INTERFERENCE WITH TRADE: THE ILLEGITIMATE OFFSPRING OF AN ILLEGITIMATE TORT?

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In 1969 the Court of Appeal handed down the decision in *Torquay Hotel Co. Ltd* v. *Cousins*,[1] a decision which has since been interpreted as developing a new tort. Those text writers who take a narrower view of the decision have described the tort as that of interference with contractual relations; those who take a wider view have described it as the tort of interference with trade.

In fact, it is somewhat doubtful whether *Torquay Hotel* v. *Cousins* extended the tort of inducing breach of contract at all; and an analysis of the early cases leading to *Torquay Hotel* v. *Cousins* suggests that the tort of inducing breach of contract is itself of dubious origin. The aim of this article is to trace the development of the tort of inducing breach of contract from its inception through to its alleged emergence as a new tort—interference with trade.

The roots of the tort of inducing breach of contract are embedded in the master-servant relationship and appear to have emerged from a confusion of the early common law and statutory actions derived from the *Statutes of Labourers* 1349 and 1351.[2] In the evolution of the tort, the decision in *Lumley* v. *Guy*[3] was crucial and marks a distinct turning point. In any discussion of the development of the law in this area it is necessary to distinguish the developments in the law prior to *Lumley* v. *Guy* and those which have occurred since that decision to the present day.

PRE-*LUMLEY* v. *GUY*

The early common law recognized an action for enticement of a servant by a third party in cases where there was violence[4] causing consequent loss of services to the master. The ambit of this action is illustrated by the cases

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1 [1969] 2 W.L.R. 289.
2 23 Edw. III, 25 Edw. III.
3 (1853) 2 El. & Bl. 215; 118 E.R. 749.
4 Christie I. M., *The Liability of Strikers in the Law of Tort*, Industrial Relations Centre, Queens University, Kingston, Ontario 1967, 108; Sayre F. B., *Inducing Breach of Contract* (1922-23) 36 Harv. L.R. 663, 665.

contained in the *Year Book 14 Edward II* (1321);[5] a volume chosen entirely at random and in which there are reported three cases involving an action by a master for the loss of the services of his servant. In *Madelane* v. *Prioress of Stratford*, it was alleged that the servant had been beaten and maltreated with the result that the plaintiff lost the services of her servant; in *Colyngham* v. *Gylemyn & Others* the allegation was that the defendants beat the servant so that the plaintiff lost the use of her servant; and in *Hardon* v. *Conduit* it was alleged that the Sheriff had without warrant imprisoned two of the plaintiff's manservants thus depriving the plaintiff of their services. As an essential element of the action for enticement was that the act causing the injury should be "against the peace", and as the violence alleged in each action was not established, none of these actions succeeded.

Sayre[6] traces the origins of this action to the Roman Law of *Pater Familias* whereby the Lord was entitled to bring an action, *actio invarium*, for violence committed upon or insults offered to his household, including wife, children and servants.

Whatever the exact origins of the action for loss of services it is clear that it existed by the 13th century. Bracton described it thus

> "A person also suffers injury, not only in his person but also in respect of those who are under his authority, as in respect of his children or his wife . . . likewise a person suffers injury through those who are members of his family, such as his servants and his serfs, if they have been beat or flogged in order to insult him, or inasmuch as it were his interest not to be without their services."[7]

In 1277 Britten[8] appears to have assumed that the action could only arise where there was a loss of services. As a consequence, pleadings of the early 14th century cases were framed in terms of violence by the defendant and consequent loss to the master of the services of his servant.

The passing of the *Ordinance of Labourers* 1348[9] reinforced the proprietary nature of the master's right to the servants' services. The Ordinance was passed as a measure to control wages and employment and was necessitated by the outbreak of bubonic plague in 1348 which had resulted in a severe shortage of labourers.[10] It gave the master greater "ownership"[11] of his servants by demanding, *inter alia*, that

5 Y.B. Eyre of London, 14 Edw. II (1320).
6 Sayre, loc. cit.
7 Henry de Bracton, De Ligibus Angliae, Trectatus Secondus Libri Tertii, Cap XXXVI, fol. CLV, ii Qualiter quis patitur injuriam propter suos.
8 Sayre, op. cit. p. 664.
9 23 Edw. III.
10 The preamble to the Act says: "Many seeing the necessity of masters and the great scarcity of servants who will not serve unless they receive excessive wages, and some rather willing to beg in idleness, than by labour to get their living; we consider the grievious incommodities, which the lack especially of ploughmen and such labourers may hereafter come here . . . ordained", etc.
11 Nash P. G., *Freedom of Contract and the Right to Work* (1969) 43 A.L.J. 300, 380 at 302.

> "If any reaper, mower or other workman or servant of whatever estate on condition that he may be retained in any man's service, do depart from the said service without reasonable cause or licence before the term agreed, he shall have the penalty of imprisonment. And that none, under the same penalty, presume to receive or retain any such person in his service."[12]

The statute imposed obligations on third parties who "received" or "retained" another's servant, but did not purport to give any direct right of action to the master against them. The courts, however, treated the statute as conferring on the master rights correlative to the duties imposed on the third parties. The master was thus enabled to sue the "retainer" where there was loss of services even in cases where no violence was alleged. By removing the need to allege violence, the statute increased the rights of the master against third parties who interfered with his servant.

After the passing of the statute, therefore, an action for trespass at common law was appropriate in cases where violence had occurred; but where no violence was involved the appropriate action was one on the case pleading the *Statute of Labourers.*

As early as the beginning of the 15th century the two actions had begun to merge.[13] Evidence of this merger can be seen in the case of *Anonymous* 1409[14] where there was disagreement amongst the justices as to the basis of the action. The suit was brought by writ of trespass at common law for retaining the plaintiff's servant, no violence being alleged. Two justices[15] asserted that there could be no action at common law as "trespass does not lie in such a case; for such a procurement cannot be said to go against the peace".[16] The other two justices[17] asserted that the action was based on pre-statute common law and as such was good; Culpepper J. because there was a "procuring" and "abetting" and Thirning C.J. because there was a "taking". Since no violence was alleged the action should have been an action on the case pleading the *Statute of Labourers.* Judgment was given for the plaintiff, the views of Thirning C.J. and Culpepper J. prevailing.

How far the two actions did in fact merge is difficult to ascertain for although there was evidence of confusion between the common law and statutory remedies in *Anonymous* 1409, Chief Justice Fineux in *Anonymous* 1516[18] seemed quite clear on the nature of the common law action

> "Si un home batist mon servant & luy mayhema & naufra, ou luy imprisona, per quod jeo perde le service de mont servant pur le temps, jeo arera bone action de trespas en cest case vers que issint fait . . ."

[12] 23 Edw. III.
[13] Christie, loc. cit., Sayre, op. cit. p. 666.
[14] Y.B. 11 Henry IV, f.23, Pl. 46. Also quoted at some length by Coleridge, J. in *Lumley* v. *Guy*, 118 E.R. 747, 763-5.
[15] Hankford J. and Hill J.
[16] Per Hill J.
[17] Thirning C.J. and Culpepper J.
[18] Keil 180; 72 E.R. 357.

