Full Court of the Supreme Court, Quinlan brought his further action as a trespasser alleging negligence only to be eventually defeated by the ultimate tribunal, and be required to bear the costs of the trial at first instance and the two appeals. When a decision is reversed in such circumstances it would not be unreasonable to expect the state to contribute materially to the costs.

T. F. CHETTLE

ROOKES v. BARNARD[1]

Intimidation—Conspiracy—Threat by members of union to strike unless plaintiff fellow-worker removed from employment—Whether actionable at suit of plaintiff.

Mr Rookes, employed by the British Overseas Airways Corporation as a draughtsman, left the trade union of which he had been a member. On his refusal to re-join the union, the other draughtsmen had, in order to maintain 100 *per cent* union membership, demanded his removal from the office. In the end they threatened to strike if this was not done, the threat being organized and conveyed by the three defendants in the action—Barnard and Fistal, draughtsmen employed by B.O.A.C., and Silverthorne, a union organizer, all officials of the union. The strike would have been in breach of the men's employment, not only because they had not given one week's notice of termination of employment, but because in this case an agreement between the union and the employers (conceded to be implied into those contracts) agreed that there should be no strikes at all.[2] The union also had 'an understanding or informal agreement with the employers for "100 *per cent* membership", which had been fulfilled'.[3] B.O.A.C. having reason to believe that other unionists might strike in sympathy, suspended Rookes from his work and two months later dismissed him, giving him a week's salary in lieu of notice.

At the trial, the jury found that each of the defendants was a party to a conspiracy to threaten strike action by the members of the union against B.O.A.C. to secure the plaintiff's dismissal; that each made a threat of strike action against B.O.A.C. to secure that dismissal; and that these threats of strike action caused Rookes to be dismissed.

The main argument in the case was whether, in these circumstances, the three defendants had committed the tort of intimidation.[4] Counsel for the defendants argued that there was no such tort, but all of the nine judges involved in the case rejected this contention. The authorities

[1] [1964] 2 W.L.R. 269. House of Lords; Lord Reid, Lord Evershed, Lord Hodson, Lord Devlin and Lord Pearce.

[2] The agreement had been made between representatives of a number of unions and representatives of a number of employers.

[3] *Per* Sellers L.J. in the Court of Appeal: [1962] 2 All E.R. 579, 582.

[4] [1964] 2 W.L.R. 269, 310 *per* Lord Devlin. Such an argument was necessary in order to support the jury's finding of conspiracy. It had to be shown that there was a 'conspiracy by unlawful means', as a 'conspiracy by lawful means' was non-actionable by s. 1 of the Trade Disputes Act, 1906 (U.K.). See *infra* n. 7.

for the existence of the tort were cases decided before the nineteenth century, but later House of Lords cases had cited them with approval.[5] It was also agreed that there were two main categories of the tort. Firstly, A might compel B, by means of a threat of an unlawful act, to do some act whereby loss accrues to him. Secondly, A might intimidate C with the intent and effect of compelling him to act in a manner which C has a legal right to do which causes loss to B. In this latter case there are at least two cases where such intimidation could constitute a cause of action: (1) when the intimidation consists in a threat to do or procure an illegal act against the party threatened (C in the above example); and (2) when the intimidation was the act of two or more persons acting together in pursuance of a common intention.[6] This second branch is one form of the tort of conspiracy, but the plaintiff was unable to make use of it because of the Trade Disputes Act, 1906. Similarly, plaintiff was precluded from alleging that the illegal act threatened was the threat to procure breach of contract.[7] What the plaintiff did allege was that the defendants, by threatening to break their service agreements with B.O.A.C., had made a threat to commit an illegal or unlawful act against B.O.A.C., and that B.O.A.C. had as a result terminated their contract with the plaintiff to his detriment. On whether such a threat was sufficient to constitute the use of unlawful means against B.O.A.C. the Court of Appeal and the House of Lords differed.[8] The Court of Appeal unanimously held that such a threat was not sufficient, and that 'unlawful' referred to actions that were either tortious or criminal.[9] They supported this conclusion by referring to the historical basis of the tort; by an argument that to give B a right of action based on a threat by A to break his contract with C would outflank elementary principles of contract law; and by an argument that the Trades Disputes Act would otherwise be rendered ineffective.

