

The Tort of Inducement of Breach of Contract

by

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The aim of this paper is to examine the law relating to inducement of breach of contract, its historical bases, its present scope, its possible future development and general role of legal remedies in the sphere of industrial relations.

A definition of inducement is one that is difficult to give and due to the rapid development of the tort in recent years, one that can only be given in relation to a particular period in its evolution.

Historically rooted in the master-servant relationship, it was first formulated in general terms in the case of *Lumley v. Gye*.¹ There, after considering the origin of this action in the rights of a master against a person who wrongly enticed away his servant, Crompton J. held that the remedy was not confined to services or engagements under contracts for service but applies to all cases where there is an unlawful and malicious enticing away of any person employed to give his personal labour or service for a given time under the direction of a master or employer who is injured by the wrongful act.

This judgment has, ostensibly, been the basis of nearly all the subsequent decisions and developments in the tort of inducement and accordingly, it is important to note the precise nature of the conclusions reached in this case.

In essence, the following requirements for the tort are laid down: the actions of the defendant must be unlawful, the person induced must be under contract—presumably to the plaintiff—and there must be damage as a result of the defendant's act. Logically, as subsequent cases have held, this principle extends not only to inducing a servant to breach a contract of employment with a master, but also to general interference causing breach of contractual relations.

¹ (1853) 2 E. & B. 216; 118 E.R. 1083.

The first case to give *Lumley v. Gye*² this interpretation was *Allen v. Flood*³ in which it was held that where B acts within his rights, yet acts in a way that is detrimental to a third party, A may be liable if he has procured B's actions by illegal means. And in *Quinn v. Leatham*⁴ Lord McNaughten explained *Lumley v. Gye*⁵ as follows:

. . . the decision did not rest on malicious intention but on the ground that it is a violation of a legal right to interfere with contractual relations recognised by law if there be no sufficient justification for the interference.

The numerous cases on inducement in the next fifty years or so all treated inducement in basically these terms. The unlawful act could be the breach of contract induced itself, there had to be actual knowledge of the terms of the contract broken in order for there to be sufficient intent, and the defence of justification was always available although its scope was narrowly confined.

In the case of *Crofter Hand-woven Harris Tweed v. Veitch*⁶ the tort was explained as follows:

. . . if C has an existing contract with A and B is aware of it, and if B persuades or induces C to break the contract with resulting damage to A, this is generally speaking a tortious act for which B will be liable to A for the injury he has done him. In some cases, however, B may be able to justify his procuring of the breach of contract.

In *British Motor Traders Association v. Salvadori*⁷ the plaintiff association was a trade union of which all British motor-car manufacturers and authorised dealers were members. It was the policy of the association to prevent the immediate resale of new cars, and therefore every member of the public who purchased a new car was required to execute a deed of covenant with the plaintiff and with the dealer from whom he purchased it, but which he undertook not to resell the car within a period of twelve months. The defendant was black-listed and was therefore unable to obtain cars through authorised channels. By devious means, however, he obtained new cars which he shortly after resold far above their original prices. The usual plan was to buy the cars from agents who had themselves bought the cars and signed the covenant only a very short time previously. The plaintiff alleged inducement in that the defendant had caused a breach of the contract contained in the covenant with the agents. Having examined the history of the tort of inducement, Roxborough J. defined it as follows:

² *Ibid.*

³ [1898] A.C. 1.

⁴ [1901] A.C. 495, 510.

⁵ *Supra* n. 1.

⁶ [1942] A.C. 435, 442.

⁷ [1949] Ch. 556.

. . . a person who knowingly and without justification actively facilitates a breach of contract and thereby causes damage, is guilty of the tort of procurement of breach of contract. While it is necessary to show damage it was held that it is not necessary to show **specific** damage—it is sufficient to establish facts from which it may properly be inferred that **some** damage may result to the plaintiff from the defendant's wrongful acts.

But with the decision in *Thompson & Co. Ltd. v. Deakin*⁸ the first of several major changes in the fundamental principles of inducement occurred.