The intention of the third party was apparently irrelevant to the action, so that where a person dug a hole in the highway and a servant fell into it breaking his thigh with the result that the master lost the services of the servant, an action on the case arose against the third party.[19]

This nameless and confused action in time became the action *per quod servitium amisit.* In its original form this action was not restricted to the master-servant relationship as such but was a part of the rights accruing to the head of the household against a third party where he lost the service or companionship of his wife or children. As described by Pollock,[20] the action bears a strong similarity to the Roman *Pater Familias* as described by Sayre

> "Next to the sanctity of the person comes that of personal relations constituting the family. Depriving a husband of the society of his wife, a parent of the companionship and confidence of his children, is not less personal injury . . . than beating or imprisonment. The same may . . . be said of the relation of master and servant which in modern law is created by contract, but is still regarded for some purposes as belonging to the permanent organism of the family, and having the nature of status. It seems natural enough that an action should lie at the suit of the head of the household for enticing away a person under his lawful authority, be it wife, child or servant . . ."

The status basis of the original common law action is illustrated by the cases dealing with these actions.

In *Jones* v. *Brown*[21] a father recovered damages from a third party who had beaten his son. The father was held to have *locus standi* apart from any evidence that the son participated in "material business" for the father, it was sufficient that he lived in the father's house as part of the family.

In *Winsmore* v. *Greenbank*[22] an action by the husband was held to lie for the unlawful and unjust inducement of the plaintiff's wife to remain absent, by which persuasion she remained absent, with the result that the plaintiff "lost the comfort and society of his wife", and the benefit of £30,000 devised to her by her late father. The basis of the decision is not adequately explained by the court, but it is clear that the husband had a right in the continued presence of his wife, which right had been violated by the defendant. Though this right certainly arose out of the contract of marriage it could hardly be said to be a contractual right, but rather was one of status. In a more recent example of the action for enticement, Lord Denning referred to the remedy as

> "Not in keeping with the times; it is a survival from the days when the wife was considered to be the property of the husband."[23]

[19] Bacon's Abridgement, 7th ed. Vol. 1, 108; 2 Bulst. 334.
[20] Landon P. A., *Pollock's Law of Torts*, 15th ed. Stevens & Sons Ltd, 167.
[21] (1795) 1 Esp. 216, 170 E.R. 334; Peake 306, 170 E.R. 165.
[22] (1745) Willes 577; 125 E.R. 1330.
[23] *Gottleib* v. *Gleister* [1958] 1 Q.B. 267, 268.

The contract of employment had been canvassed in certain of these cases. For example, in *Keane* v. *Boycott*[24] the defendant raised the argument that the contract of service was invalid as the servant was an infant at the time the contract came into existence. Although the court decided that there was a valid contract (it being for the infant's benefit) the fundamental issue was not the existence or otherwise of a valid contract, but whether the relationship of master and servant arose so that the master could establish the necessary status to maintain the action against the third party for enticing away the servant.

An offshoot of the wider action *per quod servitium amisit* was the action for seduction; and the status basis of the action is amply illustrated by the case law. The essential requirement of this action was that the daughter should be living in the home of her father as a member of the family at the time of the alleged seduction; thus in *Maunder* v. *Venn*[25]

> "The proof of any acts of service was unnecessary: it was sufficient that she was living with her father, forming part of the family, and liable to his control and command, *the right to the service is sufficient.*"[26]

Similarly in *Barrett* v. *Oliver*[27] it was held that where the relationship of parent and child existed the slightest acts of service would suffice. Since in the latter case some acts of service were proved, the court was not required to apply *Maunder* v. *Venn*, but Lord Denman C.J. in considering that case refused to say that Littledale J. had gone too far in stating the right to service was sufficient.

In *Bennett* v. *Alcott*[28] the daughter seduced was thirty years of age. Judgment was given for the plaintiff and the defendant appealed on the basis that since the daughter was over twenty-one and no contract of service had been proved there was no case to answer. Presumably the basis of the defence was that since the daughter was over twenty-one she was not under her father's control and he had no right to her services. In the absence of such a right the action would only stand where there was proof of a master-servant relationship in the strict sense. The court rejected this argument, Buller J. stating the rule to be

> "In actions of this kind the slightest evidence is sufficient . . . Here the instances of actual services were proved, and therefore it is immaterial whether the daughter were of age or not. Neither is it material whether the servant be or be not hired for a year, or whether she has any wages; it is sufficient that she is a servant de facto."[29]

In Victoria the need to prove loss of service on the relationship of master

[24] (1795) 2 Hy. Bl. 511; 126 E.R. 676.
[25] (1829) M and M 323; 173 E.R. 1175.
[26] Per Littledale J. ibid., emphasis added.
[27] (1846) VII L.T.O.S. 469.
[28] (1787) 2 T.R. 166; 100 E.R. 90.
[29] Ibid. p. 168, p. 91.

and servant in an action for seduction is no longer necessary by virtue of section 14 *Wrongs Act* 1958. Where the action is brought "by a parent or a person in *loco parentis* . . . such loss of service and relation shall be conclusively presumed in favour of the plaintiff".

The element of loss of services in the action for seduction cannot be dismissed as a mere legal fiction. It is only in the last century that women have gained any independence, and it was usual for a woman to stay in the home of her father, under his control, until her marriage. During this time she assisted with the running of the household so that where the daughter was seduced and became pregnant there was an actual loss of services by the father. In such a social context statements such as

> "In the ordinary case of a person living in a house as a member of the family, it is very reasonable to hold the relation of master and servant (determinable at will) exists between the parties"[30]

become logically acceptable. However the daughter was not considered a servant in the strict sense and one cannot argue a contract of employment existed. The right protected by the law was the right of the father to the services of his daughter until marriage,[31] and this right arose from his "status" as head of the family rather than from contract.

Although *Lumley* v. *Guy* took the general action for enticement and used it as the basis for the tort of inducing breach of contract, the specific action for seduction survives and is still recognized as status based. In *Peters* v. *Jones*,[32] the court asserted that the basis of the action was to be found in contract, but dismissed the action on the ground that the plaintiff (the victim's mother) did not have the status upon which the right of action depended.

> "There is no trace of suggestion in the English law books that a mother during the father's lifetime could be regarded at common law as the mistress."[33]

If the true basis of the action were to be found in contract then the status of the mother as "mistress" would be irrelevant; the right of action would accrue to the contracting party whatever his or her common law status.

In the subsequent decision of *Ward* v. *Lough*[34] the contractual argument was ignored by the court. The father was there held able to maintain the

[30] *Thompson* v. *Ross* (1859) 5 H. and N. 16; 157 E.R. 1082. The case is also reported 1 L.T.N.S. 43, but the above quotation does not appear.

[31] See also *Satterwaite* v. *Dewhurst* (1795) 4 Doig K.B. 315; 99 E.R. 889; *Evans* v. *Walton* (1867) L.R. 2 C.P. 615; 17 L.T.N.S. 92; *Ward* v. *Lough* (1945 2 All E.R. 338, *Davies* v. *Williams* (1848) 10 Q.B. 725, *Evans* v. *Walworth* (1867) L.R. 2 C.P. 615 and *Gladney* v. *Murphy* (1891) 26 L.R. Ir. 651 where a father and daughter were in service together and the father sued the master after his daughter was seduced, but failed as no master-servant relationship subsisted between the father and the daughter.

[32] [1914] 2 K.B. 781.

[33] Per Avory J. ibid. p. 786.

[34] [1945] 2 All E.R. 338.

action for enticement and harbouring of his daughter by reason of his status as head of the family.

