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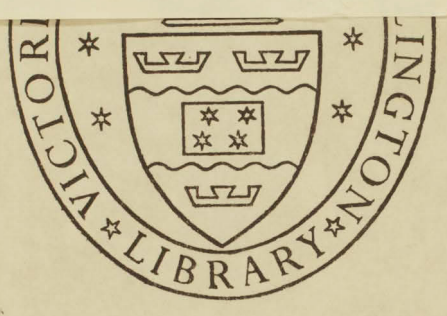

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TRADE UNIONS AND THE LAW: THE "RIGHT" TO PICKET PEACEFULLY

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INTRODUCTION

When a strike occurs a paramount interest of the strikers is to dissuade, if they can, other workmen from replacing them and the customers of the employer from dealing with him while the strike continues. Obviously, this involves that these workmen and customers must know not only that a strike is taking place, but also the strikers' side of the case. Traditionally, the most effective means of furthering the strike by direct action in this way has been the picket.(1)

Picketing is usually limited to standing outside the entrances to the employer's premises, with the pickets holding placards and handing out leaflets which contain information about the dispute. Though its raison d'être is normally seen in terms of publicising the dispute, it is apparent that intangible psychological benefits accrue from the mere fact of picketing - the solidarity, morale and resolve which may be important in a strike that hurts employee and employer alike. Precisely because it occurs in a stressful situation, the law has had to grapple with the problem of picketing that goes beyond mere attempts at persuasion and erupts into violence. Thus, whilst acknowledging a right to picket, the law has had to distinguish actions that are permitted by this right from those actions that constitute an invasion of the rights of other persons, notably the employer.

It must be stressed that the so-called "right" to picket is not simply a variant of a demonstration on freedom of speech. It is, of course, much more than this. The essence of picketing is not merely the publicising of a point of view, but is as well the persuading of other people to bring economic pressure to bear on the employer. It is, in short, legitimate economic coercion ancillary to strike action. Understandably, the general law concerning demonstrations is in large measure deficient when the question at stake is the exercise of elementary industrial rights needed to maintan a balance of power in industrial conflict.(2)

From the outset it is clear that there is a substantial difficulty with this concept of "rights". In any commercial society there is an inescapable clash of interests which necessarily involves the mutual modification of any "rights" to carry on a trade or to interfere with that "right".(3)

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(1) Donovan Commission Report on Trade Unions (1968) HMSO: Cmnd 3623, Para 855

(2) Wedderburn, The Worker and the Law (2nd ed, 1971), 326

(3) The courts once solved this dilemma by saying that the right to trade was not to be interfered with for the wrong reasons, but this view was rejected in Allen v Flood (1898) A.C.1. (H.L.) which ruled that an unlawful act was necessary. But see S.123 of the Industrial Relations Act 1973 where a strike is defined in terms of an unlawful act plus intent.

Now, a "right" to trade corresponds only to a limited duty not to interfere; some interference must be permitted in a competitive system. The question, therefore, is how far this duty extends, that is, how far the privilege of another person to interfere with this "right" is allowed. Thus, a privilege to interfere must also entail an immunity, not from the "right", but from the power to cut down the privilege. This immunity exists only inasmuch as the objects and means used are lawful. Essentially, these two distinct but related questions are policy matters, and the law has leant heavily in favour of the right to trade without interference by giving the employer great power to protect this right. This raises a fundamental consideration that pervades our industrial law: the idea of "illegality" is no gauge of rights. For, though a picket may be unlawful at times, the power to prosecute whether by employer, police or injured third party, is rarely for practical reasons enforced.(4)

HISTORICAL BACKGROUND

In the nineteenth century, trade union activities, including peaceful picketing, were treated harshly by the courts, thence, in R v Druitt,(5) the case which first introduced the term "picket" into the law books, Bramwell B. said that the law did not allow that which "was calculated to have a deterring effect on the minds of ordinary persons, by exposing them to have their motions watched, and to encounter black looks."(6) The picketing must be exercised in a manner which excited no reasonable alarm or did not annoy those who were its subjects. What mattered was that the defendant unionists (who had picketed their employer for employing non-union "blackleg" labour) had infringed the "personal liberty" of a class of persons who were fulfilling their approved role in the economic system.

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(4) E.g., the last time a union was prosecuted for an illegal strike was in 1955; and generally it is third parties and not employers who use the economic torts.

(5) (1867) 10 Cox C.C. 592

(6) Ibid, 601-2.

It came as no surprise that the English Royal Commission of 1867 which had been convened to explore the whole trade union situation, recommended that the law ought not to be disturbed. As befitted the prevailing temper, the Commission spoke in terms of "rights":

> picketing implies in principle an interference with (the workmen's) right to dispose of their labour as they think fit ... and is a violation of (the employer's) right to free resort to the labour market.(7)

Trade unionists were completely hamstrung by the law. As Sidney and Beatrice Webb put it:

> Innumerable convictions took place for the use of bad language. Almost any action taken by Trade Unionists to induce a man not to accept employment at a struck shop resulted ... in imprisonment with hard labour.(8)

The upshot of the Commission's Report and the newly strengthened political influence of the trade unions was the Conspiracy and Protection of Property Act, 1875, Section 7. provides a penalty of three months imprisonment for:

> 7. Every person who, with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing, wrongfully and without legal authority,
>
> (1) Uses violence to or intimidates such other person or his wife or children, or injures his property; or ...
>
> (4) Watches or besets the house or other place where such other person resides, or works, or carries on business, or happens to be, or the approach to such house or place; or ...
>
> Attending at or near the house or place where a person resides, or works, or carries on business, or happens to be, or the approach to such house or place, in order merely to obtain or communicate information, shall not be deemed a watching or besetting within the meaning of this section.

It was an important concession to labour. The section was not limited in its application to trade disputes, although the offences it created were not likely to arise other than in such circumstances.(9)

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(7) Eleventh and Final Report of the Royal Commission of 1867, xiii.

(8) Sidney Webb and Beatrice Webb, The History of Trade Unionism, (1930) 284

(9) But see R v Branscombe (1957) 25 C. R. 88 where the accused had been convicted under a similar Canadian section for watching the home of his divorced wife. Unsurprisingly, his conviction was quashed.

The manifest purpose of the section was to make apparent those not uncommon tactics for which unions might cross the general law protecting persons from violence and interference with property. Unfortunately, the section was couched in terms of interference with a "legal right". Since rights will never be absolute, these words were superfluous. However, their presence was an invitation to the courts, as the "right" to conduct a business free of wrongful interference was elevated, as one might well expect in the light of the underlying economic assumptions to a "right" to conduct a business free of any interference.(10) The phrase "wrongfully and without legal authority " became, as a result, the rock upon which the courts were to split, since it stood uncompromisingly in the path of such an analysis of the section.

LYONS V WILKINS and the WARD, LOCK CASE

The issue was whether "watching or besetting" a work place with the obvious intent of bringing pressure to bear on the employer is, of itself" wrongful and without legal authority", or whether to be criminal the picketing must involve an unlawful act quite apart from the statute. The conflicting views were proferred in three English Court of Appeal cases ; the two Lyons & Sons v Wilkins(11) cases on the one hand, and the later decision of Ward, Lock & Co. Ltd v O.P.A.S.(12) on the other.

