintiff company. In this case, in order to make the defendant associations liable, Pennycuick V. C. had to find that "unlawful means" had been employed by the defendants and seized upon any available possibility. It was held that the resolution of the two associations was prima facie caught by the provisions of the Restrictive Trade Practices Act 1956[37] and was "unlawful means" for the purpose of the tort of unlawful interference with another's trade. The fact that the defendant associations would probably be able to justify their action subsequently in the Restrictive Practices Court was, it seems, irrelevant.

It is difficult to do other than agree with Hoffman (for the defen-

[32] [1964] A.C. 1129.
[33] *Law of Torts* (15th ed. 1969), 493.
[34] [1964] A.C. 1129.
[35] Ibid., 1220.
[36] [1972] Ch. 105.
[37] Sections 20 and 21, as amended by the Restrictive Trade Practices Act 1968, s. 10 (1).

dant associations)[38] when he said that it was not for a Chancery Court to decide upon the legality or illegality of such a resolution when in fact the Restrictive Practices Court had been specifically set up for exactly this purpose. In finding that the resolution constituted "unlawful means" for the purposes of this tort and granting the injunctions sought, Pennycuick V. C. was in fact rendering the Restrictive Practices Court redundant.

This case, as does *Daily Mirror Newspapers Ltd.* v. *Gardner*,[39] illustrates the absurdity which can result from the insistence upon "unlawful means" as a necessary ingredient of such economic torts.

In New Zealand, "unlawful means" has been extended to include breaches of relevant awards, industrial agreements and agreements registered under the Labour Disputes Investigation Act 1913. In 1925, in *Ruddock* v. *Sinclair*,[40] a go-slow by the defendants successfully induced the plaintiff's dismissal. It was held by Sim J. that, even if this did not constitute a strike, it was at least a breach of the defendant's award and this amounted to use of "unlawful means". Accordingly, the defendants were liable.

In *Hughes* v. *Northern Coal Mine Workers Industrial Union of Workers*,[41] where a threat to strike induced the dismissal of the plaintiff, this was held to amount to a resort to "unlawful means". Although Fair J. did not expressly say that the illegality in question was a breach of a strike provision of the Act (Industrial Conciliation and Arbitration Act) then in force, it seems clear that this was the basis of the holding of illegality.

However, the more recent decision of Speight J. in *Pete's Towing Services Ltd.* v. *Northern Industrial Union of Workers*[42] is, it is submitted, somewhat out of line with the earlier authorities. Distinguishing the earlier cases on the facts, the learned judge held that it had not been proved that the threat of strike action on the part of the union officials and the "warning of the consequences" if their demands were not met did constitute an illegal act or illegal means for the tort of intimidation. He concluded:[43]

> . . . [W]ith particular reference to Part X of the Industrial Conciliation and Arbitration Act 1954, a strike as such is not illegal and indeed, there are lawful methods of striking. A fortiori it may be lawful to threaten strike, depending on the type of action contemplated.

Speight J. tended to place more emphasis upon the justification aspect of the case and was, therefore, faced with the difficulty of

[38] [1972] Ch. 105 at 110-111.
[39] [1968] 2 Q.B. 762.
[40] [1925] N.Z.L.R. 677.
[41] [1936] N.Z.L.R. 781.
[42] [1970] N.Z.L.R. 32.
[43] Ibid., 44.

holding that the union was justified in using "unlawful means" by threatening to strike contrary to the provisions of the Industrial Conciliation and Arbitration Act 1954. Like most lawyers, His Honour had difficulty in saying that certain action could be justified even although that conduct involved illegality. He therefore strained to hold the threat to strike to be lawful.

Two criticisms of the judgment may be made at this point. Firstly, industrial lawyers would argue that strike action was unlawful under the Industrial Conciliation and Arbitration Act 1954 and that, therefore, the threat also being unlawful, this constituted intimidation.[44] Secondly, it is, perhaps, not quite true to say that "unlawful means" can never be justified.[45]

However, the *Pete's Towing* case[46] shows that the essence of the tort is the pressure used and, perhaps, that in certain circumstances even "unlawful means" may be justified. Speight J. was, in fact, in the words of Viscount Radcliffe, looking to the "substance of the matter"[47] and not to the incidental means used to accomplish the purpose.