A further growth of this old status based action *per quod servitium amisit* is the now obsolete right to damages for adultery. This right developed from the common law action of criminal conversation[35] whereby a husband merely by proof of the adultery of his wife could claim damages from her fellow adulterer. The action for criminal conversation was abolished in 1857 by section 33 of the *Matrimonial Causes Act* 1857 (Imperial) which instead gave the husband a right to damages for adultery committed with his wife; in fact the two actions were closely analogous.

It was not until 1959 in Australia that the legislature extended the remedy to a wife whose husband committed adultery (section 44(1) *Matrimonial Causes Act* 1959). Until that time the relevant section in Victoria was section 99 *Marriage Act* 1958 which gave a remedy only to the husband. With the advent of the *Family Law Act* 1975 this right has finally been abolished and with it the remnants of this branch of *per quod servitium amisit*. Section 120 of that Act provides

> "After the commencement of this Act no action lies for criminal conversation, damages for adultery, or for enticement of a party to a marriage."

A review of the foregoing cases leads to the conclusion that immediately prior to *Lumley* v. *Guy* there was a body of case-law which recognized a right in the master to damages from a third party whose acts results in a loss to the master of the servants' services. The action was part of a wider right in the master over his household and as such was based on status not contract. This status relationship could arise from contract, but only in cases where the contract was a contract of service.[36] This is because where the contract was one for services the employee was "independent" and not subject to the master's control, and consequently the action *per quod servitium amisit* would not lie.

Blake v. *Lanyon*[37] was used in *Lumley* v. *Guy* to dispute this contention[38] but there is no evidence that the "employer" in the former case was not a servant apart from the fact that he was employed on a piecework basis. The question of the employee's status was not canvassed in the report and

[35] Joske P. E., *Matrimonial Causes and Marriage Law and Practice*, Butterworth 1969, 138-39; *Butterworth* v. *Butterworth and Englefield* [1920] P. 126, esp. 129. For a more recent example of the action see *Hansberry* v. *Hansberry* (1971) 18 F.L.R. 186, an action by the wife.

[36] See *Stephen's Commentaries* 1844, Vol. III, Book V, Chapter VIII, V, 4 where he examines the action for enticement and beating, confining or disabling servants so that the servant was unable to do his work and says the action "depends upon the principle . . . viz. the property which the master has, by his contract, acquired in the labour of his servant".

[37] (1795) 6 T.R. 221, 101 E.R. 521.

[38] Per Crompton J. op. cit. p. 229, p. 753.

the available evidence is consistent with his being either a servant or an independent contractor.

Similar facts occurred in *Hart* v. *Aldridge*,[39] also relied upon in *Lumley* v. *Guy*. On the question of whether two journeymen employed on a piece-work basis were servants or not Lord Mansfield said

> "A journeyman is a servant by the day; and it makes no difference whether the work is done by the day or by the piece. He was certainly retained to finish the work he had undertaken, and the defendant knowingly enticed him to leave it unfinished . . . It might perhaps have been different if the men had taken work for everybody, and after the plaintiff had employed them the defendant had applied to them, and they had given the preference to him in point of time. For if a man lived in his own house and took in work for different people, it would be a strong ground to say that he was not a journeyman of any particular master, but the gist of the action is that they were attached to this particular master."[40]

It would seem appropriate to have drawn an analogy here between the action *per quod servitium amisit* and the doctrine of vicarious liability, but little historical assistance can be drawn from such an analogy for the early common law does not appear to have recognized an action based on vicarious liability. The doctrine of vicarious liability arose with the expansion of trade and commerce in the 17th century when public opinion demanded such a remedy.[41] The maxim *qui facit per alium facit per se*, which originally applied only where one person commanded the other to do the wrongful act, was utilised to justify the new doctrine.[42] Thus vicarious liability was an off-shoot of agency principles rather than a facet of the nature of the master-servant relationship.

LUMLEY v. *GUY*

In *Lumley* v. *Guy* the basis of the master's action was changed from status to contract, and the case represents the beginning of the evolution of the tort of inducing breach of contract.

The "servant" in that case, Miss Wagner, had contracted to sing exclusively in the plaintiff's theatre for a period of three months. Before she commenced her engagement the defendant maliciously and with intent to injure the plaintiff allegedly enticed and procured Miss Wagner to refuse to sing in the defendant's theatre. An action was brought by the plaintiff against the defendant for such procuring and enticing.

[39] (1774) 1 Cowp. 54, 98 E.R. 964.
[40] Ibid. p. 55-6, p. 964-65.
[41] See Glass H. H. and McHugh M. H., *The Liability of Employers*, Law Book 1966, 100.
[42] *Lane* v. *Cotton* (1701) 1 Salk 17.

In the circumstances of the case the relationship of master and servant did not exist, and it was conceded that Miss Wagner was in fact an independent contractor. However by a majority of three to one the court found for the plaintiff on the basis that an action lay for maliciously procuring a breach of contract to give exclusive services, regardless of whether that service had commenced, so long as the procurement took place during the currency of the contract. Their Lordships went further and suggested that where damage resulted from the malicious procurement of a breach of any contract an action would lie against the procuror.

The court ignored the status basis of the master's action for enticement and treated it as stemming from contractual rights. Once that step had been taken it was easy to extend the action from contracts of service to contracts for services. That this was a departure was stressed by counsel for the defendant who stated of the existing action *per quod servitium amisit*

> "These are anomalies having their origins in times when slavery existed: they are intelligible on the supposition that the servant is the property of his master: and though they have been continued long after all but free service has ceased, they are still confined to cases where the relation of master and servant, in the strict sense, exists."[43]

If their Lordships had specifically purported to update the law to meet the needs of mid-19th century society, the logic of the decision might have been more acceptable. As it was, Crompton, Wightman and Erle JJ. professed to base their judgments on precedent apparently needless of the enormity of the change in the law they were bringing about.

The case raised two main issues. The first, which is irrelevant to the present discussion, was based on the question whether or not the "services" commenced with the forming of the contract. The court came to the conclusion that service commenced at the time the contract came into existence. The second issue and the one relevant here was whether Miss Wagner stood in the relation of servant to the plaintiff "so as to warrant the application of the usual rule of law giving a remedy in the case of enticing away servants . . ."[44]

> Relying on the decision in *Blake* v. *Lanyon*[45] Crompton J. reasoned "I think it was most properly laid down by the court in that case, that a person who contracts to do certain work for another is the servant of that other until the work be finished. It appears that Miss Wagner had contracted to do work for the plaintiff within the meaning of this rule; and I think that, where a party has contracted to give his personal services for a certain time to another the parties are in the relation of

[43] Willes, ibid. p. 218, p. 750.
[44] Per Crompton J. ibid. p. 227, p. 753.
[45] (1795) 6 T.R. 221, 101 E.R. 521.

> employer and employed, or master and servant, within the meaning of this rule. And I see no reason for narrowing such a rule."[46]

In so using *Blake* v. *Lanyon* Crompton J. took the rule enunciated in that case out of context and significantly changed the meaning of the sentence "a person who contracts to do certain work for another is the servant of that other until the work be finished".

From the short report of *Blake* v. *Lanyon*, it would appear that the "status" of Hobbs as a servant of the plaintiff was not challenged by the defendant. The question was whether the defendant, by continuing to employ Hobbs after he had notice of the contract of service between the plaintiff and Hobbs, was guilty of "receiving" the servant in circumstances where the servant had on his own initiative left his former master, the plaintiff.

