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"THE TORTIOUS CONSEQUENCES OF TAKING STRIKE ACTION IN NEW ZEALAND AFTER THE COMMENCEMENT OF THE INDUSTRIAL RELATIONS ACT, 1973."

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THE TORTIOUS CONSEQUENCES OF TAKING STRIKE ACTION IN NEW ZEALAND AFTER THE COMMENCEMENT OF THE INDUSTRIAL RELATIONS ACT, 1973.

I INTRODUCTION

> "Where the rights of Labour are concerned, the rights of employers are conditioned by the rights of the men to withhold their services. The right of workmen to strike is an essential element in the principle of collective bargaining." (1)

The object of this paper is to examine the legal consequences of taking direct action in New Zealand today. Direct action has many forms ranging from a "strike" through to a "work to rule",(2) and because of its very nature this pressure, or the threat of it, often results in the employer or some third person suffering economic damage. Not surprisingly the employers retaliated and one of the vehicles used to achieve this was the court, and there developed in the field of torts an action for economic loss.

Today in New Zealand the injured employer or third party may be able to sue for damages, or obtain an injunction against those who caused the loss, under one or several of the following branches of liability known as the Economic torts.

i) Conspiracy: a combination with the dominant motive of injuring the plaintiff

ii) Interference with contractual relations: knowingly and intentionally interfering with a contract to which the plaintiff is a party.

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(1) Lord Wright in Crofter's Hand Woven Harris Tweed Co. v Veitch [1942] A.C. 435, 463

(2) pages 6-8 post.

(iii) Intimidation: co-ercing a person by threats of violence or other illegal action into doing or abstaining from something he would otherwise have every right to do

(iv) Interference with trade, business or employment by "unlawful means": A recent rivival of an old principle which is exactly as its title states.

With time these branches of liability have developed in different directions, some developing in favour of allowing combined action by workers,(3) but all have retained some means by which an employer or other injured party has an action against those who caused the loss.

It is proposed to show the restrictions that exist in New Zealand on the right to strike and their relevence to these economic torts. Such restrictions assume particular importance because in England an important distinction between lawful and unlawful means developed in the torts to preserve the right of employers to strike.

The question to be answered by this paper is whether such a distinction is wasted in New Zealand because of the law relating to strikes. To do this it is necessary to compare the Industrial Conciliation and Arbitration Act, 1954 with the new Industrial Relations Act, 1973 and also to look at other possible restrictions on strike action, particularly in relation to breaches of industrial agreements and awards and breaches of contracts of employment.

II INDUSTRIAL CONCILIATION & ARBITRATION ACT, 1954

According to its introduction the purpose of the I.C. & A. Act (as it will be referred to) was to:

" .... consolidate and amend the law relating to the settlement of industrial disputes by concilation and arbitration."

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(3) See Petes Towing Services Ltd v Northern Transport Drivers I.U.W. [1970] N.Z.L.R. 32 and the Crofter Case (footnote (1) ante)

Trade Unions:

Before considering the Act in detail, however, it should be noted that in this paper liability will be considered mostly in relation to industrial unions although it must be remembered that individual workers can be equally liable. There are three reasons for this:

S.193 (3) of the 1954 Act provided as follows:

> "When a strike or lockout takes place, and a majority of the members of any union or association are at any time parties to the strike or lockout, that union or association shall be deemed to have instigated the stike or lockout."

This avoided a considerable practical difficulty - proving that the strike was instigated by a particular union. Therefore there was no need to consider individuals.

Second, it is unlikely that an individual could pay the compensation that can be awarded.(4) Trade Unions on the other hand are more likely to have the resources to pay the sums sometimes involved and this important question must always be to the fore in any prospective plaintiff's mind.

Finally an injunction is nearly always useless against an individual because any effective action usually involves a combination of workers. It is impractical to bring an action against each of them.

Also S.57 of the I.C. & A. Act read as follows:

> "The effect of registration shall be to render the union, and all persons who are members thereof ... liable to all the provisions of this Act."

Thus, the Act only applied to those unions that were registered under it, and their members. In practice this amounted to over 90% of unions in New Zealand and included nearly all those that had the resources and power to inflict damaging economic loss.