Similar objections have been raised in New Zealand to the use of the strike provisions constituting "unlawful means" as have been raised in England to the use of the provisions of the Restrictive Trade Practices Acts. E. R. D. Harrison, in his thesis *Trade Unions and the common law in New Zealand*, comments:[48]

> In the first place, it should be remembered that the strike provisions of the Act were, and are, part of a detailed and comprehensive system for the settlement of industrial disputes. This system was introduced to cover an area where no legal regulation had previously existed. In such a context, any attempt to invoke common law and, in particular, tortious remedies could have been quite logically refused, on the grounds that complete provision for settlement of these disputes, including machinery for enforcement had been made by the creation of a separate, statutory system, which by implication ousted the jurisdiction of the ordinary courts in these matters.
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> Alternatively, as a less radical step, the use of the strike provisions to impute liability in tort could have been abstained from, on the grounds that they formed part of a separate and unique system, and were therefore inappropriate for use in tort actions.
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> Although either of these approaches would have been logical, the courts have almost without exception neglected this type of avenue, preferring instead to retain full powers of intervention.

However, it would be quite wrong to suggest, as indeed certain of

[44] Threats to break contracts of employment constitute "unlawful means" for the purposes of the tort of intimidation. See the judgment of Lord Reid in *Rookes* v. *Barnard* [1964] A.C. 1129 at 1169: ante, p. 5.

[45] See J. D. Heydon, "Justification in Intentional Economic Loss" (1970) 20 U.T.L.J. 139, 171-182.

[46] [1970] N.Z.L.R. 32.

[47] [1965] A.C. 269 at 329 and 330: ante, p. 3.

[48] Op. cit., 391-392.

their Lordships in *Allen* v. *Flood*[49] tended to do, that the "unlawful means" is the essence of all these torts. There are certain forms of economic torts which require no independent "unlawful means" as a basis to an action. To begin with, the primary form of the tort of inducing breach of contract has no such requirement. It is sufficient if[50]

> . . . a person who wrongfully and maliciously, or, which is the same thing, with notice, interrupts the relation subsisting between master and servant by procuring the servant to depart from the master's service . . whereby the master is injured. . . .

The gist of the action is the intentional violation of contractual rights;[51] there is no dependence upon a defendant's use of "unlawful means" to support such an action.

Secondly, it may be argued that in *Rookes* v. *Barnard*[52] there was in fact no "unlawful means" to support the action and yet the House of Lords gave the plaintiff a remedy for intentionally and, in their opinion, unjustifiably causing economic loss.[53] The threats of the trade unionists to break their contracts of employment were, it is arguable, merely a renunciation of contractual rights and not unlawful per se. There is, it is submitted, an important difference between an actual breach of contract and the communicated intention of a party to a contract to repudiate that contract at some future time. The breach of contract is clearly unlawful while the threat to break a contract is merely a renunciation of contractual obligations, a possible anticipatory breach which is of no effect until the innocent party elects to treat it as a breach.[54]

In the Court of Appeal, Pearson L. J. had said: "If the extension were made [of the ambit of "unlawful means" to include threats of breach of contract], it would overturn or outflank some elementary principles of contract law."[55] His Lordship was talking primarily of the doctrine of privity of contract, an objection which it is clear is wholly unfounded.[56] However, the remark is clearly applicable to the law of anticipatory breach of contract, which is one basic principle of contract law which is to a great extent affected by their Lordships'

[49] [1898] A.C. 1.
[50] *Lumley* v. *Gye* (1853) 2 El. & Bl. 216 at 224 per Crompton J.
[51] *Quinn* v. *Leathem* [1901] A.C. 495 at 510 per Lord Macnaghten discussing *Lumley* v. *Gye*.
[52] [1964] A.C. 1129.
[53] Their Lordships were obliged to hold threats to break contracts of employment as constituting "unlawful means" in order to keep within the principle laid down in *Allen* v. *Flood* [1898] A.C. 1. It is submitted, however, that this is straining the requirement of "unlawful means" somewhat.
[54] Ante, n. 5 and cases on anticipatory breach: *Frost* v. *Knight* (1872) L.R. 7 Ex. 111; *Mihalis Angelos* [1971] 1 Q.B. 164.
[55] [1963] 1 Q.B. 623 at 695.
[56] See [1964] A.C. 1129 at 1206-1209; [1964] C.L.J. 225, 229.

ruling in *Rookes* v. *Barnard*.[57]

Finally, it was decided in the case of *Quinn* v. *Leatham*[58] that a combination of two or more to injure a man in his trade, without justification or excuse, resulting in damage to him was actionable. The facts of the case were somewhat similar to those in the case of *Allen* v. *Flood*,[59] three years earlier; however, their Lordships strove to distinguish that case in order to reach a different result.