In Lyons v Wilkins there existed the classic picketing situation. The defendants picketed their employer to prevent him from employing "blackleg" labour. Lord Lindley M.R. held that it was unnecessary to establish both the elements of "wrongfulness" and "legal authority" separately from the wrongful act alleged. The sheer act of compelling was wrongful in itself. The basic premise was that language addressed to persuade, no matter how peaceful, was not a communication of information within the proviso to S.7. However, the majority was not content with simply holding the fact of peaceful picketing to be a crime. They went further, saying that watching or besetting in any form had always been a nuisance at common law.(13)

(10) Christie, The Liability of Strikers in the Law of Tort (1967), 29.
(11) [1896] 1 Ch. 811; and [1899] 1 Ch. 255.
(12) (1906) 22 T.L.R. 327.
(13) At 267, 268.

Exactly the same fact situation occurred in Ward,Lock, yet S.7 was treated in a manner quite inconsistent with Lyons v Wilkins. S.7, it was said, legalised nothing and rendered nothing wrongful that was not so before. Its effect was to make certain acts criminal which must in themselves be tortious at common law. Thus, the statute contemplated a wrong other than the mere act of compelling. An employer's "right" to conduct his business was limited by the right of the union to peacefully persuade other workmen not to work there.

The essential difference between the two cases, therefore, was that the picketing in Ward, Lock was held unanimously to be lawful under S.7(4) and not to be an actionable nuisance at common law. This difference can only be explained as a fundamental change in judicial attitudes in the interim. That the later decision did not expressly overrule the earlier did not in the event matter in England for the dichotomy was resolved by S.2 of the Trade Disputes Act, 1906. Whilst retaining the main body of S.7, the proviso at the end was repealed and in its stead it was enacted that "it shall be lawful...in furtherance of a trade dispute" to picket if the attendance is "merely for the purpose of peacefully obtaining or communicating information, or of peacefully persuading any person to work or abstain from working."

At last, in England peaceful picketing was expressly lawful. The main value of the section lay in its removal of picketing from the ambit of a penal statute.(14) Further, it is generally taken to have settled the law in favour of the Ward, Lock decision.(15) However, no such assistance can be called to the aid of New Zealand courts, for whom the problem of which line of authority to follow is a very real one.

THE POSITION IN NEW ZEALAND

Our equivalent of S.7 is S.33 of the Police Offences Act, 1927, subsection (1) of which is drafted in exactly the same terms as the English section, but without the proviso.(16) However, instead of S.2 of the Trade Disputes Act, 1906 (U.K), we have S.33(2):

> (2)Every person commits an offence, and is liable to a fine not exceeding $500 or to imprisonment for a term not exceeding three months, who forcibly hinders or prevents any person from working at or exercising any lawful trade, business or occupation.

(14) Citrine's Trade Union Law (3rd ed., 1967), 557.

(15) Ibid, 557; Christie, op. cit., 34-5.

(16) See page 3 , supra. In 1855, a Threats and Molestations Bill was introduced to deal with anyone who induced others to quit work. The Bill was clearly aimed at making picketing a penal offence, but it aroused such fierce opposition that it was withdrawn. According to Woods, it 'covered a disorder (i.e., picketing) which was not then existent in New Zealand': Industrial Conciliation and Arbitration in New Zealand (1963), 32.

This section has an interesting legislative history. Subsection (1) was introduced in 1913, shortly after the Waihi strike of 1912, "to deal with cases which sometimes occur when feeling is highly aroused at a time of industrial trouble." (17) Subsection (2), however, engendered something of a political furore. During the 1951 Waterfront Strike picketing became widespread and the National government introduced Emergency Regulations which were then enacted in the notorious Police Offences Amendment Act, 1951.(18) Section 15(3) prohibited advising others to refrain from or cease work, or to refrain from attending or leaving any residence or any place where any trade was carried on, or to be a party to a strike. Section 17(2) gave a sergeant power to remove a picket if the object was to influence another person to refrain from working. There was no possibility of enquiring into the reasonableness of the sergeant's "opinion" (19); the onus of proof was on the defendant; and the penalty of less than three months imprisonment was sufficiently slight to deny trial by jury.

The Act effectively prohibited any direct industrial action.(20) Incredibly, the original Bill was even harsher,(21) talking in terms of "seditious intent". Walter Nash called the Amendment Act "A complete negation of many of the basic principles of democracy."(22) Picketing thus died an unnatural death. It took almost three years of the next Labour government to repeal the offending clauses, which was done in 1960 with the substitution of the present S.33(2). Indeed, it is arguable whether the union movement has rediscovered the strength of peaceful picketing as perhaps the most effective means of direct industrial action.

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(17) N. Z. P. D., (1913), vol. 162, 701.

(18) Holland had promised to outlaw picketing when he spoke in Hamilton during the election campaign on 31 August, 1951. The Evening Post of 27 September 1951, called for the banning of picketing and wanted the law concerning 'subversion' tightened. Similar sentiments were echoed in the Speech from the Throne at the end of September, N. Z. P. D., (1951), vol. 295, 6.

(19) Taylor, "Public Order and Police Powers in New Zealand", Political Science, 4 (1952) 15, 18. The Victoria University capping procession had been banned in 1951 under the Emergency Regulations.

(20) Ibid, 17.

(21) Bassett, Confrontation '51, (1971), 208.

(22) The Evening Post, 30 April, 1952.

CRIMINAL LIABILITY OF PICKETS: Section 33

With respect to S. 33(1) (d) (the same as S.7(4)),[23] though the matter has not been decided in New Zealand, it is apparent that the Ward, Lock treatment of this paragraph is the correct one.[24] The offence, then, is either "watching or besetting": even in England no clear definitions emerged, though it appears that "watching" connotes persistent watching, and "besetting" a surrounding of the workplace. There are only two reported cases[25], both of the Magistrate's Court, and both of which appear to have overlooked the authority of Ward, Lock. Though one magistrate purported to apply Lyons v Wilkins, these decisions cannot be taken to represent the law.

The substantive part of S.33 is the second subsection. Clearly, the meaning placed on the word "forcibly" is crucial for it is quite apparent from the construction of the subsection that it modifies not only "hinders" but also "prevents" and "exercising". To suggest that "forcibly" only governs "hinders" would be tantamount to rendering picketing nugatory and, in any event, contradicts the clear sense and history of the provision. The evil aimed at is patently the use of physcial obstruction and compulsion by pickets. "Forcibly" thus connotes some act against the will of another. The accent, so to speak, is on peaceful picketing.