The plaintiffs were printers and publishers of periodicals employing non-union labour. The paper they used was supplied under contract by Bowaters Sales Limited and the union, of which Deakin was the Secretary, prevented this contract being performed by requesting the drivers and loaders on whom Bowaters depended to supply paper to the plaintiffs, to refuse to deliver paper to the plaintiffs. It was held that the acts of a third party lawful in themselves (i.e. lawful apart from the fact that they have caused a breach of contract) do not constitute an actionable interference with contractual rights merely because they bring about a breach of contract even if they are done with the object and intent of bringing about such breach. Inducement, it was held, would lie in three situations, in all of which the intervener must know of the existence of a contract between A and B and must act with the object of procuring its breach by A to the damage of B:

- (a) where C *directly* intervenes by persuading A to break the contract and also:
- (b) where C intervenes by committing a tortious act against a party to the contract, e.g. by physical restraint, so as to prevent A in fact performing the contract, and also:
- (c) if C persuades a third party to do an act *in itself wrongful* (as committing a breach of a contract of service with A) so as to render, as was intended, the performance of A's contract with B impossible.

The court went on to hold that where a breach was caused by persuading the servants of one of the parties to a contract to break his contract it had to be *clearly* shown:

- (a) that the person charged with actionable interference knew of the existence of the contract and intended to procure its breach;
- (b) that the person so charged did definitely and unequivocally persuade, procure or induce the employees concerned to

⁸ [1952] 1 Ch. 646.

- break their contracts of employment with intent to procure the breach of contract;
- (c) that the employees so persuaded did in fact break their contracts;
 - (d) that the breach of contract followed as a *necessary consequence* of the breaches by the employees concerned of their contracts of employment, i.e. by reason of the withdrawal of the services of the employees concerned the contract breaker was unable as a matter of practical possibility to perform his contract.

The dichotomy that this case established between direct and indirect inducement seemed to incorporate the idea that where C acted directly against B thereby causing breach of a contract between A and B this was really equivalent to C breaking the contract and as such this breach of contract itself amounted to the unlawful act necessary to found an action in inducement.

On the other hand, where C induced not one of the parties to the contract but a third party to do some act whereby a breach of contract between A and B resulted, this was merely an indirect act which was not tortious merely because a breach of contract resulted—the act had to be unlawful *in itself*, i.e. apart from the breach of contract that it induced. If the third party broke an independent contract of employment as a result of the defendant's actions, this was sufficient to constitute an unlawful act and it is in this area of the tort that the overlap between inducement and the torts of intimidation and conspiracy occurs in that these are both acts unlawful in themselves.

Authority for this direct/indirect distinction was allegedly to be found in *Lumley v. Gye*,⁹ *G.W.K. v. Dunlop Rubber Co. Ltd.*,¹⁰ *Jasperson v. Dominion Tobacco Co.*,¹¹ and *National Phonograph Co. Ltd. v. Edison Bell Consolidated Phonograph Co. Ltd.*¹²

In fact, however, none of these cases draws such a distinction and the distinction appears to be one drawn for the first time in *Thompson v. Deakin*¹³ presumably to restrict the potentially tremendous scope of the tort and to give a degree of flexibility to the Judge in deciding whether the tort would lie. In logic, however, such a distinction cannot be defended. C's aim, whether acting directly on a party to the contract or on a third person, is the same in that

⁹ *Supra* n. 1.

¹⁰ 42 T.L.R. 376.

¹¹ [1923] A.C. 709.

¹² [1908] 1 Ch. 335.

¹³ *Supra* n. 8.

there must be an intent to cause a breach in order for the tort to be established and in both cases he is in a real sense the creator of the breach. If, in the interests of justice, the courts are attempting to formulate a means by which they may, when expediency requires, refuse a remedy to the plaintiff, then this should be done by an extension of the defence of justification and not by means of a hazy and illogical distinction between direct and indirect acts.

In *Thompson v. Deakin* itself the acts of the Bowater employees were held not to have been the cause of a breach between Bowaters and the plaintiffs as it was no part of their contracts of employment that they should effect paper deliveries to the plaintiff. Hence the breach of contract between the plaintiffs and Bowaters did not follow as a necessary consequence of the breach by their employees of their contracts of employment—they were at *one remove* from the breaches of contract complained of.

As a result of *Thompson v. Deakin*¹⁴ inducement was restricted primarily to two situations:

- (a) where C acted directly against a party to the contract: or
- (b) where C acted against the employees of one of the parties to the contract employing means wrongful in themselves from which a breach of contract resulted as a necessary consequence.

If confined to the facts in *Thompson v. Deakin*¹⁵ such a breach would only be a necessary consequence where the contract between employer and employee specifically provided that they were employed for the purpose of enabling B to perform the contract with the plaintiff.