Illegal Action:

Turning to the more specific provisions of the I.C. & A. Act it is generally considered that Part X made striking illegal.

S.192 read:

> "When a strike takes place in any industry every worker

(4) In 1964 damages of $1,747,645 with interest running at 5% for 7 years were awarded in Canada in the case of Gaspe Copper Mines Ltd v United Steelworkers of America (1964) 65 C.L.L.C. para 14,042

> who is or becomes a party to the strike and who is at the commencement of the strike bound by an award or industrial agreement affecting that industry shall be liable to a penalty not exceeding £100."

This section concerned individual workers who actually participated in strike action and were bound by an award, and it was subject to S.193 which was far more general, covering those who may not have been parties to the strike.

> "Every person who incites, instigates, aids or abets an unlawful strike or lockout or the continuance of any such strike or lockout, or who incites, instigates, or assists any person to become a party to any such strike or lockout, is liable"

The penalties were £100 in the case of workers, £500 for union officials and £1000 for a union. Subsection (4) defined an "unlawful strike" as:

> "A strike of any workers who are bound at the commencement of the strike by an award or industrial agreement affecting the industry in which the strike arises."

The effect of the above legislation seemed to be that members of unions registered under the I.C. & A. Act and workers who were bound by an award or agreement made under that Act (5) were not allowed to engage in any industrial action which fell within the statutory definition of strike.

As was stated earlier, under S.193 (3) a union was deemed to have instigated a strike if at any time a majority of its members were party to it, but if the union submitted the issue to a secret ballot in accordance with S.191 and a majority favoured strike action, then under Sections 195 (1) and (2) the union could be exempted from liability. Therefore, the effect of these sections was to provide two scales of penalty depending on whether or not a secret ballot was taken.

It could be argued that some unions would not have fallen within the above sections because they were not bound by an

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(5) For the effect of Awards generally Part V post

industrial award or agreement but in practice this situation did not arise.

Thus, on interpretation of the I.C. & A. Act it seems that strike action in New Zealand was unlawful and could constitute "illegal means" for the purposes of the economic torts. This result is supported by Blanche v McGinley(6)

> "But an organised, or combined, or general refusal to work on any shift would be a breach of the Act and illegal."

Doubt has been thrown on this conclusion, however, by the decision of Speight J. in Pete's Towing Services Ltd v Northern Transport Drivers I.U.W.(7) In that case the plaintiff operated a barge service and in the unloading process he refused to employ union labour. This resulted in his business being declared "black" by the Waterside Worker's Union. The defendant union's local organiser advised various people who did business with the plaintiff of this fact and to avoid being involved in any industrial disharmony themselves, they refused to deal with the plaintiff any further. The result was an action on his part against the defendant trade union claiming damages for conspiracy, inducing a breach of contract and intimidation.

In his judgement Speight J. dealt with each of these economic torts in a very thorough manner but at page 44 he made the following statement.

> "As I understand it, with particular reference to Part X of the I.C. & A. Act 1954, a strike as such is not illegal and indeed, there may be lawful methods of striking. A fortiori it may be lawful to threaten to strike, depending on the type of action contemplated...."

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(6) (1912) 31 N.Z.L.R. 807, p 816. Also Hughes v Northern Coal Mine Workers [1936] N.Z.L.R.781, p 787

(7) [1970] N.Z.L.R. 32

This is exactly opposite to the conclusion reached earlier but it is submitted that the learned judge erred in his interpretation of the Act. Although S.191 provided a procedure (the secret ballot) which had to be followed where a strike was likely to take place, the fact that it was taken in no way affected the legality of the action.

Section 191 (8) states:

> "Nothing in this section shall be deemed to render lawful any strike or lockout which would otherwise be unlawful ..."