The interrelationship between the two subsections is important. It is plain that but for S.33(2) the attendance itself might be a "watching or besetting". For, since all acts short of the use of force are implicity rendered lawful, paragraph (d) must be read subject to this. In other words a privilege to attend is confirmed by S.33(2); prima facie, then, insofar as the attendance is peaceful and no force is used, any act not criminal or tortious is lawful. This would appear to be a statutory immunity. Indeed, this conclusion is confirmed in England where the House of Lords[26], when considering this issue, said that there is no right to picket as such, but only an immunity, and that a picket only has a privilege to attend for the specified but still limited purposes of peaceful persuasion and communication of information.[27] This reasoning would seem to apply a fortiori

(23) Paragraph (a) of s. 33(1) creates the offence of criminal intimidation, but there must be a serious apprehension of personal violence and, like the other paragraphs, does not affect peaceful picketing. But see R v Jones [1974] I. R. L. R. 117.

(24) Under similar legislation, Ward, Lock has been approved and followed in Canada, Williams v Aristocratic Restaurants Ltd [1951] S. C. R. 762 (Canadian Supreme Court); and in Australia, Ex Parte Farrell [1937] A. L. R. 91 (High Court).

(25) Police v Fulton (1926) 21 M. C .R. 51; Police v Brooks (1934) 29 M. C. R. 35.

(26) Broome v D. P. P. [1974] 1 All E. R. 314

(27) These are the same statutory purposes as in S. 2(1), supra page 5. These purposes are now incorporated in s. 15 of the Trade Disputes Act, 1974.

to S.33 in that it is clearly less demonstrative of what a picket may lawfully do. The omission of the statutory purposes in our section in no wise means it is unlawful to persuade or communicate information. On the contrary, persuasion is implicitly lawful in S.6(2) if it is not forcible and is not criminally or tortiously unlawful so as to constitute a watching or besetting. The essential difference between S.33 and the English provision is that the former is addressed directly to the problem of violence, whereas the latter has definite statutory picketing purposes. The result is that S.33 admits of greater flexibility, but paradoxically is more restrictive because of the general law.

THE GENERAL CRIMINAL LAW

It is not improbable that no definitive definition of S.33 will ever emerge. One obvious reason for the dearth of judicial authority is not that there have been no pickets which infringed this particular penal provision, but rather that such activity has been regulated by the general criminal law attendant on the peace-keeping powers of the police.

Conceivably, any number of offences may be committed by pickets, ranging from obstructing the highway, disorderly behaviour and obstructing a constable in the exercise of his duty, to unlawful assembly and breach of the peace. Whilst the more serious of these will not have any effect on peaceful picketing, the supplementary offences concerning police powers, particularly obstructing a constable, are quite capable of rendering unlawful otherwise peaceful picketing. The problem, then, is to ascertain the extent to which S.33(2) authorises acts that might in other respects be unlawful.

In England, recent decisions have held that only those acts which are a reasonably necessary concomitant to peaceful picketing are lawful; their effect is virtually to limit picketing to mere attendance. The courts have, as it were, taken as a paradigm case a small number of pickets standing quietly outside the picketed premises, holding placards, and politely requesting passers-by to stop and listen to them.(28) There is nothing to suggest that the interpretation of S.33(2) would be otherwise.

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(28) Kidner, "Picketing and the Criminal Law" [1975] Crim. L. R. 256, 258.

The best example is Tynan v Balmer[29] where the defendant led forty pickets in a continuous circle outside some factory gates, and extending onto a public highway. The object was to bring vehicles to a halt. The court held that at common law this amounted to a nuisance; hence the defendant was liable for obstructing a constable in the exercise of his duty when he failed to comply with a direction to move on, even although no obstruction of any vehicle had in fact occurred. Since the pickets had the unlawful object of obstructing vehicles, as well as the lawful purpose of persuasion and communication of information, S.2(1) conferred no immunity to commit this unlawful act, which was not reasonably necessary for the exercise of peaceful picketing. Even if there was no common purpose to commit an unlawful act, it would be enough if that act was the natural consequence of pickets acting in a similar manner.

Tynan v Balmer highlights the three major issues that concern peaceful picketing; the first is the burning issue of mass picketing, the second is the claim to be entitled to stop vehicles, and the last is police discretion. These matters will now be discussed in turn.

Insofar as mass picketing is concerned, it can be said that it is in general enjoinable even though S.33(2) implicity authorizes it if no force is used. Leaving aside any question of civil liability, the problem cannot satisfactorily be solved by the criminal law, since unlawful assembly and breach of the peace both require an apprehension of violence and cannot render mere numbers illegal. However, if the mass picketing does not bear a reasonable relationship to the requirements of a case, one might infer that the purpose was not simply communication or persuasion, in which case the picketing would be a watching or besetting. In Piddington v Bates,[30] Lord Parker held that where a constable reasonably apprehended that a breach of the peace would occur, then it is up to the individual policeman to act as he thinks fit and request either the removal or reduction of the pickets. This solution is quite unamenable to unions; the drawing of the line is necessarily arbitrary, but if there are official pickets (i.e. perhaps wearing arm bands) then they should be allowed to remain.

The second practical problem is the claim to stop vehicles. Plainly, any right to picket is worthless when workers, whom the pickets are trying to persuade to espouse their cause, can sweep through at will in vehicles

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(29) [1966] 2All E. R. 600 (Div. Ct.).

(30) [1960] 3 All E. R. 660 (Div. Ct.); see Broome v D. P. P., supra note 26.

which the pickets have no right to stop. The matter was fully considered by the House of Lords in Broome v D.P.P.[31] It was unanimously held no such right existed; there was only an immunity while attending for the statutory purposes, which purposes were not absolute rights. To hold there was a right to stop a vehicle would impose a duty on the driver to stop, and presumably this would be backed by criminal sanctions. A picket is permitted only to invite a driver to stop and listen, provided this is couched in reasonable terms. Section 33(2) certainly confers no wider an immunity, for to compel a driver to stop against his wishes necessarily involves the use of force. It has been suggested that a notion of reasonable picketing could cover this problem,[32] that is to say, a limited right to stop vehicles for a short period for the purpose only of persuasion and communication. In practice our police often permit this, but when this is not permitted, and this may be the majority of cases, picketing becomes pointless. The better solution lies in specific legislation of such a limited right. Broome's case reveals the impact of technical change on the law, for of course picketing must change its character with the advent of the motor car.

The last, and by no means least, problem is the discretionary control of pickets by the police, who can severely restrict even peaceful picketing through a rigid and technical application of the law. Again, S.33(2) almost certainly confers an immunity on activities that can be said to be reasonably incidental to peaceful picketing. In most cases some sort of 'deal' is struck between police and picket leaders, to the extent that technical breached of the law are generally ignored.[33] Union secretaries are adamant this arrangement works well in practice, but not unnaturally look on it with some reservations. Nevertheless, the problem is a very real one and until there is expressed a statutory right to picket which will permit those acts reasonably attendant on peaceful picketing, the picket will remain subservient to the scarcely fettered whim of the over-apprehensive policeman.

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(31) Supra note 26.

(32) Kidner, op. cit. 261.

(33) C. f., General Police Instructions: Demonstrations D 32 (3) (h), 'Arrests shall only be made for the serious breaches of the law'.

CIVIL LIABILITY OF PICKETS

Not only must the potential picket be wary of the general criminal law but as well his conduct must not be such as to constitute a nuisance, his leaflets must not defame anybody, and he must not trespass on private property. It is worth noting again that the Ward, Lock case established that a prerequisite to the offence of watching or besetting was an act criminal or tortious in itself. The emphasis now is on the employer's remedy, damages or an injunction; after all, it is he who will most likely be inconvenienced by the picketing.