[5] *E.g. Allen v. Flood* [1898] A.C. 1, 74, 113 *per* Lord Halsbury and Lord Ashbury citing Bowen L.J. in *Mogul S.S. Co. v. McGregor, Gow & Co.* (1889) 23 Q.B.D. 598, 614. The judgment of Pearson L.J. in the Court of Appeal contains a review of these old cases. [1962] 3 W.L.R. 260, 292-297.

[6] *Salmond on Torts* (13th ed., 1961) 697-699. Cited by Lord Devlin [1964] 2 W.L.R. 269, 310-311.

[7] Trade Disputes Act, 1906 (U.K.). s. 1 '. . . An act done in pursuance of an agreement or combination by two or more persons shall, if done in contemplation or furtherance of a trade dispute, not be actionable unless the act, if done without any such agreement or combination, would be actionable.' S. 3 'An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment of some other person, or with the right of some other person to dispose of his capital or his labour as he will.' S. 1 rendered non-actionable the 'conspiracy by lawful means', and s. 3 the procuring of the breach of contract between B.O.A.C. and Rookes. These torts will be discussed *infra*. The Trade Disputes Act has been enacted in only one Australian State (Queensland).

[8] Sachs J., the trial judge, held that such a threat was sufficient: [1961] 3 W.L.R. 438. For comments on this case see Hamson, 'A Note on *Rookes v. Barnard*' [1961] *Cambridge Law Journal* 189, and Wedderburn, 'The Right to Threaten Strikes' (1961) 24 *Modern Law Review* 572.

[9] [1962] 3 W.L.R. 260, 278 *per* Sellers L.J., 285 *per* Donovan L.J., 297-298 *per* Pearson L.J.

The Court was also troubled by the fact that the threats of Barnard and Fistal to break their *own* contracts would have had little effect.[10]

But the House of Lords rejected all these arguments and held that the threat to break a contract could constitute the use of unlawful means in the tort of intimidation. Though it was conceded that the old cases and the *dicta* in the House of Lords supported the restriction of the tort,[11] the historical argument was rejected, and it was argued that in the context of modern economic conditions the threat to break a contract was a powerful weapon, and as the essence of the tort was coercion, the nature of the threat was immaterial.[12] To the privity of contract argument the House of Lords argued that B was in no sense suing on this contract[13] and the analogy was drawn between this type of action and the cause of action based on *Lumley v. Gye*.[14] [15] It was also remarked that A could not obtain immunity from this tort by acting firstly and then informing of his reasons for so acting, so that C then acted in a manner detrimental to B.[16] To counter the argument that the Trade Disputes Act would be negated, Lord Devlin argued that there was no way the common law could exclude threats to break contracts of employment, and that the remedy lay in the hands of the legislature.[17] To the argument that the threats of Barnard and Fistal had little coercive effect Lord Devlin replied that though this was a case where

[10] *Ibid* 268-269 per Sellers L.J.

[11] [1964] 2 W.L.R. 269, 294 *per* Lord Evershed.

[12] *Ibid.* 293 *per* Lord Evershed, 311-314 *per* Lord Devlin. Lord Evershed referred with approval to Benjamin Cardozo, *The Nature of the Judicial Process* (1923) 23: 'The rules and principles of case law have never been treated as final truths, but as working hypotheses, continually retested in those great laboratories of law, the courts of justice', citing from Smith, *Jurisprudence* (1909) 21. However, when he is reshaping the law to changing social conditions, the judge is acting as a legislator, and proceeds, partly at least, on policy grounds. It would be of assistance if the courts would articulate the reasons for their extensions of the law, for this would enable future courts to properly understand the uses and limits of the decisions.

[13] [1964] 2 W.L.R. 269, 313 *per* Lord Devlin.

[14] (1854) 2 E & B 216. This is known as the tort of unlawful interference with contractual relations, and is discussed *infra*.