Nonetheless, despite its lack of logical or historical foundation, the concept of the direct/indirect distinction seems to have maintained its role with little variation until the decision in *Stratford v. Lindley*.¹⁶ In this case the defendants were a trade union which, because of a dispute with Company A, brought the business of the plaintiff to a standstill. The result of this case was to greatly widen the scope of direct interference. What had been treated as mere notification to the employers in *Thompson v. Deakin*¹⁷ was held to be sufficient to establish inducement and Lord Pearce opined that in cases of direct action it was not necessary to show that the breach resulted as a necessary consequence. It is no defence to show that the breach could somehow have been avoided provided that it was

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ [1965] A.C. 269.

¹⁷ *Supra* n. 8.

a reasonable consequence. But where the act complained of is merely indirect, Lord Pearce opined that it might well be that the breach must be a necessary consequence.

While this decision continued to tacitly recognise the existence and the validity of a distinction between direct and indirect acts, it does mark an increasing willingness by the courts to involve themselves in industrial matters and as such may mark the watershed in the swing towards the intrusion of the courts into the industrial sphere.

So the matter stood until the decision in *Daily Mirror Newspapers v. Gardner*,¹⁸ where the concept of direct/indirect was entirely rejected as being illogical and unworkable.

The facts were that the defendant, the Federation of the retailers who bought the plaintiff's newspapers from wholesalers supplied by the plaintiff, notified the plaintiff that, due to the fact that they regarded their profit margin as insufficient, they were going to issue Stop Notices to the wholesalers, i.e. they would cancel their orders of the plaintiff's newspapers for one week. The plaintiff now sought an interim injunction. It was argued on the issue of direct/indirect that there had been no direct interference as the defendants had brought no pressure to bear on the wholesalers to break their contract with the plaintiff, but had merely recommended that the retailers cease taking orders.

Without further ado, however, Lord Denning M.R. held that to draw a distinction between direct and indirect acts was an unwarranted restriction of the tort. In the place of the tort he had just abolished he proposed the following principle: whether one induces a breach of contract by a direct approach to the one who breaks the contract or by indirect influence through others, he is acting unlawfully if there is no sufficient justification for the interference.

This decision, while it casually overturned a considerable body of very weighty precedent, represents a far more logical approach to the whole question. It was not, however, to survive long in such a form.

Undoubtedly responding to a realisation of just how far he had potentially extended inducement, in *Torquay Hotel v. Cousins*¹⁹ Lord Denning rapidly retraced his steps on this question and simultaneously formulated what virtually amounts to a new tort, the implications of which will be considered later in this paper. Lord Denning, returning to the position of *Thompson v. Deakin*,²⁰ held that the

¹⁸ [1968] 2 W.L.R. 1239.

¹⁸ [1968] 2 W.L.R. 1239.

¹⁹ [1969] 2 W.L.R. 289.

means employed must be direct. Indirect means are insufficient unless means unlawful in themselves are employed. Were it otherwise, His Lordship opined, the effect would be to take away the right to strike.

The practical consequences of this are, however, extremely irrational. If, for example, in *Thompson v. Deakin*²¹ Deakin had written to Bowaters requesting them to join forces with him and cut off supplies to Thompson, he would have been liable within the principle of *Lumley v. Gye*.²² But if he acts by getting Bowaters' lorry drivers to bring about the same end either without breaches of their contracts of employment or without the breach of contract between A and B following as a necessary consequence of the employees' breaches, he is not liable.

For New Zealand at any rate the recent case of *Pete's Towing Services v. Northern Industrial Union of Workers*²³ may have shown a way out of this dilemma.

In this case the plaintiff company operated a barge which was carrying bulk supplies of sand for Ready Mixed Concrete Ltd. As the result of a dispute with the Whangarei Watersiders Union regarding the refusal of the plaintiff to employ Union labour, C, of the Whangarei Watersiders Union, called upon D, the local organiser of the drivers' union, to explain that the plaintiff had been declared black by the Watersiders Union until such time as the plaintiff would enter into discussions with the Union regarding the use of Union labour. As a result of C's approach, D explained the position to the drivers receiving sand from the plaintiff's barge and their respective employees. The unloading then ceased as Ready Mixed declined to accept any further sand. Both D and C requested the operator of the plaintiff's barge to inform the plaintiff's company that if he would enter into negotiations with the Watersiders Union the unloading of the barge would be recommenced immediately. The plaintiff refused and sued in inducement, intimidation and conspiracy.