His Honour also envisaged a lawful strike as one where the notice required under the award to terminate employment was less than the notice of strike action. It is argued, however, that the learned Judge relied to an excessive extent on English decisions, particularly Morgan v Fry,(8) which held that a strike is not unlawful where no breach of contract is involved. This is not the situation in New Zealand and under the I.C. & A. Act a strike could be illegal under Part X even where there was no breach of contract involved. - Ross v Moston.(9)

Thus, it is submitted that in this aspect of the case Speight J. was wrong in the conclusion he reached and that under the I.C. & A. Act strike action was illegal.(10)

Definition of "Strike":

The next question involves looking at the definition of "strike" in the I.C. & A. Act to see exactly what forms of direct action are covered.(11)

"In this Act the term "strike" means the act of any number of workers who are or have been in the employment of the same employer or of different employers -

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(8) [1968] 2 Q.B. 710: That case is also interesting for the following retraction by Lord Denning at p. 725. In trying to rebut his own arguments in an earlier case he said:-

> "It is difficult to see the logical flaw in that argument. But there must be something wrong with it: for if that argument were correct, it would do away with the right to strike in this country."

(9) [1917] G.L.R. 87 (Court of Arbitration)

(10) Support for this submission can be found in Hansen, B.G. "Industrial Relations Reform in N.Z." (1974) 7V.U.W.L.R.300, 321 Also Farmer; J.S.: The Law and Industrial Relations: The Influence of the Courts (1971) 2 Otago L.R. 275, 287-289

(11) S.189

(a) In discontinuing that employment, whether wholly or partially; or

(b) In breaking their contracts of service; or

(c) In refusing or failing after any such discontinuance to resume or return to their employment; or

(d) In refusing or failing to accept engagement for any work in which they are usually employed; or

(e) In reducing their normal output or their normal rate of work, -

the said act being due to any combination, agreement, common understanding, or concerted action, whether express or implied, made or entered into by any workers -

(f) With intent to compel or induce any such employer to agree to terms of employment or comply with any demands made by the said or any other workers; or

(g) With intent to cause loss or inconvenience to any such employer in the conduct of his business, or

(h) With intent to incite, aid, abet, instigate, or procure any other strike; or

(i) With intent to assist workers in the employment of any other employer to compel or induce that employer to agree to terms of employment or comply with any demands made upon him by any workers.

There are many forms of "direct action" to which a group of workers can resort and these include; a complete withdrawl of labour, a go slow, a rolling strike and a black ban.[12] All these came within the definition of "strike" provided they were aimed at industrial matters - that is advancing the personal interests of the union or its members.

This, however, left open a very wide area which for convenience will be called "non-industrial direct action". The best known action of this type is the political strike where any loss or inconvenience is very much incidental to the main intention of the direct action. The action of the Federation of Labour in refusing to handle French goods or service ships and planes travelling to French territories is a very good and perhaps the best known example of this, and it is

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(12) The last three are covered in the definition by S.189(i)(e)

difficult to bring such action under any of the "intentions" required by S. 189 (i). In taking this action it could not be said that the trade unions involved were trying to further individual interests, by making demands on any employer, but rather they claimed that they were looking after the welfare of all New Zealanders.

Summary:

Under the I.C. & A. Act not all direct action amounted to an "illegal act".

The Act didn't cover the actions of unions that were not registered and workers who were not bound by an award or industrial agreement,(13) although in practice these situations were unlikely to arise in relation to the economic torts.

The "political strike" cannot be so easily disposed of and continuing with the French Nuclear Testing example, although companies must have suffered considerable economic loss as a result of the Federation of Labour ban, any liability relying on the "strike" - "illegal means" relationship was precluded because political action by workers did not fall within S. 189 (i)

It must be realised, however, that these exceptions are just that, and Part X of the I.C. & A. Act still had the effect of declaring most forms of direct action illegal.

III INDUSTRIAL RELATIONS ACT, 1973

The 1973 Act is described in its introduction as:

"An Act to make provision for improving industrial relations and to consolidate and amend the I.C. & A. Act, 1954 ...."

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(13) These are covered by the Labour Disputes Investigation Act 1913, which also imposed restrictions on the right to strike.

and it introduces a two tiered approach for solving industrial disputes, based on whether the dispute is one of "interest" or "right".

A "dispute of interest" involves the determination of the terms of a new industrial award or agreement. Sections 63 to 90 cover the procedure to be adopted.

The parties may reach a voluntary settlement which will be registered as such but if this cannot be done, the problem can be referred by either party to a conciliation council consisting of representatives of both sides and chaired by an industrial conciliator, to bring about a "fair and amicable settlement of the dispute".(14) If this fails the dispute is referred to the Industrial Commission established by the Act for the making of awards. Its decision is binding.