The court's view was that while the work contracted for was unfinished Hobbs remained the servant of the plaintiff, and by giving employment to Hobbs the defendant was keeping him out of his former service. To quote the whole of the passage used by the court in *Blake* v. *Lanyon*

> "A person who contracts with another to do certain work for him is the servant of that other till the work is finished, and no other person can employ such servant to the prejudice of the first master. The very act of giving him employment is affording him the means of keeping out of his former service."[47]

One would imagine the court in *Blake* v. *Lanyon* being surprised at the contention of Crompton J. that they were laying down a test as to where a sufficient relationship existed for the action of procuring or receiving another's servant to lie. They were stating the period of the relationship not defining it.

Erle J. in *Lumley* v. *Guy* proceeded on the assumption that an action lay where the servant was enticed away from the master and that this was the situation on the facts before him. To the objection that he was in fact extending the law he replied

> "The class of cases referred to rests upon the principle that the procurement of the violation of a right is a cause of action, and that when this principle is applied to a right arising upon a contract of hiring, the nature of the service is immaterial."[48]

In support of this proposition Erle J. cited *Green* v. *Button*,[49] *Sheperd* v. *Wakeman*[50] and *Winsmore* v. *Greenbank*.[51]

[46] *Lumley* v. *Guy*, op. cit. p. 227, p. 753.
[47] Op. cit. p. 222, p. 522.
[48] *Lumley* v. *Guy*, op. cit. p. 232, p. 755.
[49] (1835) 2 C.M. and R. 707, 150 E.R. 299.
[50] (1659) ibid. p. 791, 82 E.R. 982.
[51] (1745) Willes 577, 125 E.R. 1330.

Baron Parke in *Green* v. *Button* described that case as in substance "an action on the case for a false and malicious representation".[52] As a result of this false and malicious representation goods ordered under a contract were not delivered to the plaintiff, so that there was a violation of a contractual right. However the court was concerned with the analysis of the method of the violation rather than with the mere fact that a violation of a contractual right had occurred.

In *Shepherd* v. *Wakeman*, a similar case, the defendant falsely and maliciously represented in a letter that the plaintiff was married to him, whereby the third party refused to marry her.[53] Again the essence of the action was the false and malicious representation.

Although Erle J. saw *Winsmore* v. *Greenbank* as showing that "procuring a violation of the plaintiff's right under a marriage contract was held to be an actionable wrong" a careful reading of the case does not support this interpretation and the true basis of that decision would seem to be the protection of a quasi-proprietary right of the husband in his wife.[54]

Not only do the cases Erle J. cited in favour of his principle fail to support it, those he distinguished go directly against him. In *Taylor* v. *Neri*,[55] distinguished on the basis that no contract was breached, an action *per quod servitium amisit*, was held not to lie. The "servant" in *Taylor* v. *Neri* was an opera singer hired for a season and it was alleged that the defendant beat the servant *per quod servitium amisit*. The plaintiff was non-suited as Eyre C.J. was of the opinion "that he was not a servant at all".[56] The facts of *Taylor* v. *Neri* are closely analogous to those in *Lumley* v. *Guy*, and would seem to indicate that the plaintiff in *Lumley* v. *Guy* should also have been non-suited.

In *Ashley* v. *Harrison*[57] the plaintiff brought an action against a man who had libelled one of his performers "whereby she refused to sing". The damage was held to be too remote and the plaintiff was non suited. Erle J. distinguished that case on the basis that there was there no intention to breach the contract. This view is not evident from the report of *Ashley* v. *Harrison* which suggests that the defendant's act was committed with the intent of deterring the singer from performing for the plaintiff.

Hence on examination of the five cases cited by Erle J. in support of the principle that the procuring of a violation of a right is without more actionable, suggests rather that no such broad principle existed.

52 Op. cit. p. 715, p. 302.
53 "Action sur le case fuit port pur ceo que le defendant false & malitiose ad esery un letter al un que intend pur prendr' le plaintiff al feme per quie il dit: You ought not to marry her, for before God she is my wife; and therefore if you do, you will live in adultery with her, and your children will be bastards le quel letter fuit deliver al Exon per que le plaintiff perde sa marriage. Et verdict pur plaintiff."
54 See earlier discussion of this case, infra p. 44.
55 (1795) 1 Esp. 386, 170 E.R. 393.
56 Ibid. p. 387, p. 394.
57 (1793) 1 Peake 256, 170 E.R. 148.

Wightman J. proceeded to give the plaintiff a remedy by analogy to the facts of *Green* v. *Button* and *Winsmore* v. *Greenbank* without any detailed analysis of the basis of either of these decisions. He reasoned that the right to maintain an action for the enticement of the servant arose from the common law, not the *Statute of Labourers*. In *Green* v. *Button* Wightman appeared as counsel for the plaintiff and argued that the rule of law to be applied was that contained in *Ward* v. *Weeks* that "every man must be taken to be answerable for the necessary consequences of his own wrongful acts".[58] The court had declined to decide the case on so wide a basis, but in *Lumley* v. *Guy* his Lordship appears to have treated his arguments in *Green* v. *Button* as though they had been accepted by the court. Thus hoisted by his own bootstraps and ignoring the basis of the decision in *Green* v. *Button*, he was able to reason that the right to maintain an action for the enticement of a servant arose from the common law not from the *Statute of Labourers*.

He attempted to consolidate this approach by relying on *Hart* v. *Aldridge*.[59] Certainly Wightman J. could find some support for his view in the dictum of Ashton J.

> "Even supposing . . . that the servant lived in his own house, if he were employed to finish a certain number of shoes for a particular person by a fixed time, and a third person enticed him away, I think an action would lie."[60]

Lord Mansfield who was the other judge in *Hart* v. *Aldridge* certainly did not accept this statement. He made the point that the master's action only arose where the master servant relationship existed and while a relationship may be evidenced by exclusive personal services no action arose where the employee was in fact an independent contractor. Wightman J.'s conclusion from *Hart* v. *Aldridge* that "it is the exclusive personal service which gives the right"[61] of action suggests that he misconstrued Lord Mansfield on this point. The word "servant" was used loosely in *Hart* v. *Aldridge* and may account in part for Wightman J.'s misinterpretation. It also illustrates the many difficulties which stem from imprecise use of technical words by judges in these cases.

Of the three majority judgments in *Lumley* v. *Guy* none seems to be based firmly on legal logic, but rather all turn on a desire to give a remedy and bend the law to fit the need. Whether in fact there was a need is doubtful as the plaintiff would have had an action against Miss Wagner for breach of contract, though the effectiveness of this remedy could well depend upon her financial resources. Certainly there may have been a moral

[58] Op. cit. p. 301, p. 710.
[59] (1774) 1 Cowp. 54, 98 E.R. 964. See earlier discussion of this case, infra p. 48.
[60] Ibid. p. 56, p. 965.
[61] *Lumley* v. *Guy*, op. cit. p. 242, p. 759.

need—the defendant should be made to "pay" for his acts intended to harm the plaintiff, and why in logic should such a remedy be confined to the master-servant relationship once the rationale behind the limitation had long since disappeared. However rather than extend the law on this basis the majority chose to use the previous case-law to justify a proposition which it does not support.