Following *Daily Mirror Newspapers v. Gardner*,²⁴ Speight J. held that if there had been a contract of employment between the plaintiff and his employee known to the defendant, then, in the absence of justification the tort of inducement would have arisen regardless of the legality of the means. The primary question in every case is whether the defendant knew or ought to have known of the contract between A and B and whether the defendants were justified in their actions.

²¹ *Ibid.*

²² *Supra.*

²³ [1970] N.Z.L.R. 32.

²⁴ *Supra* n. 18.

Yet while ostensibly adopting this distinction between direct and indirect acts, Speight J. gave these terms a new meaning with the introduction of the concept of the main aim—is the breach of contract the prime purpose of the defendant's actions or is it merely incidental and secondary?

This idea introduces the question of intention and motive that has frequently been considered in relation to the issue of intent. Previously direct action had been held to mean acts aimed directly against one of the parties to the contract, as opposed to indirect acts which were those directed against a third party. Under the test of the main aim, however, the question becomes solely one of intent—whether the acts were directed against one of the immediate parties to the contract or a third person, the acts would be direct if the primary intent was to cause a breach of contract. Only where the primary intent is not to cause a breach of contract, but this results only incidentally from the defendant's acts, does this amount to indirect acts for which means unlawful in themselves must have been used.

This is a far more logical approach to the question of direct and indirect acts although it departs completely from the concept as formulated in *Thompson v. Deakin*.²⁵ One wonders why Speight J. sought to retain the term at all rather than making it a question in every case of whether the defendant was justified. However, as will be seen when the question of justification is considered, should this defence be as strict as most cases have described it, then there is considerable merit in Speight J.'s formulation of the main aim as a means of retaining a necessary degree of flexibility in the court's hands in deciding upon the application of the law to an individual case.

Whether this aspect of the decision in *Pete's Towing Services*²⁶ will continue unquestioned is a matter for the future. Considering the general trend in inducement in the last five years, it is tentatively submitted that either this will remain the law or else the distinction will entirely disappear and its role will instead be satisfied by the new approach to the defence of justification formulated in *Pete's Towing Services*.²⁷

Should the distinction continue to be followed in New Zealand however, either in the *Thompson v. Deakin*²⁸ context or along the lines of the meaning given in *Pete's Towing Services*,²⁹ it is interest-

²⁵ *Supra* n. 8.

²⁶ *Supra* n. 23.

²⁷ *Ibid.*

²⁸ *Supra* n. 8.

²⁹ *Supra* n. 23.

ing to speculate as to whether the necessary act unlawful in itself in the case of an indirect act is in New Zealand a strike. Section 192 of the Industrial Conciliation and Arbitration Act makes it illegal for a worker to strike where at the commencement of the strike he is bound by any award or industrial agreement affecting that industry. As this covers the vast number of New Zealand workers, the effects of this are extremely far-reaching in the field of inducement.

My submission is that a breach of this provision would amount to an act unlawful in itself quite apart from any breach of contract induced by the strike action. Hence if the union goes on strike they will be liable if they cause a breach of contract between A and B as a reasonable result of their acts if (a) they are acting directly against A or B, or (b) their main aim is to cause a breach of contract between A and B—in New Zealand at present it is the latter test. On the other hand, if the acts of the union are indirect in that they act against a third person thereby causing a breach of contract between A and B, or alternatively a breach of contract is merely an incidental result of their main aim, they will have committed an act unlawful in itself, if, as will usually be the case, they are covered by the provisions of Section 192 of the Industrial Conciliation and Arbitration Act and will again be liable for inducement if the other elements of the tort are present. The only way out is for a union to de-register. But this does not validate a strike under the I.C.&A. Act. Only de-registration will do this.

Clearly then the right to strike in New Zealand is, for most unions, very circumscribed.

This was foreseen by Speight J. in *Pete's Towing Services*³⁰ and was apparently the reason that Denning reinstated the distinction between direct and indirect acts in *Torquay Hotel v. Cousins*³¹ but although both Denning and Speight felt that their formulations of the distinction protected the right to strike, with respect I cannot see this unless we greatly strain logic. For although the motive of the trade union leader who calls the strike may be to improve the conditions of his union members, the success of this motive will be dependant upon the fact that the strike will cripple A by rendering him incapable of fulfilling his contracts and almost invariably, causing breaches of contracts between A and B will be the intention and the main aim of the trade union, and this is the important question—issues of motive are irrelevant so far as this is concerned.