In *Quinn* v. *Leatham*,[60] Lord Shand, who had agreed with the majority in *Allen* v. *Flood*,[61] distinguished the two cases on the following basis:[62]

> As to the vital distinction between *Allen* v. *Flood* and the present case, it may be stated in a single sentence. In *Allen* v. *Flood* the purpose of the defendant was by the acts complained of to promote his own trade interest, which it was held he was entitled to do, although injurious to his competitors, whereas in the present case, while it is clear there was combination, the purpose of the defendants was to injure the plaintiff in his trade as distinguished from the intention of legitimately advancing their own interests.

Their Lordships held the defendants liable because they had conspired to injure the plaintiff and their actions were not justifiable as the maintenance of a "closed shop" was not then regarded as a legitimate object of a union. However, since the case of *Crofter Hand Woven Harris Tweed Co.* v. *Veitch*[63] in 1942, it is clear that where two or more conspire intentionally to cause a person loss, this is actionable as a conspiracy. In this case, however, their Lordships recognised that maintaining a "closed shop" was in fact a legitimate object of union activity.

However, the tort of conspiracy still has its anomalies. Where two people conspire together to cause a person loss, and do in fact cause such loss, they are liable for the results of their conspiracy. If, however, the defendant is a large and powerful company, being one legal entity, there cannot be said to be a conspiracy and the plaintiff in such a case will be unable to recover.

J. D. Heydon discusses this anomaly in his article:[64]

> . . . [W]hy should an act done with certain motives lead to liability if done by two but not if done by one? 'Broad grounds of policy' are said to justify the distinction, but what are they? Many judges, particularly those in the *Crofter* case,[65] have successfully shown how numbers alone are irrelevant to the question of extent of damage. In view of this, either motive conspiracy should not be a tort, or *Allen* v. *Flood*,[66] deciding that

[57] [1964] A.C. 1129.
[58] [1901] A.C. 495.
[59] [1898] A.C. 1.
[60] [1901] A.C. 495.
[61] [1898] A.C. 1.
[62] [1901] A.C. 495 at 514.
[63] [1942] A.C. 435.
[64] "Justification in Intentional Economic Loss," loc. cit., 160.
[65] [1942] A.C. 435 at 468 per Lord Wright.
[66] [1898] A.C. 1.

> malevolent action by one alone is not actionable, was wrong. It is a tribute to the power of precedent that the very basis of existence of one tort and the non-existence of another should have been repeatedly passed over. From this distance it seems clear that the 'liberal' majority in *Allen* v. *Flood,* which discussed some policy issues, made a short-term gain for trade union immunity from property-holding juries at the cost of losing theoretical consistency and a practical weapon against intolerable conduct.

So it is that since *Allen* v. *Flood*[67] there is a requirement that "unlawful means" must have been employed where there is no combination.[68] Once again, it is clear that the ratio of this case has had a restrictive effect upon subsequent developments in the field of economic torts. Despite this, the authorities indicate that the tort of conspiracy to injure, the primary form of the tort of inducing breach of contract (as exemplified by *Lumley* v. *Gye*[69]) and possibly the tort of intimidation (where, as it has already been submitted, the House of Lords strained to find "unlawful means" in order to find the defendants liable), all rest upon an intention, without justification, to cause loss to the plaintiff.

> The courts should rationalize the position by basing the practical law on intentionally caused loss rather than on the theoretically more restrictive notion of causing loss by unlawful means. A court would not need much courage to take this step for as we shall see it would not substantially alter the law in practice.[70]

Finally, the inconsistency which may result from a reliance upon "unlawful means" for certain economic torts is aptly illustrated by a passage in the judgment of Speight J. in *Pete's Towing Services Ltd.* v. *Northern Industrial Union of Workers:*[71]

[67] Idem.