Traditionally, it has been the law of private nuisance that has most concerned the courts. Even though Ward, Lock ruled that picketing per se did not constitute a nuisance(34), the basic test for liability is still that put forward by Lindley M.R. in Lyons v Wilkins: the actions of the defendants must substantially interfere with the ordinary comfort and enjoyment of the plaintiff's premises. The law of nuisance is necessarily flexible, unfortunately so for trade unions, since the regulation of picketing is subject very much to the attitude of the individual judge.

The general uncertainty is again evidenced in that S.33(2) may justify a common law nuisance(35). Immunity is granted implicitly for those acts attendant on reasonable picketing, even though those acts might constitute a degree of annoynace which would otherwise be sufficient to support an action at common law. Though the ambit of the immunity is incapable of delimitation, there is no binding precedent(36), nor any New Zealand cases, to suggest our judiciary should interpret ungenerously the criterion of reasonability. Canadian and English cases have treated this question harshly, but it is suggested that the standard of reasonableness expected of an employer should be of a significantly lesser degree than the comfort and enjoyment of the ordinary householder; after all, the employer well knows the cut and thrust of industrial conflict and the free enterprise system.

Once more, the most contentious factor in determining reasonableness is the issue of numbers. To say that only those pickets should attend who are in fact necessary to put the trade union case really begs the question(37). For, in New Zealand, where the picket is primarily a publicity device, and thus political in nature, union officials see large numbers as being vital: what better way to convince a

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(34) But see Quinn v Leathem [1901] A. C . 495, 541

(35) Citrine, op. cit., 563, makes the same point in respect of s.2(1).

(36) Bird v O'Neal [1960] A. C. 907 (P.C.), a nuisance decision, gives no guidelines.

(37) Citrine, op. cit., 565-6, makes the contrary argument.

cynical public or complacent employer of the merits of a strike than by a show of solidarity, a show of real grievance? Nonetheless, mass picketing which is patently designed to prevent ingress or egress is, like as not, a nuisance(38). In England, the fact of definite statutory purposes means it is not hard to infer that pickets who assemble in large numbers do so for other purposes. Section 33(2) is more flexible, theoretically permitting mass picketing inasmuch as no force is used.

There is, too, the tort of public nuisance. The effect of decisions like Lowdens v Keaveney(39) and Police v Stewart(40) is that if the public have a right to pass and repass on every part of the highway then, whether or not actual obstruction occurs, pickets standing on a pavement would technically constitute an unreasonable user(41). Hence, even though the police often request the pickets to keep moving, it is no use adopting a colourable pretence at the common law right of passage by having the pickets move round, in a circle, for instance, as was done in Tynan v Balmer.

PEACEFUL PICKETING AND THE ECONOMIC TORTS

Once the picket has navigated the stormy waters of tortious and criminal liability, there still remains to negotiate the most formidable seas of all. For in recent years there has been a great upsurge in trade union liability for what are loosely known as the economic torts, whose raison d'être is the protection of a person's intangible business interests from unlawful interference.

Insofar as the picket is concerned, the economic tort most likely to support an interim injunction is that of inducing breach of contract. Indeed, this tort has achieved some pre-eminence in this field. Quite simply, the tort is established where there has been a knowing and intentional inteference with a contract to which the plaintiff is a party, either by directly inducing one party to break it, or by indirectly procuring by unlawful means a breach through the actions of a third party to the contract(42). Liability will most likely arise under either head for there is an unwritten 'rule' among unionists that it is 'not done' to cross a picket-line. The question is whether this convention constitutes unlawful means: after all, it induces the workers, who are third parties to the commercial contract, to commit a wrongful act in breaching their contracts of employment, with the consequential breach of the commercial contract. These breaches may occur even though the picketing is wholly peaceful and no persuasion is used.

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(38) E. g., Tynan v Balmer, supra note 29. In America, mass picketing is simply an unfair labour practice.

(39) [1903] 2 I. R. 82; and see R v Clark (no. 2) [1964] 2 Q. B. 315.

(40) [1961] N. Z. L. R. 680.

(41) See, e.g., Hubbard v Pitt [1975] 2 W.L.R. 254, 265-7. Pickets standing on a pavement with ample room for passage held to be a public nuisance.

(42) Simpson and Wood, Industrial Relations, (1973), 331. The direct/indirect distinction is accepted in New Zealand, Kawau Island Ferries Ltd v N. I. U. W. [1974] 2 N. Z. L. R. 617, 622 (C.A.).

There is, however, one preliminary matter. This is the nice question of causation: that is to say, does the picket-line in fact cause the ensuing breach of the commercial or principal contract? or is the cause the employee who independently refuses to cross the line?

This very point arose for decision in Hudson Steamship Co. v New Zealand Seamen's I.U.W.[43], where the defendants picketed the gangway of the plaintiff's ship in an attempt to force him to employ an all New Zealand crew. Some workers who were needed to repair the ship refused to cross the picket-line. Though the union was informed of the employer's commercial contract, the fulfillment of which was dependent on the repairs being effected quickly, it refused to remove the pickets. The plaintiff sought an injunction to restrain the picketing on the grounds the defendant's conduct was calculated to induce a breach of contract. Granting the injunction, Speight J. appears to have viewed the picket-line as being about to cause a breach. The effect of the decision is that if the commercial contract is breached through failure to cross a picket-line by a third party, then this constitutes unlawful means, despite the fact that the pickets may not have persuaded the third party at all. This is tantamount to holding the very fact of picketing illegal, since it is well established that for there to be liability for indirect inducement, the defendant must do an act illegal in itself, quite apart from the inducement of the breach of the principal contract[44]. On this ground the decision is quite plainly wrong and cannot be taken to represent the law.

Indeed, there would appear to be a conflict with the later case of Pete's Towing Services Ltd. v N.I.U.W.[45], where Speight J., again presiding, said

> It would be going too far to hold that all strikes or threats of strikes, even though lawful, give rise to a claim in tort if the strikers can foresee consequential hindrance from performing contracts. Such results I would hold to be indirect and not tortious where they are incidental and secondary to, but not the prime purpose of the action....The test is, I think, one of proximity and intention[46].

If such be the case for the strike itself, then it must follow that the 'consequential hindrance' is also 'incidental' for ancillary strike action such as picketing.

(43) Supreme Court (Auck.), 4 July, 1969, unreported. The writer is indebted to Mr. R. Harrison for drawing his attention to this case and for the ensuing analysis. See Harrison, Trade Unions and the Common Law in New Zealand, (1973) unpublished Ph. D. thesis, Auckland University.

(44) Thomson v Deakin [1952] Ch. 646. But see the Canadian case of Smith Bros. Construction Co. v Jones [1955] 4 D. L. R. 255, 264, ' If the development of the trade union movement has reached the point where workers will not cross a picket-line to go to work, that is just as effective an interference with contractual relations as any other form of restraint might be '.

(45) [1970] N. Z. L. R . 32.