While undoubtedly the courts can and will hold that such breaches are merely a side effect of C's actions, this is a very naive view of

³⁰ *Ibid.*

³¹ *Supra* n. 19.

the facts and if these actions are to be exempted from the scope of inducement it should be on the grounds either of justification or by the passage of a statutory exemption such as the Trade Disputes Act that is in force in England.

The next area of the tort to have been subjected to judicial creativity is the question of intent and the related issue of knowledge. In order for liability to be established the contract breaker must have had an intention to cause a breach of contract and in order for this to be established there must be knowledge of the existence of a contract.

Initially this requirement was strictly enforced and even as recently as *Thompson v. Deakin*³² it was held that in principle the tort was confined to situations where the defendant knows of the existence of the contract. In this case it was held that there was no actual knowledge by the defendant of a contract between A and B.

Fairly rapidly in the 1960s, however, the strict application of this principle was broken down.

One of the first cases to question this was *Stratford v. Lindley*.³³ In this case Lord Radcliffe held that the defendant must be treated as possessing sufficient knowledge of the existence and nature of the hiring contracts on the basis that the existence of such contracts was obvious even though there was no evidence that the defendant did actually know of the existence of a contract, quite irrespective of whether they were aware of the actual terms of the contract.

A year later Lord Denning in *Emerald Construction Co. v. Lowthian*³⁴ held that ignorance of the exact terms of a contract did not by itself rebut a sufficient intention to procure a breach. It was sufficient that the defendant had the means of knowledge and turned a blind eye. Hence if the officers of a union had deliberately sought to get the contract terminated heedless of its terms, regardless of whether it was terminated by breach or not, they would be prima facie wrong. It is unlawful for a third person to procure a breach of contract knowingly, recklessly or indifferent of whether there is a breach or not.

The facts were that the defendant had caused a breach of contract between A and B but argued that they had no knowledge of the precise terms of the contract and assumed that employment contracts could be terminated on short notice. This lack of knowledge, it was argued, prevented them formulating a positive intention to bring about a breach. It was held, however, that it is sufficient to

³² *Supra* n. 8.

³³ *Supra* n. 16.

³⁴ [1966] 1 W.L.R. 691.

show that the defendant intended to disrupt the contract with a reckless disregard of whether he caused breach or not and it is unnecessary to prove a precise knowledge of the terms.

This new concept of knowledge has been followed ever since.

In *Daily Mirror Newspapers v. Gardner*³⁵ there was no evidence that the defendants were aware of the terms of the plaintiff's contracts with the wholesalers which were in fact of a somewhat tenuous nature, amounting to running contracts on the basis of standing orders for a specified number of copies which the wholesaler could alter if he desired, and terminable on reasonable notice. Nonetheless, following *Stratford v. Lindley*³⁶ and *Emerald Construction Co. v. Lowthian*,³⁷ it was held that the defendant's instructions to members had been given without caring whether the result would be in breach of the plaintiff's contracts with the wholesalers—knowledge of the terms of the contract is no longer essential.

Under this formulation of the principle it would seem the defendant would be liable even when he had no means of ascertaining the existence of a contract or its terms even though he wanted to, provided he nonetheless acted without caring whether he breached the contract or not.

While the pre-1960 cases on some occasions approached the question of knowledge so strictly that the ends of justice were sometimes defeated, some of the recent cases seem to be taking the question of knowledge almost to the status of an irrebuttable presumption which may work just as much injustice if carried too far. Courts have undoubtedly been influenced in this by the feeling that they have only been dealing with interlocutory matters that could be reversed at trial but, considering the few cases on inducement that actually do go to trial, the validity of this approach is questionable.

The variable in considering this question of knowledge is the distinction between intention and motive and on this point the case law is very inconsistent. In *South Wales Miners Federation v. Glamorgan Coal Co. Ltd*³⁸ Lord James considered this question as follows: during the argument I do not think quite sufficient distinctions were drawn between the intentions and the motives of the defendant. The intention clearly was that the workmen should break their contracts; the motive was no doubt that by so doing wages should be raised but if in carrying out the intention the defendants purposely procured the wrong that is thereby inflicted, this cannot be obliterated

³⁵ *Supra* n. 18.