Coleridge J. was the only dissident in *Lumley* v. *Guy* and his judgment has been admired for its "ability and scholarship".[62] His dissent was in substance

> "In respect of breach of contract the general rule of our law is to confine its remedies by action to the contracting parties, and to damages directly and proximately consequential on the act of him who is sued; that as between master and servant there is an admitted exception, that this exception dates from the *Statute of Labourers*, 23 Edw. 3, and both on principle and authority is limited to it."[63]

He supports this proposition by a detailed discussion of *Anonymous 1409*[64] and examines the *Statute of Labourers* and its effect, coming to the conclusion that neither the pre-statute common law nor the statutory action covered the case before the court.

While Coleridge J.'s arguments may not have been impeccable, he was the only member of the bench who correctly analysed the state of the law in 1853. Only Coleridge J. appeared aware of the step forward the court was taking by its decision in *Lumley* v. *Guy*. In his own words

> "I know not whether it may be objected that this judgment is conceived in a narrow spirit, and tends unnecessarily to restrain the remedial powers of the law . . . But whether this be so or not, we are limited by the principles and analogies which we find laid down for us, and are to declare, not make the law."[65]

There may have been merit in developing the law as was done in *Lumley* v. *Guy*, and it may be that the judiciary should play a creative rather than a purely declaratory role. However, leaving these matters to one side, the case is unfortunate not for the actual "bending" or even "breaking" of the law, but rather because of the manner in which the majority went about its "bending" operation, using authority to show the existence of a remedy which did not exist in the given circumstances.

In another context Lord Reid explained this breakdown in the theory of precedent as evidence of the human element in adjudicators of our law

> "If they do not like an existing decision or *ratio* because it will produce an unjust or unreasonable result in the case before them they try to

[62] Sayre, op. cit. p. 668.
[63] *Lumley* v. *Guy*, op. cit. p. 246, p. 760.
[64] Y.B. XI Hen. IV. See earlier discussion of this case infra p. 43. Discussed *Lumley* v. *Guy*, ibid. p. 225-259, p. 763-765.
[65] *Lumley* v. *Guy*, ibid. p. 269, p. 768.

distinguish it. And that is where the trouble starts, and you begin to get an impenetrable maze of distinctions and qualifications which destroy certainty . . ."[66]

It would be desirable if judges were more honest when adapting the law to different social and political attitudes so that at least their contemporaries had some certainty with regard to future decisions.

There is some difficulty in assessing the state of the law immediately after the decision in *Lumley* v. *Guy*. This difficulty arises from the quite different lines of reasoning used by the members of the majority to reach their conclusions. However in spite of the vagueness of the doctrine enunciated it was clear that an "employer" could successfully bring an action where:

(1) there was a valid and binding contract between the plaintiff and the person induced to breach that contract,

(2) the contract was one for exclusive personal services,

(3) there was a breach of the contract,

(4) that breach was the consequence of a malicious act on the part of the defendant, intended to harm the plaintiff and in fact harming him.

To this must be added the reservation by Crompton J. (and possibly also Wightman J.) that the doctrine extended beyond contracts for exclusive personal services to all contracts.

The change represented by *Lumley* v. *Guy* is a dramatic one. The earlier law was not concerned with intent or motive, its essence was the interference with the quasi-proprietary rights of the master in the services of his servant. After the decision in *Lumley* v. *Guy* the basis of the action was contract, not property, and the intent of the third party towards the "master" became the essence of the action.

1853 TO *TORQUAY HOTEL CO. LTD* v. *COUSINS*

During the fifty years following the decision in *Lumley* v. *Guy*, and in spite of a number of apparent setbacks, the action *per quod servitium amisit* evolved into the modern tort of inducing breach of contract. Its survival was greatly assisted by the passing of the *Conspiracy and Protection of Property Act* 1875[67] which gave trade unions certain protection against the actions for conspiracy, an action which had frequently been utilised to control the ever-increasing power of the trade unions.[68] With the passing of the Act the employer factions in Victorian England needed some alternative method of dealing with the unions, and one of the methods they discovered

[66] Lord Reid, *Judges as Lawmakers* (1972) 12 J.S.P.T.L. 22, 24-25.
[67] 1875, 38 and 40 Vict. c. 86.
[68] Sykes E. I. and Glasbeek H. J., *Labour Law in Australia* Butterworths 1972, p. 331.

was the *Lumley* v. *Guy* tort, then still somewhat uncertain, but possessing definite potential.

The doubts which were originally felt as to the validity of the decision in *Lumley* v. *Guy* are perhaps reflected in the fact that the action for inducing breach of contract appears to have remained in limbo until 1881. In that year the court of appeal in *Bowen* v. *Hall*[69] by a majority of two to one upheld an action for inducing breach of contract. The court, however, based the action on a new footing—the principle enunciated in *Ashby* v. *White*.[70] This principle as enunciated by Brett L.J. was

> "That whenever a man does an act which in law and in fact is a wrongful act, and such an act, as a natural and probable consequence of it produces injury to another, and which in the particular case does produce such injury an action on the case will lie."[71]

Brett L.J. applied these criteria to the facts and found in favour of the plaintiff. The unlawful act was the persuasion to breach the contract, an act not unlawful of itself, but made so by the malicious intent of the plaintiff. Although the facts in *Lumley* v. *Guy* were almost identical to those in *Bowen* v. *Hall*, the contract breached being one for exclusive personal services but not creating the master-servant relationship, Brett L.J. (with Selbourne L.C. concurring) expressly rejected the *Statute of Labourers* as the proper basis for the action, preferring Mr Justice Coleridges' dissenting view in *Lumley* v. *Guy*

> "It was stated the contract in question was within the Statute of Labourers, that is to say, that the same evil was produced by the same means, and that as the statute made such means when employed in the case of master and servant, strictly so called, wrongful, the common law ought to treat similar means employer with regard to parties in a similar relation as also wrongful. If, in order to support *Lumley* v. *Guy* it had been necessary to adopt this proposition, we should have much doubted, to say the least. The reasoning of Coleridge J., upon the second head of his judgment, seems to us to be as nearly as possible, if not quite, conclusive."[72]

As *Ashby* v. *White* was not cited in *Lumley* v. *Guy* nor relied upon by any of the judges in that case, Brett L.J., while professing to affirm the decision in *Lumley* v. *Guy was* actually again changing the basis of the liability of the procurer of a breach of contract.

Interestingly there was a strong dissent in *Bowen* v. *Hall by* Coleridge C.J. In substance this dissent was

> "The point is so neatly raised whether the opinion of the majority of judges or the opinion of the dissentient judge in the case of *Lumley* v.

[69] (1881) 6 Q.B.D. 333.
[70] (1703) 1 Sm. L.C. 8th ed. 264, 1 E.R. 417.
[71] *Bowen* v. *Hall*, op. cit. p. 337.
[72] Ibid. pp. 339-340.