(46) Ibid, 47. Knowledge of the commercial contract will almost always be presumed, ibid, 47.

Fine sounding though this is, it is completely negated in a picketing context by the nebulous distinction that is drawn in the economic torts between mere advice and persuasion(47), the one being permitted, the other not. This distinction does not avail the picket one whit, for if the advice is of a character that is obviously intended to be acted upon, then it amounts to persuasion(48). As a matter of causation, therefore, persuading or advising a third party to break his employment contract will always constitute unlawful means(49). Consequently, not only may an injured third party sue on this basis but also the logical extension is that the employer may base an action on the picket's persuading his own employees to break their contracts of service. Since this is an unlawful act anyway, the distinction between direct and indirect is inessential with respect to the contract of employment(50). In the event, a picket is limited to merely communicating information, even though S.33(2) implicitly permits peaceful persuasion of other workmen not to work. Any notion of reasonable picketing is meaningless if mere persuasion to join a strike is actionable.

The result is a strange one and it is derived directly from the phrasing of S.33 (2) as an immunity. It stems, too, from the fact that we do not have in New Zealand an equivalent of the English Trade Disputes legislation, the most recent of which expressly enacts that it is not tortious to induce another person to break his contract of employment(51).

The other forms of economic tort liability, conspiracy and intimidation, are not likely to be of much assistance to the employer who wants redress. In a peaceful picketing situation, the tort of conspiracy to injure willnot usually arise(52); on the other hand, where the picketing is unlawful either criminally or as a tort— e.g., trespass, nuisance, defamation— an employer may point to this as unlawful means and, provided actual loss occurs, this would be sufficient to establish the tort of conspiracy to commit an unlawful act. However, a conspiracy suit is likely

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(47) Ibid, 47; Kawau Island Ferries case, supra note 42, 623.

(48) Torquay Hotel Ltd v Cousins [1969] 2 Ch. 106, 147.

(49) This is clear from Pete's Towing Services, supra note 45, and also Rookes v Barnard [1964] A. C. 1129 (H.L.). Since it is an unlawful act, the defence of justification presumably does not apply.

(50) Thus, an employer could obtain an injunction and defeat a strike that depended for its effect on pickets persuading others of his emloyees to join the strike. This persuasion is illegal under the Industrial Relations Act, 1973, s. 123.

(51) Section 13(1) (a) of the Trades Disputes Act, 1974 - this was recommended by the Donovan Commission after Rookes v Barnard, supra note 49.

(52) In any event, the tort would appear to have been laid to rest by Crofter v Veitch [1942] A. C. 435 (H.L.).

to be 'mere surplusage'(53) to the tort of interference with contractual relations. Similarly, the tort of intimidation depends on an unlawful threat. Such an improbable occurrence will found liability, but since it is the essence of peaceful picketing that ~~leaves~~ the actor be left a choice of action(54), the tort will not often be established.

These cases have exposed rather than created the narrow ambit of the picket's immunity. The problematical nature of peaceful picketing is in large measure caused by the traditional conflict that has always existed in the jurisprudence of the law of torts, namely,, that between the nominate torts on the one hand, and general principles or rights on the other(55). Under the nominate torts theory, if the actions of the defendant constitute the particular elements of, for instance, nuisance or inducing breach of contract, then liability automatically follows. Once the conduct fits into the pigeonhole there is no outward concern with the settlement of opposing 'rights' and justifications(56). The second approach emphasises the plaintiff's 'rights' which may not be interfered with without justification. The interaction of these two theories in a picketing context can be illustrated neatly: interference by unions with an employer's right to trade profitably has usually been enjoined as being tortious; but many approved activities carried on by traders in a free enterprise system in their turn necessarily infringe the same right to trade without interference that the courts have seen fit to protect from trade union activity. The result is somewhat illogical. It stems directly from the fact that the common law is simply not equipped to deal with what is essentially a social and economic, and not legal, issue. As a fundamental problem that has always plagued industrial law, it is partly understandable as an historical aversion to labour. To the extent that the inconsistency is soluble, it is so solely on policy grounds, and the question necessarily becomes a political one.

PEACEFUL PICKETING AND THE INDUSTRIAL RELATIONS ACT 1973

Added to any tortious or criminal liability, the picket may well be subject to an administrative sanction under the Industrial Relations Act, 1973. Though part of the rationale of the Act was to reduce the tort liability of trade unions(57), unfortunately no provision concerning picketing was included. Picketing does not come within the definition of 'industrial matters' in S.2, since it is stipulated therein that the criminal liability of unions is not affected by the Act if it is an indictable offence.

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(53) Per Lord Dunedin in Sorrell v Smith [1925] A. C. 700, 716. (H.L.).

(54) Unlike, e.g., a threat of a 'black ban'.

(55) Christie, op. cit., chap.V; and see discussion on 'rights', infra pages 1-2.

(56) E.g., Lyons v Wilkins, where the privilege to trade was elevated into a strict right without any recognition of the equally important privilege to interfere.

(57) Hansen, "Industrial Relations Reform in New Zealand: Comment on the Industrial Relations Act, 1973," (1974) 7 V.U.W.L.R. 300, 326.

However, the real question is in respect of economic tort liability: if the picketing is in furtherance of an illegal strike, can any employer or injured third party use this illegality as unlawful means? One of the features of the Act is that strikes are given a spurious and somewhat antiseptic validity— there are 'disputes of interest', 'disputes of right' and 'personal grievances'. It is apparent, though, that most strikes will be illegal for the purposes of the Act(58), mainly as constituting a breach of a no-strike clause in an award. There is a strong argument that the restrictions on strike activity are only meant to facilitate the conciliation processes that the Act creates and are not intended to be used in areas totally unrelated to this(59). Clearly, this is the preferable solution. However, the matter must at the very least remain doubtful and it is not inconceivable that the technical offence of strike illegality could be used as unlawful means(60). If this latter approach is correct, it means virtually all picketing is actionable at common law. Furthermore, if the intention of the picket is to defeat an award or collective agreement (as will almost always be the case) then the union is liable to a penalty under the Act.(61)

Obviously, these are quite unsatisfactory conclusions; it is no argument to claim that the sanctions would rarely be used, for the debate centres around the power to use them. Nevertheless, the question of improvement is deferred for the moment, whilst other matters concerning picketing are considered.

SECONDARY PICKETING

Up to this point, this article has been concerned only with what is termed 'primary picketing', that is, picketing of the employer with whom the pickets are in dispute. There is, however, another particularly important piece of the jig-saw of industrial conflict known, not surprisingly, as 'secondary picketing'. This is simply the exertion of economic pressure by picketing another person to cause that person to use his influence, generally of an economic kind, on the employer with whom the union is in dispute(62). For instance, a union might picket a supplier or distributor to persuade him not to do business with the struck employer Implicit in the following discussion is the premise that the pressure is free from criminal or tortious conduct(63).

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(58) See Chapman, "Tortious Consequences of the Strike", (1974) 7 V.U.W.L.R. 455.

(59) Chapman, op. cit. 466; Hansen, op. cit. 322-3.