³⁶ *Supra* n. 16.

³⁷ *Supra* n. 34.

³⁸ [1905] A.C. 239.

by the existence of a motive to secure a money benefit to the wrongdoer. In *Thompson v. Deakin*,³⁹ however, this finding of what constitutes motive and what constitutes intention, was entirely reversed and it was held that the intention of the contract breakers was not to cause a breach of contract but to improve workers' conditions. Which way these two dice will fall in a given case seems to be largely a matter for the individual judge but logically it would seem that the intention should be the aim of causing a breach of contract which provides the means of achieving the motive which will be the underlying cause of the defendant's action.

Should all the elements of the tort be established, it is always open to the defendant to plead that he was justified in causing a breach of the plaintiff's contract. If established, this will constitute an absolute defence.

One of the earliest cases to examine the question of justification at any length was *South Wales Miners Federation v. Glamorgan Coal Co. Ltd.*⁴⁰ Here miners employed in collieries, without giving notice to the employers and in breach of their contracts, abstained from working on certain dates upon the direction of a federation of the miners given by their executive council. The federation and council acted honestly without malice or ill-will and solely with the object of keeping up the price of coal.

They were held liable in inducement, the defence of justification not lying in such a case. The argument that the executive of the federation had a duty to protect the interests of the union members and that they were accordingly justified in breaching the plaintiff's contract, was rejected.

It is interesting to note that the argument rejected here, is almost exactly that accepted 65 years later in *Pete's Towing Services*.⁴¹ This is a striking illustration of the way in which the development of this tort has been influenced and shaped by changing attitudes.

In *Conway v. Wade*⁴² Lord Loreburn L.C. considered the question of justification and whether it could be supplied by self-interest or trade competition or what, and left the question open with the comment that no answer in general terms had ever been given and perhaps never could be given.

In *Pratt v. The British Medical Association*⁴³ it was held that acting for the advancement of one's own trade interests or the in-

³⁹ *Supra* n. 8.

⁴⁰ *Supra* n. 38.

⁴¹ *Supra* n. 23.

⁴² [1909] A.C. 506.

⁴³ [1919] 1 K.B. 244, 266.

terests of those with whom one was associated, cannot amount to justification. Further it was held, there cannot be justification where there is a legal remedy that could have been claimed.

In *Brimelow v. Casson*⁴⁴ the plaintiff was a theatrical agent and the defendants were members of the Joint Protection Committee which was established to protect the interests of theatrical performers. The plaintiff was paying his chorus girls at less than the minimum wage. As a result some of the girls were forced to lead an immoral life and one of them was, in fact, living with a deformed dwarf. As the only method of doing anything about this situation the defendant induced theatre proprietors to refuse to let the plaintiff have the use of their theatres, either by breaking contracts already made or by refusing to enter into further ones. The defendants were held to be justified as they owed a duty to their calling and its members to take all necessary steps to compel the plaintiff to pay his chorus girls a livable wage. It is obvious, however, from the opening lines of Russell J.'s judgement that he was considerably influenced by the emotional nature of the situation, describing the circumstances as a terrible and revolting tragedy. This probably explains what is an anomalous decision.

While it has never been decided precisely the scope of justification, it is fairly clear what does not amount to justification.

Salmond⁴⁵ enumerates the principle as follows: it is a question of law. In deciding whether it is established in a given case, the court must have regard to:

- (a) the nature of the contract,
- (b) the position of the parties to it,
- (c) the grounds of the breach,
- (d) the means employed to procure the breach,
- (e) the relationship of the person procuring the breach to the person who breaks the contract,
- (f) the object of the person in procuring the breach.

In practice, it seems that the main question to which the courts have regard is (f): the object of the defendant in procuring the breach and, the anomalous decision in *Pete's Towing Services*⁴⁶ aside, it is clear that the defence lies only within very narrowly defined limits and in most cases, a defendant will be unable to establish the grounds to support it.

⁴⁴ [1924] 1 Ch. 302, 313.

⁴⁵ *Law of Torts* (14th ed) p. 539.

⁴⁶ *Supra* n. 23.

In *Thompson v. Deakin*⁴⁷ where the defendant union NATSOPA had gone out on strike when one of their members was fired, it was held, following *Glamorgan Coal Co. Ltd.*,⁴⁸ that this could not amount to justification as the only interest was that of NATSOPA and that was insufficient.