[68] See the judgment of Nield J. in *R.* v. *McDonnell* [1966] 1 Q.B. 233. Writing of the need for combination for this economic tort, it is stated in a casenote in (1921) 37 L.Q.R. 395, 397: "Why need it be concerted? It is true that one person can seldom have it in his power to do this kind of mischief: it is far from certain that he never can. To put an imaginary case too incredible to give offence, let us feign that Mr Carnegie, the most benevolent of men in fact, bore malice against some formerly rival firm and put it about that no town whose citizens dealt with that firm need expect any share of his bounty in the way of library buildings or otherwise. Would the fact that Andrew Carnegie was only one man be of itself a conclusive answer to an action brought by the firm so treated? We humbly conceive not. In other words, the reason of the thing seems to point to the confirmation of Lord Bowen's opinion, already approved in the Supreme Court of the United States, that all harm wilfully done to one's neighbour is actionable unless it can be justified or excused. If that is so, it is matter not of law but of fact that there are ways in which one person of ordinary means can do no appreciable harm but an association can do much. This, we believe, is the most promising road towards getting rid of the confusing talk about conspiracy."

[69] (1853) 2 El. & Bl. 216.

[70] Heydon, loc. cit., 177.

[71] [1970] N.Z.L.R. 32 at 42.

> In *Rookes* v. *Barnard*,[72] Rookes had no contract with B.O.A.C. and it was entitled to dismiss him as it did—to his financial detriment. But the tort consisted of the method adopted by the unionists in getting B.O.A.C. to dismiss Rookes. They did so by threatening to do something which was unlawful, that is, to break their own contracts of employment in breach of a "no strike" agreement. On the other hand, in *Morgan* v. *Fry*[73] the Port of London Authority was similarly entitled to dismiss Morgan and the means adopted by Fry on behalf of his union to persuade the Port of London Authority to dismiss Morgan, was a threat to strike which would paralyse the particular dock. But the strike notice given by Fry's union was legal, being of the required duration, so that there were no illegal means adopted by the defendant. Consequently, Rookes succeeded but Morgan failed.

In these two cases both plaintiffs were in the same position; both had, by means of threats, lost their jobs. The effect of the defendants' actions in both cases was the same, in that the plaintiffs were dismissed. Yet, one was able to recover from the defendants while the other was not able to do so, simply on the ground of some incidental clause in the contracts of employment, which made their action lawful or unlawful. It was merely a fortuitous circumstance that "unlawful means" were not employed by Fry. In his speech in the House of Lords in *Rookes* v. *Barnard*,[74] Lord Devlin says that it is important that the illegal or "unlawful means" used is "not just a technical illegality, a case in which a few days longer notice might have made all the difference."[75] This raises the question of just how technical the "unlawful means" must be. In *Rookes* v. *Barnard*,[76] the "unlawful means" was based upon the "no strike" clause in the defendants' contracts of employment, but if there had been no such clause, presumably, the strike being lawful, Rookes would suddenly have been in a very different position.

If we take a very simple example, the position may be made clearer. A threatens to publicise that B is a criminal unless he sacks C. Prima facie this is a libel or slander which is being threatened and therefore C would have an action against A for intimidation. But, if on the other hand it happens that B has in fact a criminal past, A's statement is justified and according to the authorities C loses his action for intimidation because no "unlawful means" have been employed.

What, in fact, is important in such an action is not the "unlawful means" used on B; it matters little to C what form the "persuasion" takes. It is the fact that he suffers because of it, rather than because it was unlawful vis-à-vis B, which is important.

[72] [1964] A.C. 1129.
[73] [1968] 2 Q.B. 710.
[74] [1964] A.C. 1129.
[75] Ibid., 1218-1219.
[76] [1964] A.C. 1129.

All their Lordships in *Rookes* v. *Barnard*[77] agreed that it matters little to the plaintiff what means are used to coerce B. Lord Devlin said:[78]

> I find therefore nothing to differentiate a threat of a breach of contract from a threat of physical violence or any other illegal threat. The nature of the threat is immaterial, because . . . its nature is irrelevant to the plaintiff's cause of action. All that matters to the plaintiff is that, metaphorically speaking, a club has been used.

Having said this, however, their Lordships all stop short at "unlawful means". The result of this reasoning is that while it is the effect A's behaviour has on C which matters (i.e., he is sacked), it is the wrong done to B which founds his action. This surely is quite inconsistent. It must be the effect upon C which is looked to; the basis of the tort is the fact that A has managed by some means to cause C loss, intentionally. The question then should be asked, not whether the means used were unlawful, but whether A's action was justified.