(60) This view is probably taken by Szakats, "The Relationship between Law and Trade Unions, with special reference to the use of injunctions", Occ. Paper No. 12, 1975, Ind. Rel. Centre, V. U. W., 26. In Canada, an illegal strike establishes tort liability, Gagnon v Foundation Maritime (1960) 23 D.L.R. (2d) 721.

(61) Section 149.

(62) Carrothers, "Secondary Picketing", (1962) Can. Bar Rev. 57, 57.

(63) Thus, if the means are unlawful the picket willbe open to the tort of interference with trade, business or employment by 'unlawful means', Emms v Brad Lovett [1973] 1 N. Z. L. R. 282.

Overseas, this tactic has been widespread, particularly in America where peacaful picketing has become one of organised labour's most effective techniques for implementing consumption boycotts through the participation of the general public. Universally, the real problem has been the extent to which such action is lawful, for there are many ways in which indirect pressure may be brought to bear on the struck employer. In Canada, secondary picketing has been declared illegal per se as being based on a conspiracy to injure(64); in England, the Donovan Commission recommended it be made lawful(65) and the position today is that it is lawful in furtherance of a trade dispute to picket any place of work or business for the purposes only of persuasion and communication(66). In New Zealand there is no legislation in point, still less any decided cases. Though s.33(2) appears to permit all secondary picketing short of the use of force, it is now clear that this immunity is severely limited by the 'rights' of others to use the highway, to conduct a business free of unlawful interference, and so on; in short, a host of technical offences, which offences may result in the issuing of injunctions to restrain the picketing. The question, therefore, is whether any activity of this sort should be permitted at all.

The major argument for banning secondary picketing is that it interferes with the operations of an innocent third party or neutral employer. Hence, the question is generally seen as an interference with 'rights': the right of the defendant union to engage in secondary picketing of the plaintiff's premises must give way to the latter's right to trade, the rationale being that whilst the former right may be exercised for the benefit of a particular class, the latter is a more fundamental right, of greater importance in that its exercise affects the community at large(67).

The difficulty with this reasoning is that it is simply out of step with modern economic realities. For one must needs recognise that third parties are necessarily closely embraced and seriously affected by disputes between other employers and their employees(68). In other words, a strike in most industries (say, a manufacturer)

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(64) Hersees of Woodstock v Goldstein (1963) 38 D. L R. (2d) 449.

(65) Donovan Commission Report, op. cit. para 872.

(66) Section 15, Trade Disputes Act, 1974 (UK).

(67) Hersees case, supra note 64, 454-5. And see page 15, supra.

(68) This is implicit in the remarks of Speight J., note 46, supra. There is, of course, a powerful freedom of speech argument - see Lord Denning in Hubbard v Pitt, The Times, 13 May, 1975, infra.

has a multiplying effect in a number of secondary or related concerns (e.g., the retailer or wholesaler). Thus, once a society and its legislature sanctions the privilege to strike as well as the primary picket-line, it follows that it has conceded the legitimacy of such secondary consequences. This recognition means that secondary[69] picketing to effect these consequences should be treated in a similar fashion.

There is, therefore, no valid reason for eliminating secondary picketing categorically: the essential matter is the extent to which a third party merits insulation from this economic pressure. Secondary picketing should not be unlawful merely because it takes place away from the primary dispute; it should be unlawful only if it brings pressure to bear in a manner unlike that by which third parties are normally entangled in a strike[70]. That is to say, the activity should only be permitted to the extent that it affects 'allies' of the struck employer, where there is a community of interest through corporate structure or a continuing business relationship. After all, how else are freezing workers to publicize their dispute when the works are in the country, than by picketing a retailer in a nearby town or city? Moreover, picketing a retailer to persuade the public not to buy the struck manufacturer's product should not as a matter of policy be enjoined where the retailer cannot establish injury to his business other than through the public's refusal to buy that product. In any event, such tactics are generally regarded as a socially acceptable and necessary form of group pressure.[71]

Unions in New Zealand do not greatly use consumption boycotts, largely, one suspects, because of ignorance or apathy (even despite the restrictive nature of the law). Nevertheless, it is a vital weapon in their arsenal and in an age when the media plays an important role in publicising a dispute, the secondary picket will be as effective as any form of economic action. In England, unions are just beginning to discover its worth[72] and it is more than likely we will see a marked increase in this activity within these shores. There is, then, a need for clear and realistic legislation relating to the means and purposes of the picket. The solution lies in legislation similar to that in England[73] where, if the picketing is in furtherance of a trade dispute and is for the statutory purposes of persuasion or communication of information then it is lawful.

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(69) In this context, the use of the word "secondary" is unfortunate because it lumps indiscriminately into one category both employers who are neutral to the dispute, and those who have a community of interest with the struck employer and whomay, in fact, be his "allies" ', Aaron & Wedderburn, Industrial Conflict: A Comparative Legal Survey, (1972), 102.

(70) Beatty, "Secondary Boycotts: A Functional Analysis", (1974) 52 Can. Bar Rev. 380, 392.

(71) Donovan Commission Report, op. cit. para 875.

(72) See, e.g., Trice, "Methods and Attitudes to Picketing", [1975] Crim. L. R. 271

(73) See page 17 , supra.

PICKETING BY GROUPS OTHER THAN EMPLOYEES

In recent times, with the rise of pressure groups to protect other than employment intersets, there has been a growing awareness of the need to make views heard by those organizations that bear some responsibility for the social and economic conditions they create. Picketing can be one of the most effective ways of achieving this end and this raises the question of a possible privilege to picket, not just to those engaged in industrial disputes, but also to the consumer public in dispute with traders and with those providing professional and other services.

This very question arose recently in the English case of Hubbard v Pitt(74), in which a group of social workers, the 'Islington Tenants Campaign', considered to be indefensible the activities of estate agents who assisted property developers in Islington. The agents had made a large killing by harrassing poor tenants into leaving dilapidated properties and then selling the [illegible] homes to middle class families, thus reducing the availability of houses to the needy. Accordingly, the defendants picketed the estate agents' office holding placards and distributing leaflets, which referred to the plaintiffs in opprobrious terms. There was ample room on either side of the picket-line and between individual members of it for the public to pass along or across the footway. The case thus raised fairly and squarely the issue of the lawfulness of completely peaceful picketing unconnected with a trade dispute. At first instance, Forbes J. held in part that as the picketing rendered passage on the highway 'less commodious', it was a public nuisance(75). However, the majority of the Court of Appeal (Stamp and Orr LL.J.), though disapproving this approach, avoided the issue by deciding for the plaintiff on another ground. They granted an interlocutory injunction since, on a balance of convenience(76), the temporary interference with the defendants' right of free speech, if the derogatory leaflets turned out to be true, was far outweighed by the damage done to the plaintiff's business if, in the event, the derogatory leaflets turned out to be defamatory and untrue.

In a dissenting judgment of outstanding liberalism, Lord Denning M.R. would have discharged the injunction on the ground that the law should not interfere with the 'undoubted right of Englishmen' to demonstrate and protest. Since the Ward, Lock case clearly established the common law privilege to picket(77), the root question

(74) The Times, 13 May 1975.