Probably because of the restricted approach taken by the cases in which justification has been raised, it has been seldom pleaded and the fullest discussion of its scope is provided by the Canadian decision of *Posluns v. Toronto Stock Exchange and Gardner*.⁴⁹ The following points were made: although justification as a defence to an action for inducing breach of contract had never been precisely defined and although the defence rarely succeeds, since it does not include self-interest or the fulfillment of an undertaking to assist others with the same interest, nor an honest belief in a duty to act nor inducement of a breach of contract because the other party thereto has broken another contract with the intervener, yet it has been admitted that where the interference has been promoted by impersonal or disinterested motives and also was effected in the public interest, that a person may be justified. Beyond these cases a person may be justified where there is a statutory or contractual privilege.

Here the Toronto Stock Exchange gave approval to a member to have the plaintiff as a shareholder and director and the plaintiff, who was employed by a member, acted as such. Subsequently the Exchange withdrew its approval because of the members' improper conduct and in consequence the plaintiff was dismissed.

It was held that the plaintiff's relation to the members involved an agreement to submit to the proper control of the Exchange which, therefore, was justified in procuring his dismissal when it acted in accordance with the principles of natural justice in withdrawing its approval of the plaintiff.

Although this formulation of the defence may be questioned in some respects, especially as regards the fact that justification will not lie where a breach of contract between A and B is induced in order to force B to fulfill a contract with the intervener—Speight J. in *Pete's Towing Services*⁵⁰ for instance, held that where the defendant was doing nothing more than insisting on the performance of another an inconsistent contract previously made between himself and A, this would be justified—it was undoubtedly the law in New Zealand until 1970, and still is in England, that self-interest, no matter how

⁴⁷ *Supra* n. 8.

⁴⁸ *Supra* n. 38.

⁴⁹ (1965) 46 D.L.R. (2d.) 210.

⁵⁰ *Supra* n. 23.

high and altruistic, cannot amount to justification; equally a duty to act for someone else is not justification.

It was in the face of this weighty body of precedent that Speight J. gave his decision in *Pete's Towing Services*.⁵¹ Having decided that all the elements of the tort existed, the court proceeded to hold that the defence of justification was established.

The defendant had pleaded that he had a duty to act to protect the interests of the union members and to prevent industrial strife. Accepting this argument the court held that in every case the question of both motive and intention must be examined. A union official has the role of advancing the interests of its members *and* of keeping its union out of trouble.

Speight J. stressed the fact that one of the defendant's members, the driver of the Ready Mixed truck, was doing work that by law he should not have been doing and that those legally entitled to do the work—the Watersiders' Union—were bringing pressure to bear on the defendant which, had the defendant failed to respond, could have led to very serious industrial trouble.

Hence, the court held the defendant had a duty to act and was justified on the basis of justice and fairness; taking into consideration the fair conditions which the defendant and the Watersiders' Union put forward, the cause giving rise to the dispute and the reasonable alternative for continuation which was available without prejudicing the completion of the contract for the supply of sand or the legal position of the plaintiff.

Before examining the merits of this finding it must be noted that, quite apart from the issue of whether this decision can be supported by precedent, Speight J. appears to have been greatly influenced by the argument that the plaintiff had a reasonable alternative in his course of action—they had only to commence discussions with the Watersiders' Union and the work could have continued.

But this has only to be considered for a moment to observe how ill-founded such an argument was. Clearly the Watersiders' Union wanted not merely discussion with the plaintiff but discussions that would lead to the plaintiff acceding to their demands that Union labour be employed. Had the plaintiff broken off discussions with the Watersiders' Union without reaching a satisfactory conclusion there can be no doubt that the plaintiff would have again been black-listed and the mere fact that he had agreed to discussions would not have prevented this.

⁵¹ *Ibid.*

If we take this a step further we will see that the plaintiff was not offered a reasonable alternative because he had contracted with Ready Mixed to supply sand at an unusually low figure which was possible only on the basis that he did not incur the higher costs of employing Union labour. Had the plaintiff acceded to the defendant's demands it would have been financially crippling.