> *Guy* should prevail in a court which is not bound by the decision in that case. I am of the opinion that as we are not bound by it we ought to overrule it. . . . I do not propose to state my reasons for this opinion. I could only recite the cases and arguments of Sir John Coleridge in *Lumley* v. *Guy*."[73]

As Coleridge C.J. was the son of Sir John Coleridge,[74] the dissentient judge in *Lumley* v. *Guy*, it is possible that the family connection influenced the dissent in *Bowen* v. *Hall*. Coleridge C.J. also disputed the contention of Brett L.J. and Selbourne L.C. that malicious intent could make an otherwise lawful act unlawful, a proposition later repeated and accepted in *Allen* v. *Flood*.[75]

A further twelve years passed before the courts in *Temperton* v. *Russell*[76] were again faced with a similar problem. The contract there, however, was not one related to employment but a contract for the supply of concrete goods. To uphold the action in such a case would extend the action for inducing breach of contract from the employer-employee relationship to encompass all contracts. Apparently oblivious of the different type of contract before them their Lordships simply quoted the views of Brett L.J. (now Lord Esher) in *Bowen* v. *Hall* and applied the principle enunciated by him to the facts before them. Lord Esher himself said

> "It was agreed that the action for inducing persons to break a contract is confined to cases of master and servant or cases of personal services. But the case of *Bowen* v. *Hall* shows that the distinction relied on is not tenable. That was not a case of master and servant. In that case the majority of the judges in the Court of Appeal approved the view taken by the majority of the judges in *Lumley* v. *Guy*."[77]

The position taken by Lord Esher is tenable on the basis of his earlier reasoning in *Bowen* v. *Hall*; but it completely ignores the fact that both *Lumley* v. *Guy* and *Bowen* v. *Hall* involved breaches of contracts for exclusive personal services. Whatever the merits of the reasoning of the court, *Temperton* v. *Russell* extended the principle of *Lumley* v. *Guy* to a contract other than one between employer and employed.

With the decision in *Allen* v. *Flood*[78] in 1898 it looked as if the new tort of inducing breach of contract would no longer be a viable action. In *Allen* v. *Flood* it was held that an otherwise lawful act was not made unlawful by a malicious intent. The case arose out of a dispute between

[73] Ibid. p. 341, p. 342.
[74] Foss E., *The Judges of England* Vol. IX, 1820-1864, London 1864 (reprint Ams. Press, N.Y. 1966) at 176, John Taylor Coleridge had six children the eldest of whom "was following in his father's footsteps". At the time of printing (1864) John Dukes Coleridge was listed as a Q.C.
[75] [1898] A.C.1.
[76] [1893] Q.B. 715.
[77] Ibid. p. 727.
[78] Op. cit.

unions and the defendant "asked" that the employer dismiss the members of the other union or a strike would result. The employer complied and dismissed the members of the other union who sued the defendant. The court held that the defendant was entitled to inform the management that if certain workers were not dismissed others would go out on strike and the fact that his motive was malicious was irrelevant. This struck directly at the basis of the reasoning of Brett L.J. (with Selbourne L.C.) in *Bowen* v. *Hall* and (as Lord Esher M.R. with Lopes J.) in *Temperton* v. *Russell*, since the principle in *Ashby* v. *White* required no wrongful act other than a malicious intent.

However, the decision in *Allen* v. *Flood* did not deter the plaintiff in *Quinn* v. *Leatham*[79] from bringing an action for inducing breach of contract, although probably for reasons of uncertainty the action was framed in the alternative as an action in conspiracy. The court found for the plaintiff but the only member of the court really canvassing the breach of contract question was Lord McNaughton. His Lordship's answer to the *Allen* v. *Flood* impediment was

> "The case really brought under review by this appeal is *Temperton* v. *Russell*. I cannot distinguish that case from the present . . . the decision in *Temperton* v. *Russell* was not overruled in *Allen* v. *Flood*, nor is the authority of *Temperton* v. *Russell*, in my opinion, shaken in the least by *Allen* v. *Flood*. Disembarrassed of the expressions which Lord Esher unfortunately used, the judgment in *Temperton* v. *Russell* seems to me to stand on surer ground."[80]

Once the decision in *Temperton* v. *Russell* is "disembarrassed" of Lord Esher's reasoning (which was overruled in *Allen* v. *Flood*) that case would seem to have no "surer ground" left to rely upon, especially as the other grounds for the decision in *Lumley* v. *Guy* were expressly rejected. However, McNaughton L.J. went on to base his decision on *Lumley* v. *Guy*

> "Not on the basis of malicious intention—that was not I think the gist of the action—but on the ground that the violation of a legal right committed knowingly is a cause of action, and that it is a violation of a legal right to interfere with contractual relations recognised by law if there be no sufficient justification."[81]

His Lordship thus bases the tort of inducing breach of contract on a new and wider footing, suggesting that it is merely one aspect of a broad principle of liability based upon intentional violation of legal rights.

In view of the sweeping language used and the fact that only one judge expressed an opinion on the *Lumley* v. *Guy* tort, it was possible that the decision in *Quinn* v. *Leatham* would itself be called into question. Four

[79] [1901] 2 A.C. 495.
[80] Ibid. p. 509.
[81] Ibid. p. 510.

years later, however, in *South Wales Miners Federation* v. *Glamorgan Coal Co. Ltd*[82] the House of Lords accepted without comment that the tort of inducing breach of contract existed. The Lord Chancellor, the Earl of Halsbury, stated

> "My Lords, I cannot think that in this case there is anything to be determined except the question of fact. I say so because the questions of law discussed are so well settled by authority, and authority in this House."[83]

Lord McNaughton expressed a similar opinion

> "It is not disputed that the Federation committed an actionable wrong."[84]

The tort of inducing breach of contract was taken as established, and the only question discussed in *Glamorgan Coal* was whether the defence of justification existed on the facts; a defence which has proved extremely difficult to maintain.

In the years between *Glamorgan Coal* and *Torquay Hotel* v. *Cousins* the tort was frequently invoked mainly in the industrial dispute situation.[85] However, the action remained stable during this period. This can be substantiated by an examination of two cases decided immediately prior to *Torquay Hotel* v. *Cousins, Emerald Constructions Co. Ltd* v. *Lowthian*[86] and *Daily Mirror Newspapers Ltd* v. *Gardner*.[87] Both these cases, like *Torquay Hotel* were actions for injunctions arising out of a trade dispute.

The *Emerald Constructions* case arose out of a campaign by the Amalgamated Union of Building Trade Workers against "labour only" sub-contracts. Such a sub-contract existed between the plaintiff, Emerald Constructions Co. Ltd and a building contractor Higgs & Hill. The contract was subject to termination by Higgs & Hill in the event of the sub-contractors failing to maintain reasonable progress. The A.U.B.T.W. wanted Higgs & Hill to employ the builders directly and to this end sought to have the sub-contract terminated. When an ultimatum to this effect failed the union resorted to strikes and picketing of the building site with the result that the plaintiff was unable to maintain "reasonable progress". At the same time the action was heard the contract had not been terminated, although an affidavit from Higgs & Hill stating that the contract would have to be terminated if no progress was made on the building was offered in evidence.

Lord Denning M.R.'s view of the law applicable was

[82] [1905] A.C. 239.
[83] Ibid. p. 242.
[84] Ibid. p. 245.
[85] See for example *Thompson* v. *Deakin* [1952] Ch. 646, *Stratford* v. *Lindlay* [1964] 3 W.L.R. 541, *Morgan* v. *Fry* [1968] 3 W.L.R. 506.
[86] [1966] 1 W.L.R. 691.
[87] [1968] 2 W.L.R. 1239.

> "The parties to (the contract) had a right to have their contractual relations preserved inviolate without unlawful interference by others: *Quinn* v. *Leatham*, by McNaughton. If the officers of the trade union, knowing of the contract, deliberately sought to procure a breach of it, they would do wrong: see *Lumley* v. *Guy*."[88]

Lord Diplock's definition of the tort was more succinct

> "There are three essentials in the tort of wrongful procurement of a breach of contract: the act, the intent and the resulting damage."[89]

The court held that knowledge of the terms of the contract in question was not a necessary ingredient of the intent required in cases where the defendant's acts showed recklessness or indifference as to whether a breach occurred.[90] In the present case, such recklessness or indifference existed since the union desired the sub-contract terminated and was indifferent as to how this result was achieved. The court granted the injunction sought by the plaintiffs. Interestingly no mention was made of the defence of justification.