(75) [1975] 2 W. L. R. 254.

(76) Following the House of Lords in American Cyanimid Co v Ethicon Ltd, The Times 6 February, 1975.

(77) Overruling Forbes J. who had to limit Ward, Lock to its facts to reach the conclusion ultra-peaceful picketing was a common law nuisance.

was whether the defendants were guilty of a common law nuisance. How could this ever be so, he asked, where no-one had in fact been obstructed or intimidated?(78) Any picketing was lawful insofar as it is merely to obtain or communicate information, or peacefully to persuade, and it is not such as to submit any other person to any kind of restraint or restriction on his personal freedom.

Had the leaflets not been derogatory, the majority would still have come to the same conclusion. It was not so much the leaflets as the actual causing of damage to the plaintiff by the picketing in his 'front garden' that rendered the activity illegal. In the upshot, all a prospective picket need establish is definite damage caused by the pickets and on the balance of convenience test an injunction will issue. The decision is a grand example of the 'employer's rights' approach to secondary picketing(79). The difficulty with the result is, of course, as Lord Denning pointed out, that there is no valid reason for distinguishing picketing in furtherance of trade disputes and picketing for other causes. The one, surely, is implicit in the other. Indeed, to suggest that housewives should not be permitted to picket a store selling dangerous toys, if they thereby cause loss of sales on those toys, is quite contrary to what is poularly regarded as a legitimate form of group pressure. Inasmuch as the consumers' claims are reasonable and well founded, they should be allowed to picket peacefully.

Clearly, this sort of picketing is close to an ordinary demonstration(80), even though it is primarily economic in nature. However, this does highlight the powerful freedom of speech element that is present in all picketing. This case further illustrates the unsatisfactory nature of the law of interim injunctions, which function is to preserve the status quo on a balance of convenience until a full hearing occurs(81). When the possibility of economic loss is weighed up against the transient nature of the right to persuade others, the law looks on the letter as being expendable. The fact that when the issue comes to trial on the substantive grounds/the campaign may be over is not taken into account. It was for this policy reason that Lord Denning would not grant an injunction.

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(78) But see Tynan v Balmer [1967] 1 Q. B. 91, page 1, supra.

(79) Note 67, supra.

(80) For an explanation of the difference, see defendant counsel's application to the House of Lords for leave to appeal, [1974] I. R. L. R. 125. Leave was refused.

(81) This is definitely the test in New Zealand, Kawau Island Ferries case, supra note 42, 620-1; Szakats, op. cit. 6-8.

Though Hubbard v Pitt is not strictly binding in New Zealand, that our injunction law is the same serves to show that all forms of picketing can be severely restricted by an injunction. The immunity of s.33(2) could extend to this situation, but the earlier analysis has shown that general criminal and tortious liability, particularly the technical nature of trespass and obstruction to the highway(82), affords ample avenues for prosecution. One of the clear lessons to be learned from this case is the timely reminder that common law litigation is a poor substitute for legislative debate in the resolution of deep-rooted social and industrial controversies.

PICKETING PRACTICE BY UNIONS IN NEW ZEALAND

Time and time again the question has hovered in the wings as to the lack of case law on picketing in New Zealand. At last it can now enter onto the stage and the reasons why this should be so may be counted. One obvious reason, of course, is not that we have no problems, but that they appear to revolve around general questions of criminal law rather than special questions of industrial law. But the matter goes far deeper than the mere control of pickets; for the fact cannot be obscured that there is in New Zealand a significantly low incidence of the activity. The following suggestions as to factors causing this cast an interesting reflexion on our industrial ralations system and our trade unions in general.

Without doubt, the most important factor is the long history of legislative intervention in matters industrial, stretching as far back as 1894. State management of discontent is almost a tradition in contrast to the free collective bargaining of North America. This has led to what the sociologist calls 'institutionalization', but what is more easily understood in this context as the compulsory channelling of conflict by collective bargaining through specific agencies or institutions: Industrial Courts, Conciliation Councils, Industrial Mediators. Since the process is mandatory, the effect over time has been a willingness on the part of the registered unions (the vast majority) to treat problems through governmental means rather than private(83). What emerges is what one might term an 'arbitration- syndrome', a readiness to submit to negotiation which must obviously act in a great many cases as a substitute for direct action such as picketing. So called 'responsible unions' have accepted a peace-obligation(84), with the result that conflict tends to be expressed

(82) E.g., Police v Stewart, supra note 40; Hubbard v Pitt [1975] 2 W. L. R. 254.

(83) Eberhart, "Work Stoppages in America and New Zealand", Economic Record, June 1961, 140, 143.

(84) Hyman, Strikes (1973), 81.

in relatively innocuous forms. Traditional reasons for picketing, such as convincing other people of the validity of the strike, or generally publicising it, are clearly not so important when the dispute is to be settled formally and less emotionally by the compulsory call of conciliation. It is at the point that the institutional system breaks down, when the strike becomes drawn out, that the reasons for picketing come into their own.

One of the principal effects of the labour movement evolving under the wing of the state has been a general lack of militancy(85). Within the collective bargaining system itself, with its emphasis on rules and procedures, the very existence of the registered union is seen in a typified role as the bargaining representative of the workers(86). Thus, the legislation has served to shape unions to its own characteristics through perpetuating small, ineffective entities by giving them exclusive bargaining rights in their particular areas(87). Where union recognition is not a problem, where union organization is defined and where internal lines of communication are in working order there is not a great inducement to picket, for picketing tends to be 'a weapon more frequently used by struggling unions than by unions which are well established'(88). Further, with the combined effects of registration and compulsory unionism, the quality of trade union leadership has tended to deteriorate(89). The overall condition of the unions has changed with the political alignment of the labour movement with , in some matters, a consequential shift from practical to political considerations. The irony, of course, is that we have always had a high level of strike activity per head of population and it now seems reasonable to talk in terms of a serious strike problem'(90). It is hard, therefore, to avoid the conclusion that the lack of picketing is in large measure a result of trade union apathy and ignorance.

It is valuable in this context to draw a brief comparison with the North American experience where picketing is prolific and often violent in nature. There, organised labour has always regarded the government as an enemy to be fought and a menace to be avoided. Because rights and freedoms have been hard won in a protracted and painful struggle, unions are all the more defiant and jealous of their position. Since they have always had more power than our own unions, American unions react vigorously when their rights are violated, there being few better ways to effect this than through the picket.

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(85) Howells, Woods and Young (eds.), Labour and Industrial Relations in New Zealand, (1974), 168. With a few notable exceptions: Waihi Strike, 1912, Waterfront Dispute, 1951.

(86) Woods, op. cit., supra note 16, 192.

(87) Howells, Woods and Young, op. cit. xi;

(88) Kahn-Freund, Labour Law: Old Traditions and New Developments, (1968), 57.

(89) Woods, op. cit. 132; Howells, Woods and Young, op. cit. 170.

(90) Howells, Woods and Young, op. cit. 161.