III. The Defence of Justification

If the courts based the law as regards economic torts upon intentionally caused loss rather than upon causing loss by "unlawful means", not only would this bring a welcome uniformity and rationalisation to this area of the law, but, as J. D. Heydon suggests in his article "Justification in Intentional Economic Loss":[79]

> . . . [T]he courts could approach problems of justification in a wholly new light. For the law would approach Bowen L. J.'s dictum: "intentionally to do that which is calculated in the ordinary course of events to damage, and which does in fact damage another in that other's property or trade, is actionable if done without just cause or excuse."[80]

Any defence of justification is bound to be vague and by its very nature will depend upon questions of degree and upon the very different circumstances of each case. It is clear from the outset, therefore, that much will depend upon the discretion of the courts, the need to balance the interests of the plaintiff and the defendant, and the "general social, economic and moral value of the parties' conduct".

There are, it would appear from the authorities, two main areas of justification: firstly, where a defendant is justified in causing someone loss, in his own interest and secondly, where he is so justified in the public interest.

[77] Idem.
[78] Ibid., 1209.
[79] Loc. cit., 177.
[80] *The Mogul Steamship Co. Ltd.* v. *McGregor, Gow & Co.* (1889) 23 Q.B.D. 598 at 613.

1. *The private interest*

In the *Mogul* case[81] in 1889, where the defendants had forced the plaintiffs out of the market by undercutting their prices, it was held that "the right of traders to carry on trade freely to their own best advantage" was a just cause and this, according to Bowen L. J., had to be balanced against "the right of the plaintiffs to be protected in the legitimate exercise of their trade."[82]

The courts have applied the *Mogul* test of balancing the rights of the parties against each other in many cases,[83] including *Quinn* v. *Leatham*[84] and the *Crofter* case.[85] In *Quinn* v. *Leatham*,[86] Lord Shand distinguished *Allen* v. *Flood*[87] on the ground that while the defendant in that case was justified in that his purpose was to promote his own trade interest, the purpose of the defendants in *Quinn* v. *Leatham* was "to injure the plaintiff in his trade as distinguished from the intention of legitimately advancing their own interests."[88]

In other words, Lord Shand based his decision squarely upon the issue of whether or not there was sufficient justification for the acts of the defendants. In deciding this issue, regard was had to[89]

> . . . political and economic factors, the balance of industrial power between labour and management, and current ideas on how far the law should interfere in competitive and industrial struggles.

However, these influences have never been considered by the courts in any very explicit or open way.

> It is true that although the relevant private and public interests are not often discussed openly, the courts have placed different weight on crucial interests at different times: in particular, some of the weapons of labour have been legitimized. But these changes have tended to occur sub silentio, covered by general formulae like balancing the legitimate interests of both sides in freedom to carry on their trade, which are unreliable guides.[90]

> The true grounds of decision are considerations of policy and of social advantage, and it is vain to suppose that solutions can be attained merely by logic and general propositions of law which nobody disputes.[91]

[81] (1889) 23 Q.B.D. 598.
[82] Ibid., 611.
[83] *Sorrell* v. *Smith* [1925] A.C. 700, where interests of retail newsvendors were weighed against those of wholesale newsvendors; *Huntley* v. *Thornton* [1957] 1 W.L.R. 321, where interests of unionists who disobeyed a strike order were balanced against those of union officials; *Stratford (J. T.) & Son Ltd.* v. *Lindley* [1965] A.C. 269, where interests of a union were balanced against those of an employer who recognised another union in preference to it.
[84] [1901] A.C. 495.
[85] [1942] A.C. 435.
[86] [1901] A.C. 495.
[87] [1898] A.C. 1.
[88] [1901] A.C. 495 at 514.
[89] Heydon, loc. cit., 156.
[90] Ibid., 156-157.
[91] *Vegelahn* v. *Guntner* 44 (1896) N.E. 1077 at 1080 per Holmes J.