Daily Newspapers Ltd v. *Gardner* involved a slightly different set of facts as the inducement was indirect. Daily Mirror Ltd sold newspapers to wholesalers who sold them to newsagents. When Daily Mirror Ltd cut the discount it allowed to wholesalers the National Federation of Retail Newsagents, Booksellers and Stationers organised a one week boycott of the Mirror.

In essence the Federation was acting to persuade the newsagents to suspend the contracts between them and the wholesaler in relation to the supply of the Mirror for a period of one week. This suspension would in turn force the wholesalers to suspend their contracts with Daily Mirror Limited for a similar period. Lord Denning M.R. treated this indirect breach in the same way as a direct breach

> "It seems to me that if anyone procures or induces a breach of contract, whether by direct approach to the one who breaks the contract or by indirect influence through others, he is acting unlawfully if there be no sufficient justification for the interference."[91]

Davies L.J. concurred, expressing the opinion that the case was covered by Lord Denning's observations in *Emerald Constructions* v. *Lowthian*.[92] Russell L.J., although feeling "some difficulty" also agreed that an injunction should be granted, but preferred the alternative argument based on section 21(1)(d) *Restrictive Trade Practices Act* 1956. On the question of the tort of inducing breach of contract Russell L.J. felt some doubt, but

88 Op. cit. p. 700.
89 Ibid. p. 703.
90 Ibid. per Lord Denning M.R. 700-701; per Lord Diplock L.J. 703-704.
91 Op. cit. p. 1250.
92 Ibid. pp. 1252-1253.

declined to explain that doubt and also declined to dissent on the question.[93]

From an analysis of these two cases, it can be seen that the elements of the tort of inducing breach of contract immediately prior to the decision in *Torquay Hotel* v. *Cousins* were:

1. a valid contract between the plaintiff and the person induced by the defendant to breach that contract,
2. an act of inducement of the defendant,
3. the intention of causing a breach of contract or recklessness as to that consequence,
4. an actual breach of contract, and
5. there is some authority for the proposition that the defence of justification can be raised by the defendant.

In both *Emerald Constructions* v. *Lowthian* and *Daily Mirror Newspapers* v. *Gardner* no actual breach of contract had occurred at the time the action was heard, but in both cases such a breach was imminent unless the conduct of the defendants was restrained. Hence the application and granting of injunctions in those cases.

TORQUAY HOTEL CO. LTD v. *COUSINS*

Applying the law as established in *Emerald Constructions* v. *Lowthian* and *Daily Newspapers* v. *Gardner* to the facts in *Torquay Hotel* v. *Cousins* there would appear to be no need for an extension of the law to cover the situation before the court.

The case arose out of the efforts of one union to gain recognition on behalf of its members employed in the hotel and catering business. By agreement with the employers the workers within the hotel and catering industry were organised by two other unions. However, some members felt dissatisfaction with these two unions and formed the defendant union. Due to the agreement with the first two unions the hotelier first approached for recognition by the defendant union, the manager of the Torbay Hotel, refused to enter discussions with the new union. This refusal resulted in industrial action in the form of a strike by those workers who had joined the new union and picketing by them of the Torbay Hotel. In the course of the ensuing publicity, the manager of the Imperial Hotel (owned by the plaintiffs, Torquay Hotel Co. Ltd) was reported to have advocated the "stamping out" of the intervention of the defendant union in the hotel and catering business. This resulted in picketing and "blacking" of the Imperial Hotel by the union, no members of which were employed by the Imperial Hotel.

The picketing resulted in difficulties for the Imperial Hotel in obtaining oil deliveries from their usual suppliers, Esso Petroleum Pty Ltd. Esso was

[93] Ibid. p. 1253.

informed by the union of the "blacking" of the Imperial Hotel and that any attempt to deliver oil would be prevented. This threat was particularly credible since the tanker drivers were members of the union and would be unwilling to cross the picket lines.

The Imperial Hotel consequently obtained a delivery of oil from Alternative Fuels. This company was subsequently notified of the dispute between the union and the Imperial Hotel and thereafter made no further deliveries. The Imperial Hotel then ordered and obtained oil from Esso, no pickets being in the vicinity at the time of the delivery. Consequently at no time was there any breach of contract.

It was at this point that the Imperial Hotel gave the defendant union notice of the contract between itself and Esso and requested the removal of the picket line. The union failed to comply with this request and the Torquay Hotel Co. Ltd as owners of the Imperial Hotel instituted proceedings for an interlocutory injunction *quia timet.*

The Court of Appeal unanimously held in favour of *Torquay Hotel Co. Ltd* and granted the injunction.

The facts reveal acts on the part of the defendants which constituted inducement, the picketing of the Imperial Hotel by the union and the warning to Esso and later Alternative Fuels not to attempt to deliver fuel as the tanker drivers would not be willing to cross the picket lines. Although on the two occasions that delivery of oil was attempted, once by Alternative Fuels and once by Esso, it was effected, the conduct of the union constituted a direct inducement to Esso either to breach the contract with the Imperial Hotel or to terminate such contract.

Although it may be difficult to argue that the intention of the defendants was to induce a breach of contract between Esso and the Imperial Hotel, their behaviour easily fits within the reckless or indifferent conduct which was sufficient to satisfy the requirement of intent in *Daily Mirror Newspapers Ltd* v. *Gardner.* That they were at least indifferent to whether a breach of contract occurred is emphasised by the warnings given to both Esso and Alternative Fuels not to attempt deliveries of oil to the Imperial Hotel.

With regard to the third element, there had been no breach of contract at the time the action came before the court, but two things must be emphasised. The first is that this action was one for an injunction *quia timet,* a remedy to restrain the defendants from acting to the detriment of the plaintiffs. The second important factor is that in both *Emerald Constructions* v. *Lowthian* and *Daily Mirror Newspapers* v. *Gardner,* actions for injunctions, *no* breach of contract had occurred at the time the action was heard. The question which concerned the court was whether a breach was imminent if the defendant's conduct was allowed to continue unchecked, and if so whether an injunction was the appropriate remedy.

In *Torquay Hotel* v. *Cousins* the contract which was the subject of the

court action was between the plaintiff and Esso Petroleum Ltd for the supply of fuel oil. The question of whether a breach could occur was complicated by a *force majeure* clause which in substance said

> cl. 10 "neither party shall be liable for any failure to fulfil any term of this agreement if fulfilment is delayed, hindered or prevented by any circumstances whatever which is not within their immediate control . . . including labour disputes."[94]

Leaving the question of the effect of such a clause aside for the moment, the plaintiff's argument was that the contract became operative when they ordered oil from Esso, and when the pickets refused to allow the delivery of that oil, which they had openly threatened to do, then a breach of contract would occur, a breach resulting from the intentional action of the defendants. This potential and imminent wrongdoing could be restrained by injunction.

Thus, on the facts, *Torquay Hotel* v. *Cousins* fits within the ambit of the tort of inducing breach of contract as defined in the cases of *Emerald Constructions* and *Daily Mirror Newspapers*. Certainly this was the view taken by the majority of the judges in the Court of Appeal.