Now, it is part of the nature of picketing that it takes time and the union to organise it. In New Zealand, though there may be a comparatively large number of strikes, they are mostly of a fairly short duration and do not involve a large number of workers(91). These wild-cat or demonstration strikes tend to be small in scale and quickly settled(92); the natural inference from this is that these stoppages are largely unofficial (i.e., not recognised by the trade union). If industrial conflict is mostly spontaneous and unstructured, pickets are unlikely to be organised, nor indeed to serve any practical purpose. Not surprisingly, the opposite trends are to be found in Canada and in America: much less frequent stoppages in proportion to the workforce, involving more workers, but each one lasting seven times longer.(93)

Finally, apart from our industrial relations system, there are two further points of significance. The first is that with a relatively high level of employment in this country there has not been a desperate need to picket an employer to prevent him employing 'blackleg' labour. In fact, where a union is in a monopoly position the employer can hardly continue working. The second is more fundamental still. Historically, unions have always had a lack of confidence in their strength(94) and picketing would appear only to have come to the fore in times of industrial upheaval(95). What picketing there is has generally been peaceful and in this respect the unhappy memory of the decisive state action in the 1951 Waterfront Dispute provided an object lesson that was not lost on trade union leaders(96). One must remember, too, that picketing was categorically unlawful between 1951 and 1960; unions learned, so to speak, to do without. They have since been more than reticent in realising the potential of peaceful picketing.

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(91) Donovan Commission Report, op. cit. 96; see Howells, Woods and Young, op. cit. statistical appendix.

(92) Woods, The Law and Industrial Relations, paper delivered to the Royal Society of New Zealand, 1967, 4 - eighty per cent of all disputes are settled quickly at the conciliation stage.

(93) Donovan Commission Report, op.cit., 96. In America, where large-scale stoppages often accompany the periodic negotiation of company-wide contracts, these have become ritualistic engagements: unions co-operate in an orderly shutdown of production and companies often provide shelter and refreshment forpickets. The duty to picket is often a condition for receiving strike benefits

(94) Woods, op.cit. supra note 16, 41.

(95) See page 6, supra.

(96) Bassett, op. cit. 210-2. One union secretary told the writer that in view of the power with which the state faced a union he was simply not going to 'fight a scrap' he knew he would lose.

CONCLUSION

What emerges from the preceding pages is that though there may be a limited statutory right to picket, this has been limited even further by the general law. The criminal law, the common law of nuisance and the economic torts., not to mention the penalties under the I.R.Act, allcombine to the extent that it can be said that the bulk of even peaceful picketing today is, likely as not, in some form illegal.

'Likely as not', of course, because there is simply no case law in New Zealand. That this is a function of the low incidence and relatively peaceful nature of the activity is not in doubt, and this raises interesting questions why this should be so, which questions have been considered above. But this is not to say that comparisons with English and Canadian cases are worthless. To be sure, in the absence of New Zealand decisions, comparisons can be hazardous. In the event, this article has had to concentrate more on the legal principles involved rather than with the practical result facing a picket in classifiable fact situations.

Before considering the logical reform, it is necessary to dispose of two objections. The first is that the general criminal law adequately controls picketing at present. The problem with this is that control only becomes an issue when the picketing is unreasonable; the criminal law has no business pre-empting this condition. Any successful picketing depends to a large extent on the discretion of sensible and experienced police officers. Though one must realistically recognise that this power would not often be used, the police officer is nevertheless placed in an invidious position, which is unacceptable to policeman and unionist alike. There is, moreover, the whole problem of the civil law, which has been shown to be quite unsatisfactory in the regulation of what is essentially an industrial relations problem(97). The primary question is which techniques are best suited for the regulation of conflict. General criminal offences cannot hope to deal adequately with a special problem, involving the balancing of cpmpeting privileges(98). The present law provides for unreasonable conflict, enshrouding the employer in a cocoon which, in a competitive free enterprise system, he hardly deserves to have. Indeed, it is an axiom of industrial relations that prohibitions can be rationally superimposed only on a body of law that provides from the first for reasonable industrial conflict(99).

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(97) See page 15, supra, ~~also p 16~~.

(98) The Statutes Revision Committee, when reporting on the Police Offences Act, 1927, in 1974, recognized this and recommended picketing be regulated under the I. R. Act.

(99) Christie, op. cit. 195.

The second and more formidable objection is that there is simply too little picketing to justify a reform of the law. The Donovan Commission recommended in 1968 that no change be made in the English law, yet in the past seven years there has been a surprising upsurge in picketing, which upsurge necessitated two changes in the law. Moreover, this sort of argument is not attractive in times of accelerating rates of inflation and rising unemployment that will certainly test any industrial relations system. Though it may well be that the phenomenon only makes an appearance in times of great unrest, it is naive to expect picketing will never become a problem. It has often been remarked that the extent and severity of labour troubles are both apt to increase as the degree of industrialization increases(100).

The law, then, is deficient because it fails to grant substantive picketing 'rights' rather than through any failure to provide the employer with adequate means of redress or to penalize irrational conduct. Therefore, subject to the criminal law controlling picketing that is not peaceful, there must be some statutory notion of reasonable picketing practice: it must be lawful to stop a vehicle for a reasonable period of time; to persuade any worker to breach his contract of service(101); and secondary pressure should be lawful where an 'ally' of the employer is involved.

If the place for such suggestions is in the I.R.Act then in logic the lawfulness of the picketing should be tied to the lawfulness of the strike, through acts that are not in themselves unlawful. Obviously, this is not possible where almost every strike is illegal. Which is not to say that this shouldrender all picketing unlawful. Even though this is the theoretical conclusion in a compulsory collective bargaining system, one must realistically recognize that the system does break down and that picketing is an elementary industrial privilege that requires a wider immunity than it has at present.

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(100) Eberhart, op, cit., 145; Howells, Woods and Young, op. cit. 170.
(101) This is not possible under s. 123 as it now stands - see note (102) infra.

This might adequately be resolved by the enactment of an explicit right to take justified industrial action. The arguments for such a right have been made elsewhere[102]; suffice it to say here that the essential issue is to ensure that all common law actions come within the exclusive jurisdiction of the Industrial Court, where a more desirable flexibility would allow a better balancing of 'rights'. The point is that industrial relations problems must be solved within the machinery of the Act.

The reality, however, is that the law concerning peaceful picketing is harshly restrictive. Few people realise how shackled the trade union movement is by the range of consequences, criminal, tortious and administrative, which can ensue from the mere fact of industrial conflict[103]. For the present, the prospective picket must suffer a law that reflects the conditions and attitudes of the nineteenth century. It is as well to recall the words of Bramwell B. that the law then did not permit that which 'was calculated to have a deterring effect on the minds of ordinary persons, by exposing them to have their motions watched, and to encounter black looks'[104].

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(102) E.g., Szakats, op. cit. [illegible], who makes the argument in relation to the unsatisfactory law of injunctions. Obviously, these suggestions involve modification of the Act - for the machinery, see Szakats, 27-8.

(103) Howells, Woods, Young, op. cit. 192. New Zealand is unusual among western industrial nations in that there are clear criminal liabilities for industrial action, ibid 175.

(104) Note 6 supra.

LX Ro ROSS, C.J. Trade unions and the law.