In the *Crofter* case,[92] their Lordships defined the "lawful interests" which the defendants were justified in having regard to very widely in order to include generalised trade union interests. Viscount Simon L. C. said in that case:[93]

> It is enough to say that if there is more than one purpose activating a combination, liability must depend on ascertaining the predominant purpose. If that predominant purpose is to damage another person, and damage results, that is tortious conspiracy. If the predominant purpose is the lawful protection or promotion of any lawful interest of the combiners . . . it is not a tortious conspiracy, even though it cause damage to another person.

The defence of justification is equally applicable to all forms of economic torts, including, it would appear, the tort of intimidation.[94] Where the issue involved is the interference with contracts, the courts here also have balanced the interests of the plaintiff in his contractual rights against those of the defendant and the public interest, if any, which is advanced by the defendant in defence of his interference with those rights. One is justified when acting in the exercise of an equal or superior right[95] or when protecting existing contracts, property and financial interests. The line of justification seems generally to be drawn between a "policy of interest" and a "policy of prestige". If the defendants act to further their own interests, they are justified; if they act merely out of hurt pride, or to demonstrate their power "to dictate policy or to prove themselves masters in a given situation",[96] they are not so justified.

2. *The public interest*

It should perhaps be noted here that this distinction between private and public interests is to some extent an idle one in that it will sometimes be quite impossible to separate the two or categorise them. It is generally thought to be in the "public interest" that racial discrimination is discouraged, yet their Lordships in the Court of Appeal in *Scala Ballroom (Wolverhampton) Ltd.* v. *Ratcliffe*[97] based their decision, not explicitly upon any consideration of the public interest, but upon the private interest of the musicians' "comfort of mind". However, underlying this decision there are certain very important public policy considerations.

In this case, coloured musicians opposed their employer's policy of all-white audiences and this was held to justify a conspiracy, even

[92] [1942] A.C. 435.
[93] Ibid., 445.
[94] See *Rookes* v. *Barnard* [1964] A.C. 1129 at 1206 per Lord Devlin.
[95] *Read* v. *Friendly Society of Stonemasons* [1902] 2 K.B. 88 at 96 per Darling J.
[96] *Crofter's* case [1942] A.C. at 435 at 445 per Viscount Simon L. C.
[97] [1958] 1 W.L.R. 1057.

though the discrimination did not damage the musicians' material interests, in the sense of "interests which can be exchanged for cash". At first instance Diplock J. based his decision on the extremely wide public policy ground of freedom of speech. He said it was "the right of all citizens to advocate policies in which they bona fide believed."[98]

What can be said to be justification in the public interest has been discussed in several cases, including the *Crofter* case,[99] where Viscount Simon L. C. thought that conduct which "would undermine principles of commercial or moral conduct"[1] would be unjustifiable and Lord Porter implied that the promotion of morality would justify a conspiracy.

In *Brimelow* v. *Casson*,[2] where the defendant induced certain chorus girls to break their contracts with the plaintiff, it was held that he was justified in so doing on the ground of protecting public morality. The girls had been paid such low wages that they had resorted to prostitution.

The public interest was again raised, in the form of a public duty, in the case of *P.T.Y. Homes Ltd.* v. *Shand*.[3] Here, two politicians, a civil servant and certain union officials agreed that no offers should be made to the plaintiff builder because he contracted on a "labour only" system. The union officials had motives of self interest. It was alleged, however, that the politicians acted to the plaintiff's detriment in order to avoid strikes just before an election. It was held that the politicians' action was justified in that they were attempting to avoid industrial trouble; the bona fide fulfilment of a public duty constitutes justification.

Such cases should form the guidelines upon which the courts will be able to construct a coherent yet flexible defence of justification with considerations of the relative positions of the plaintiff, the defendant and the public interest in each case.

3. *The justification of "unlawful means"*

Assuming the existence of a prima facie tort of intentionally causing loss, is it possible for those economic torts which are committed by the use of "unlawful means"[4] to be justified?