[15] [1964] 2 W.L.R. 269, 307 *per* Lord Hodson. However, it cannot be said that the House of Lords' answer to these privity of contract arguments is satisfactory. The arguments have been fully developed by Wedderburn, 'Intimidation and the Right to Strike' (1964) 27 *Modern Law Review* 257, 261-267. The main points of his argument are (a) that the fundamental distinction between duties owed in tort and duties owed in contract has been obscured, for in the latter case the duties owed are fixed by the parties and are owed only to specific persons: (b) as between the contracting parties, the innocent party has a new cause of action, for in addition to his action for anticipatory breach there is added the tort of intimidation; (c) there is no parallel with *Lumley v. Gye* for there the plaintiff is allowed to protect *his contract* against outside interference; and (d) the argument that B is not suing on the breach but on the threat to break is illogical and unreal. He concludes: 'English law now witnesses the extraordinary rule that a third party can sue for damages deliberately done to him by means of a threatened breach of contract; but he still cannot sue for a benefit which both the contracting parties deliberately intended him to have out of the contract! So much for privity of contract'.

[16] [1964] 2 W.L.R. 269, 295-296 *per* Lord Evershed; 313-314 *per* Lord Devlin. The extent of such an implied intimidation must remain very uncertain.

[17] *Ibid.* 322-323.

the coercive power was dispersed, the defendants were liable because they had acted in combination. Sachs J. had approached the problem by arguing that here there had been a linking of threats, and one threat could not be considered in isolation from the others.[18]

The House of Lords did give some other indications of the scope of the tort. It was made clear that the act of coercion of A towards B, or towards a third party C must be unlawful,[19] and in the latter case A must know and intend that C will act in a manner detrimental to B. Their Lordships made it clear that B must have been intentionally aimed at by the threat, though the formulation of Sachs J. and Lord Hobson was somewhat different.[20] Also, the intimidator, must have, or the person intimidated must believe that he has, the coercive power which is the essence of the tort.[21] Lord Devlin also remarked that

> I note that no issue of justification was raised at the time and there is no finding of fact upon it. So your Lordships have not to consider what part, if any, justification plays in the tort of intimidation.[22]

It is to be lamented that no guidance was given on this issue, as the defence of justification in analogous torts varies greatly. The defence cannot be raised to the tort of 'conspiracy by unlawful means',[23] it is very restricted in relation to the tort of unlawful interference with contractual relations,[24] and very generous in relation to the tort of 'conspiracy by lawful means'.[25] Perhaps Lord Hodson's analogy of the tort of intimidation in this respect to *Lumley v. Gye* provides a clue,[26] but the more realistic view would be to give the tort a generous application, for though this would restrict the scope of the tort, it would compel the courts to consider the relative interests involved, and it will also offset the unfairness of the dividing line mentioned by Lord Devlin. The 'stop list' and other associated practices are powerful weapons of coercion but may not involve an unlawful act,[27] but as a result of *Rookes v. Barnard* it will be difficult for a trade union to act without the commission of an unlawful act. If the court allows as a defence the fact that the person or group of persons was acting in furtherance of their legitimate trade interests the distinction will be of less importance.

[18] *Ibid.* 316. The reasoning of Sachs J. had been approved of by the commentators: see n. 8 *supra.*

[19] *Ibid.* 312 per Lord Devlin: 'It cannot be said that every form of coercion is wrong. A dividing line must be drawn and the natural line runs between what is lawful and what is unlawful as against the party threatened.'

[20] *Ibid.* 308 *per* Lord Hodson, and [1961] 3 W.L.R. 438, 446 *per* Sachs J. In their view, the question was whether the act of intimidation was likely to harm the plaintiff and whether it was followed by reasonably foreseeable damage.

[21] [1964] 2 W.L.R. 269, 315 *per* Lord Devlin.

[22] *Ibid.* 311.

[23] *Salmond op. cit.* 706; Street, *The Law of Torts* (3rd ed., 1963) 354; *Winfield on Tort* (6th ed., 1954) 534.

[24] Starke, 'Unlawful Interference with Contractual Relations' (1955) 7 *Res Judicatae* 136, 145-146.

[25] *McKernan v. Fraser* (1931) 46 C.L.R. 343; *Crofter Hand Woven Harris Tweed Co. Ltd v. Veitch* [1942] A.C. 435.

[26] See n. 15 *supra.*

[27] *Ware & De Freville v. M.T.A.* [1921] 3 K.B. 40.