Russell L.J. followed the traditional line of authority. He interpreted the *force majeure* clause as not excluding the possibility of breach

> "It is an exemption from liability for non-performance, rather than an exemption from the liability to perform."[95]

With regard to the acts of the union and their intention, Russell L.J. summed up his judgment

> "[the facts] demonstrate an attitude on the part of the union officials of willingness to directly induce breaches of contract . . . this justifies the continuance of the injunction."[96]

Winn L.J. used almost identical reasoning to that of Russell L.J. His view of the *force majeure* clause was that

> "As I construe the clause it affords only immunity against any claim for damages; it could not bar a right to treat the contract as repudiated by continuing breach; despite the clause Esso could well have been held to have committed a breach by non-delivery."[97]

In granting the interlocutory injunction against the individual defendants,[98] Winn L.J. said

[94] The clause is fully quoted in Mr Justice Stamps' judgment—[1968] 3 W.L.R. 540, 549.
[95] Op. cit. p. 305.
[96] Ibid.
[97] Ibid. p. 308.
[98] The application for an injunction in relation to the union was dismissed in accordance with section 4(1) *Trade Disputes Act* 1906 which prohibits actions for damages for torts committed by or on behalf of a trade union.

> "The present case . . . is a simple case of conduct evidencing . . . such a disposition to induce or produce to the prejudice of the Imperial Hotel non-performance of contracts of their suppliers that relief by injunction was appropriate."[99]

There can be no doubt that these views did not accord with the opinion expressed by Stamp J. in Chancery or by Lord Denning M.R. in the Court of Appeal.

Lord Denning M.R. accepted the defendants' argument that the *force majeure* clause made a breach of contract impossible in the circumstances specified; nonetheless he found in favour of the plaintiffs. In doing so he based his decision on the existence of a tort of unlawful interference with trade, of which interference with contractual relations is but one example. He stated his basic principle thus

> "I have always understood that if one person deliberately interferes with the trade or business of another, and does so by unlawful means, that is, by an act which he is not at liberty to commit, then he is acting unlawfully, even though he does not procure any actual breach of contract. If the means are unlawful, that is enough."[100]

Authority for this proposition was drawn from *Rookes* v. *Barnard*,[101] *Stratford* v. *Lindley*[102] and *Daily Mirror Newspapers Ltd* v. *Gardner*. "Unlawful" was given an extremely broad interpretation; the unlawful act here being the "blacking". This, said his Lordship, induced the breach of the tanker drivers' contracts of employment, illegal at common law and not protected here by section 3 *Trade Disputes Act* 1906, as the "blacking" was held not to be in contemplation or furtherance of a "trade dispute" within the meaning of the Act.

Hence it is fair to say that two of the three judges who decided the appeal did no more than apply the currently accepted law of the tort of inducing breach of contract. To this extent the headnote in *Torquay Hotel* v. *Cousins* is misleading when it says

> "There was sufficient evidence that the defendants intended to interfere directly and deliberately with the plaintiff's contracts with Esso."[103]

While this represents a correct view of the judgment of Lord Denning M.R., it was *not* the opinion of the court. A more correct headnote would be

> Held: Injunction granted to the plaintiff.
> Per Winn L.J. and Russell L.J.

[99] Op. cit. p. 310.
[100] Ibid. p. 301.
[101] [1964] A.C. 1129.
[102] [1965] A.C. 269.
[103] Op. cit. p. 291.

> "There was sufficient evidence that the defendants intended directly and deliberately to induce a breach of the plaintiff's contract with Esso to warrant the grant of an injunction."

Per Denning M.R.

> "There was sufficient evidence that the defendants intended to interfere directly and deliberately with the plaintiff's contracts with Esso."

The difference in the approach of the judges turns on the interpretation given to the *force majeure* clause in the contract between the Imperial Hotel and Esso. Since Winn and Russell L.JJ. both concluded that the clause precluded only liability for breach, but did not make the contract impossible to breach in the circumstances, they were able to pigeon-hole the action within the ambit of the tort of inducing breach of contract.

However, both Stamp J. in the lower court and Lord Denning M.R. in the Court of Appeal interpreted the *force majeure* clause as excluding the possibility of a breach of contract. Hence to allow a remedy to the plaintiff they were forced to find some other ground—the one they turned to being the so-called wider tort of unlawful interference with trade or business, of which interference with contractual relations is merely one aspect.

Discussions of the case generally conclude that since relief was given where no breach of contract occurred, *Torquay Hotel* v. *Cousins* has brought about an expansion of the tort which used to be known as the tort of inducing breach of contract and which is now more aptly described as the tort of interference with contractual relations.[104]

> "It was held that the unionists were liable for interfering with the contract, despite the fact that there was no breach of contract."[105]
> "In *Torquay Hotels Ltd* v. *Cousins* . . . the High Court granted an injunction against union officials who 'interfered' with commercial contracts by industrial action when seeking recognition of the union, even though no breach of the contracts was caused."[106]

Such statements ignore the true basis of the action. The question in the Court of Appeal was not whether damages should be awarded for a tort alleged to have been committed, but whether an injunction *quia timet* had properly been granted in the court below.

It was therefore unnecessary to show that a tort had been committed by the defendants, but merely that if the defendants conduct was not restrained, a tort would be committed resulting in damage to the plaintiff.

104 Sykes and Glasbeek, op. cit. pp. 344-345; Glasbeek H. J. and Eggleston E. M., *Cases and Materials on Industrial Law* 3rd ed. Law Book Co., 112 (1969); 113 S.J. 52; 43 A.L.J. 332; Heydon J. D., *The Future of the Economic Torts* (1975) 12 U.W.A.L. Rev. 1, 3.

105 Wedderburn K. W. and Davies P. L., *Employment Grievances and Disputes Procedure*, University of California Press, 1969, 120.

106 Glasbeek H. J., *Lumley* v. *Guy—The Aftermath* (1975) 1 Mon. L.R. 136, 202. He elaborates this view in Sykes and Glasbeek op. cit. 344-345.

As such *Torquay Hotels Ltd* v. *Cousins* falls within the ambit of *Emerald Constructions* v. *Lowthian* and *Daily Newspapers* v. *Gardner*, cases in which an injunction was granted where tortious conduct was imminent but had not eventuated.

It is only Lord Denning who can be said to have introduced anything new into the law relating to the tort; and the case cannot be relied upon for either the wider or narrower propositions attributed to it by such writers as Wedderburn, Heydon, Sykes or Glasbeek.

In conclusion, while two judges in different courts took a wider view of what constituted tortious conduct, the decision in *Torquay Hotels Ltd* v. *Cousins* does not represent a further departure in the tort of inducing breach of contract. The alleged tort of unlawful interference with trade is illegitimate for two reasons

1. An analysis of *Torquay Hotel Co. Ltd* v. *Cousins* shows that the case does not extend the tort of inducing breach of contract to the situation where damages in tort will be awarded where no contract has been breached. That such was the case was the view of only one of the three Lord Justices in the Court of Appeal, and
2. An examination of the minority judgment of Lord Denning reveals a lack of reasoning based on precedent or logic. Like *Lumley* v. *Guy* it illustrates the judicial desire, recognized by Lord Reid, to provide a remedy where none otherwise existed; although as already stated on the facts of *Torquay Hotel* no new principle was necessary in order to give the plaintiff the remedy sought.

However if the interpretation of the text-writers is followed, it may eventually be validated by the very process it has abused, just as *Lumley* v. *Guy* and *Quinn* v. *Leatham* have survived as legitimate authorities for principles they did not decide.