It has generally been thought that "unlawful means" are not capable of justification. However, there is some authority to suggest

[98] Ibid., 1059.
[99] [1942] A.C. 435.
[1] Ibid., 439.
[2] [1924] 1 Ch. 302.
[3] [1968] N.Z.L.R. 105.
[4] Intimidation, not the primary form of inducing breach of contract, and conspiracy to use unlawful means.

the contrary.[5] In *Morgan* v. *Fry*,[6] Widgery J. said at first instance that a threat to induce breaches of contract would be justified only if actual inducement could be justified as between the defendant and the innocent party to the contract; if that were not possible, there could be no justification as between plaintiff and defendant.[7] On appeal, Lord Denning M. R. considered justification to be possible if the organisers of the breakaway union, which the defendant unionists were trying to stamp out, "were really troublemakers who fomented discord in the docks, without lawful cause or excuse."[8]

In his article "Justification in Intentional Economic Loss", J. D. Heydon points out[9] that violence and dishonesty are at times justified in law and that therefore, such relatively minor illegalities as nuisances, property damage, breaches of contract and threats to do such things may be easier to justify because of their less serious nature. He concludes:[10]

> In short, the possibility of justification should not depend on whether there is some independent illegality in the facts, but on the seriousness and social utility of what has to be justified . . . . Such an approach will properly bring into consideration a whole host of factors whose exact content would be determined by general considerations of public policy. . . .
> Illegality should be irrelevant except in so far as it can be translated into some more substantial interest, as it often can. Just as public policy is the main force behind restraint of trade, and, to some extent, conspiracy, so it is the main force (albeit in a more confused and disguised way) behind inducing breach of contract and causing loss by unlawful means. The principles lying behind these rules of law in the area of trade competition are the same; it is only their detailed application that differs depending on the relative position of plaintiff, defendant, and the general public in each case.

IV. Two Outstanding Problems?

Conservative thinkers may object to the prima facie tort on two bases. Firstly, they may argue that such a wide formulation will undoubtedly "open the floodgates" and the courts will be besieged by unmeritorious and frivolous claims. Secondly, it may be argued that judges are ill-equipped to deal with sophisticated commercial disputes involving intricate economic arguments.

The first of these objections has been raised upon many occasions in the past in opposition to changes and developments in the law and, so far, it has been quite unjustified. Unmeritorious claims may

[5] Its assumed illegality can be justified in *De Jetley Marks* v. *Greenwood (Lord)* [1936] 1 All E.R. 863 at 874 per Porter J. and in *National Phonograph Co. Ltd.* v. *Edison-Bell Consolidated Phonograph Co. Ltd.* [1908] 1 Ch. 335 at 361 per Buckley L. J.
[6] [1967] 1 Q.B. 521.
[7] Ibid., 547-548.
[8] [1968] 3 W.L.R. 506 at 517.
[9] Loc. cit., 181.
[10] Ibid., 182.

be met in two ways: a plaintiff will have to bear the costs of such litigation if the decision is for the defendant, and the burden of disproving the defence of justification raised by the defendant should be upon the plaintiff. The necessity of discharging the legal and the evidential burden will, it is submitted, deter unmeritorious claims.

The second objection to a prima facie tort with a defence of justification is far more cogent. The argument is that whilst the issues in an employer/employee, industrial dispute may be relatively straightforward, centring on the validity of the employer's or employee's claim, the issues involved in the justification of a cartel agreement are far more intricate. Looking at the *Mogul* case,[11] it is clear that the defendants could only hope to succeed by showing that their cartel benefited themselves in their own private interests and the public interest in the long term.

In order to justify the benefit to the public, a court would need access to such information as the nature of the industry concerned, the necessity for a secure and steady market, the capitalisation of the industry and the overall economic justification for permitting a cartel.

It was precisely because judges felt themselves unable to handle this sort of evidence that the Restrictive Practices Court was formed, with its permanent judge assisted by an economist and an expert from the industry. This is, perhaps, a strong argument against any change in the law in a country which has no Restrictive Practices Court and no expertise in this area. The solution, however, is simple. As part of the proposed Monopolies and Restrictive Practices Bill, the Government should provide a specialised Restrictive Practices Court staffed by a permanent judge with lay assessors to assist him. The Court should also hear justification cases in economic torts and matters involving employer/employee disputes. By the same line of reasoning, it may well be that employer/employee cases ought to be handled by a separate Industrial Court.

V. Conclusion

The law as regards economic torts developed in an extremely piecemeal and inconsistent way, and is fraught with anomalies and difficulties, stemming to a great extent from the majority in *Allen* v. *Flood*.[12]

A tort of intentionally and without justification causing economic loss would at once rationalise and systematise the law in this area without in fact changing, in substance, the basis of past decisions.

[11] (1889) 23 Q.B.D. 598.
[12] [1898] A.C. 1.