There are, however, many problems that may arise in the future to which the judgments give little guidance. One such problem is just how important was the fact that the contract of employment in the instant case contained a specific 'no-strike' clause. Lord Evershed regarded this fact as vital, for he remarked that

> it has long been recognized that strike action or threats of strike action . . . in the case of a trade union dispute do not involve any wrongful action on the part of employees, whose service contracts are not regarded as being or intended to be thereby terminated.[28]

However, he then pointed out that the circumstances of this case were distinguished by one important fact—the agreement between the employers and the employees writing the 'no-strike' clause into the contract of employment.[29] The Court of Appeal in *J. T. Stratford & Son Ltd v. Lindley*[30] also regarded this clause as vital.[31] It is clear that a strike may involve the breach of other clauses in the contract of employment other than a 'no-strike' clause.[32] The most common case will be where the workers quit without notice due under the contract and Lord Devlin[33] in *Rookes v. Bærnard,* and Lord Denning M.R.[34] in *J. T. Stratford & Son Ltd v. Lindley* regarded the threat of such a breach as constituting the tort of intimidation.[35]

Another problem is whether the courts will make any distinction between advice or exhortations on the one hand, and threats on the other. An analogous distinction has been made in relation to the tort of inducing breach of contract and perhaps it will be made here.[36] There was also the question of how Silverthorne could be made liable, for he had no contract with B.O.A.C. The House of Lords do not discuss the problem, but the explanation has been given that

> the relevant joinder in the tort of intimidation is a joinder in the co-ordination of the several unlawful threats and not necessarily a joinder in the unlawful acts threatened.[37]

[28] [1964] 2 W.L.R. 269, 289.

[29] *Ibid.* 290. Lord Reid also regarded as possible a strike that did not involve a breach of contract: *ibid.* 278.

[30] [1964] 2 W.L.R. 1002; Denning M.R., Pearson and Salmond L.JJ.

[31] *Ibid.* 1017 *per* Denning M.R., 1034-1035 *per* Salmond L.J. In this case the Court found in favour of the trade union officials primarily on the basis that they had threatened to induce the trade unionists to break their contracts of employment unless the employer complied with their demands. This would constitute the tort of intimidation but for s. 3 of the Trade Disputes Act, which protected them: *ibid.* 1017-1020 *per* Denning M.R., 1033 *per* Salmond L.J.

[32] *Ibid.* 1035 *per* Salmond L.J. See Wedderburn (1961) 24 *Modern Law Review* 572, 584 where examples are given.

[33] [1964] 2 W.L.R. 269, 309.

[34] [1964] 2 W.L.R. 1002, 1017.

[35] This problem might be overcome if the courts were prepared to assume that notice to quit was unnecessary, or, if necessary, would be given. This they appear to have done. In cases where it is uncertain whether the threat talks of breach of contract the benefit of the doubt has been given to the threatener. See the cases cited by Wedderburn (1961) 24 *Modern Law Review* 572, 577.

[36] Wedderburn (1961) 24 *Modern Law Review* 572, 580. The Lords did intimate that such a distinction would be made: [1964] 2 W.L.R. 269, 277, 290, 305-306.

and since Silverthorne joined in the making of the threats he was liable. It is also to be noted that in Australia the scope of unlawful acts will be increased by the existence of penal restrictions placed on strikes as such. The threat of an unlawful strike would be actionable as the tort of intimidation provided that the other elements of the tort were made out.[38]

It is interesting to consider what the position of the defendants would have been if the fact situation had presented itself to an Australian court, where, except for an action in Queensland,[39] the Trades Disputes Act would not have complicated matters. The plaintiff would no doubt have alleged that the defendants had procured a breach of the contract between B.O.A.C. and himself, and that they were liable in tort on this basis. The answer to this would be that 'there was no breach by B.O.A.C. of the appellant's service agreement'.[40] However, there is a strong argument that, at least in the case where the act of the intervenor amounted to a distinctly unlawful act (as in this case), it is not necessary for the plaintiff to show that the other contracting party was thereby led to commit an actionable breach of the contract, and that it is enough to show that the contractual situation was ruptured or frustrated in some way without any suable breach being committed.[41] If this argument is accepted, then Rookes may have had a successful cause of action on this basis also (depending on whether the contract would be regarded by the court as 'ruptured' or 'frustrated').