Nonetheless, the liberalisation of the defence of justification that this decision may have presaged, is to be welcomed. Long shackled by bonds that made the defence virtually impossible to make out and led to the distortions of the direct/indirect dichotomy and the inconsistent application of the intention/motive dichotomy from one case to another, *Pete's Towing Services*⁵² make the defence available in cases where the defendant is acting from duty, even though it be a duty to protect his own union. Clearly this is inconsistent with earlier decisions but nonetheless, in a sphere such as industrial law where the issues are liable to be extremely delicate, it is vital that a degree of flexibility be retained in order that the harshness which the strict application of this tort could occasion, be ameliorated in appropriate cases. Admittedly this puts the law into a state of uncertainty and runs the risk that is always inherent in accumulating a discretion in the court's hands, but this seems the lesser of two evils. It is to be hoped that the tort will now more closely approximate the definition put forward in *Salvadori v. British Motor Traders Association*,⁵³ a person who knowingly and without justification actively facilitates a breach of contract and thereby causes damage, is guilty of the tort of procuring breach of contract.

Hopefully this will lead to the demise for once and all of the illogical direct/indirect distinction.

The final issue for examination is the extension of the tort from causing *breach* to causing *interference* formulated by Lord Denning in *Torquay Hotel v. Cousins*.⁵⁴ Here the defendant union sought to prevent the supply of fuel to the plaintiff's hotel but by devious means the plaintiff succeeded in obtaining supplies from an alternative source.

Denning held that the time had come when the principle should be further extended to deliberate and direct interference with the execution of the contract without that causing any breach. This new tort as defined by Denning includes preventing or hindering the performance of the contract.

⁵² *Ibid.*

⁵³ *Supra* n. 7.

⁵⁴ *Supra* n. 19.

The direct/indirect distinction continues to apply to this and hence where the interference is direct this is unlawful in itself, but where the interference is indirect, there must be means employed that are unlawful in themselves.

The logical extension of this is that there is no longer any need for an unlawful act in the original sense of causing a breach, interference is now that unlawful act and hence in *Lumley v. Gye*⁵⁵ for instance, C should now be liable for interfering in the contractual relations between A and B even where B gives notice and there is consequently no breach. If this is the result of C's interference this should be sufficient. Whether future decisions will so decide is a question for posterity.

There were a few obiter remarks suggesting that interference might some day come within the ambit of inducement but *Torquay Hotel v. Cousins*⁵⁶ was the first case to specifically rest its decision on this.

While taken out of context there are a number of cases where judges have mentioned interference as being tortious, they undoubtedly meant to refer to interference causing breach. Lord Morris for instance in *Thompson v. Deakin*⁵⁷ referred to inducement as lying whenever a person without justification knowingly and intentionally interferes with a contract.

This comment is true of all the authorities that Denning cites in support of his decision with the exception of *Stratford v. Lindley*.⁵⁸ In all the other cases the issue is one of breach and it would seem that any comments regarding interference were really made with reference to this.

In *Stratford v. Lindley*,⁵⁹ however, the question of whether the principle extended to interference was specifically mentioned and left open. Lord Radcliffe made the comment that the object of the defendant's acts was to bring the plaintiffs to their knees and the law should treat such an attitude according to its substance and without the comparatively accidental issue of whether breaches of contract are involved. It is this that seems to be behind the decision in *Torquay Hotel v. Cousins*.⁶⁰

⁵⁵ *Supra* n. 1.

⁵⁶ *Supra* n. 19.

⁵⁷ *Supra* n. 8.

⁵⁸ *Supra* n. 16.

⁵⁹ *Ibid.*

⁶⁰ *Supra* n. 1. See also the judgment of Lord Denning in *Emerald Construction Co. v. Lowthian* (*supra* n. 34) where Lord Denning appears to have laid the basis for this latest development in the law.

CONCLUSION

The tort of inducement has undergone tremendous changes since its initial formulation in *Lumley v. Gye*.⁶¹ Like most areas of the law it has become increasingly sophisticated and complex. The last ten years in particular have marked an increasing intrusion by the courts, largely by means of the tort of inducement, into the industrial/labour sphere. It is interesting to speculate upon the reasons for this change of attitude but regardless of the reasons the potential dangers are obvious. An increasing division of society into the employer and the employee in which the courts stand as the stalwart supporter of the employer, could result. If this were to happen, the result would be far-reaching in every area of the law. What is really required is a mutual awareness of the aims of society and a willingness together to achieve them. In the absence of this, the curbing hand of the courts may be necessary but the governance of industrial matters more properly belongs to the political organs of the state; if the courts must interfere let us hope that they will approach the question with intelligence and restraint.

⁶¹ *Supra*.