It is interesting also to consider the case in the light of the law of civil conspiracy considered as a whole. Conspiracy may be committed by a combination resulting in damage to the plaintiff either (a) by acts unlawful in themselves (the 'conspiracy by unlawful means'), or (b) by acts (which would be lawful in an individual) done with the predominant objective of injuring the plaintiff and not for some justifiable or legitimate objective ('conspiracy by lawful means').[42] In relation to the latter branch of this tort, it is the plaintiff who must show that the act of the defendant was done with he predominant object of injuring the plaintiff,[43] and it is likely that in the circumstances of this case the plaintiff would have failed to make out the cause of action. On the other hand, Rookes did succeed in the case on the ground that the defendants had conspired to injure him by the use of unlawful means, *i.e.* by the commission of the tort of intimidation. The position of

[37] Hamson, *op. cit.* 196. Wedderburn argues that this is wrong and argues that Silverthorne, and Barnard and Fistal also, could only be described as joint tortfeasors in a conspiracy to *induce* or procure breaches of contract. This would bring them under the protection of Trade Disputes Act: Wedderburn (1961) 24 *Modern Law Review* 572, 581-583. But in *J. T. Stratford & Son Ltd v. Lindley* the Court said that Silverthorne had been a joint tortfeaser in the *threat to break* the contracts of employment: [1964] 2 W.L.R. 1002, 1016.

[38] Sykes, *Strike Law in Australia* (1960) 179.

[39] See n. 7 *supra.*

[40] [1964] 2 W.L.R. 269, 289 *per* Lord Evershed.

[41] Sykes, *op. cit.* 171-180.

[42] Fleming, *The Law of Torts* (2nd ed. 1961) 668-675. Sykes, *op. cit.* 149-167.

[43] Sykes, *op. cit.* 158-159.

Rookes in Australia would have been strengthened by the fact that if the threat to strike involved a threat to violate a penal clause of a statute or an award then this too would have involved the use of unlawful means.[44] Whether a threat to break a contract involves the use of unlawful means in relation to the tort of conspiracy is an open question. (A threat to induce the breach of a contract may be a tort and thus involve the use of unlawful means.) Lord Devlin made a clear distinction:

> I have not been considering what amounts to unlawful means in the tort of conspiracy. I am not saying that a conspiracy to commit a breach of contract amounts to the tort of conspiracy: that point remains to be decided. I am saying that in the tort of intimidation a threat to break a contract would be the threat of an illegal act.[45]

There are certain *dicta* to support the view that such a threat would constitute unlawful means,[46] but however that may be, the distinction may not be of much use in industrial disputes, unless the courts give a wide scope to the defence of justification, because of the ground covered by the tort of intimidation.

Rookes v. Barnard then, if accepted by Australian courts, will have great relevance to these analogous torts in that it extends the scope of 'unlawful means'. Once it is accepted that a body such as the House of Lords may extend the ambit of the common law in this way, the reasoning of the Lords is hard to resist, for the threat to break one's contract may indeed be a powerful weapon. However, the courts refuse to accept the principle that any form of economic coercion is unlawful, and it is here that the result of the case is unsatisfactory, for trade unions will now face greater obstacles than other economic pressure groups. This raises the question whether the law of torts should operate at all in the field of industrial relations, and especially so in Australia, where the arbitration machinery has been set up, and so far such problems have been dealt with almost solely in that context.[47] It would only add bitterness to industrial disputes if the trade unions were sued in the civil courts as well. The solution would perhaps be to enact the Trade Disputes Act together with the amendments suggested by Lord Devlin[48] or others.[49]

Finally, it should be noted that the House of Lords, on the question of exemplary damages, revived three cases decided between 1763 and 1861, and overruled or disapproved of three Court of Appeal cases decided between 1934 and 1960. The effect is to narrow the range of cases in which exemplary damages may be awarded.[50] P. J. BAYNE

[44] *Williams v. Hursey* (1959) 33 A.L.J.R. 269, 305 *per* Menzies J.; *Coal Miners Industrial Union v. True* (1959) 33 A.L.J.R. 224.
[45] [1964] 2 W.L.R. 269, 314-315.
[46] Sykes, *op. cit.* 165 cites several cases and agrees with this view.
[47] *Ibid.*; Fleming, *op. cit.* 656.
[48] [1964] 2 W.L.R. 269, 323; the words 'is a breach of contract or' would precede the words 'induces some other person *etc*'.
[49] *New Statesman*, 3 April 1964, 513, where it is suggested that a breach of contract should not be made unlawful.
[50] [1964] 2 W.L.R. 269, 324-334.