A "dispute of right" on the other hand, refers to a disagreement related to an existing agreement or award. The part of the act dealing with "disputes of right" is a refinement of the sections inserted in the I.C. & A. Act by the 1970 Amendment. The 1973 sections insert into every award, whether existing or not at the time it was passed, provisions for the settlement of disputes of right.

If it is what is classified as a personal grievance(15) there is an informal settlement procedure laid down and failing this the matter can be referred to the Industrial Court. Other disputes are referred to a committee consisting of an equal number of representatives of both parties chaired by a conciliator. The decision of the majority is binding although the matter may be referred to the industrial court for settlement if the members, other than the chairman, are equally divided.

Definition of Strike:

First, in comparing the respective definitions of "strike", there is a difference in that S.189 (g) of the 1954 Act has been omitted.

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(14) S.77

(15) For definition see S.117 (1)

Thus, direct action to further a personal grudge, unrelated to any claim for better conditions of employment, or a protest strike directed against the striker's employer would appear to join those forms of direct action already excluded and mentioned earlier in this paper.

This difference is of very little practical importance, however, since the definition of strike in S.123 of the 1973 Act seems to be superfluous - it simply doesn't relate to any other section in that Act because where the word "strike" does appear, it is further qualified, and there are no blanket provisions prohibiting strikes as in the I.C. & A. Act.

Legislative History of the Bill

Before this point is considered in detail, however, although not a valid method of statutory interpretation, it is interesting to compare the two Bills that were produced before the Act was passed.

The move for "reform" of the I.C. & A. Act was originally made by the National Government with a Bill that was very far reaching in its application. The definition of strike contained none of the "intentions" required by the old definition. There was also, along with the old strike clauses a new penalty section - "failure to resume work where public interest affected".

This all falls into place, however, when it is realised that the Bill appeared a short time after the Federation of Labour ban on French goods and services and the concern that was being voiced for the harm the ban was thought to be causing New Zealand. On the basis of the comments already passed in this paper it can be seen that the new definition of "strike" would have included "non industrial direct action" of this kind and it is submitted that it can quite safely be assumed that this was the intention of the government at the time.

Perhaps enlightened by the abuses that could be made of penalty clauses the new Labour Government made considerable alterations and the result is the present Industrial Relations Act. This goes to the other extreme and as was stated earlier

contains no blanket provision prohibiting strikes. (16)

Strike Action:

The new Industrial Relations Act does, however, contain some restrictions on strike action although these are not as wide as those in the I.C. & A. Act.

First, in that part of the 1973 Act concerning "disputes of interest" there is the following section - S.81:

> "In every case where a dispute is before a Concilation Council the following special provisions shall apply:
>
> (a) Until the dispute has been finally disposed of by the Council or the Commission neither of the parties to the dispute nor the workers affected by it shall, on account of the dispute, do or become concerned in doing, directly or indirectly, anything in the nature of a strike or lockout, or of a suspension or discontinuance of employment or work; but the relationship of employer and employed shall continue uninterrupted by the dispute, or anything arising out of the dispute, or anything preliminary to the reference of the dispute and connected with it."

Subsection (b) provides a penalty not exceeding £100 for unions and workers found by the industrial court to be in breach of the above section.

Therefore, once proceedings have been commenced before a Conciliation Council any discontinuance of work could be an"illegal act" provided it relates to the dispute in question.

Similarly, where there is a "dispute of right", S.115 provides that the clause in S.116 (7) should be inserted in every award or collective agreement whether made before or after the commencement of the 1973 Act, with the intention that it will lead to the " .... final and conclusive settlement, without stoppage of work, of all disputes of rights ...." (17)

The section to be inserted is as follows:

> "The essence of this clause being that, pending the settlement of the dispute, the work of the employer shall not on any account be impeded but shall at all times proceed as if no dispute had arisen,

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(16) The 1973 Act is "toothless" to an almost ridiculous extreme. Under S.120 the Minister of Labour has the power to call a "compulsory" conference in the case of a strike or lockout but there are no penalties if any of the parties fail to turn up.

(17) S.115 (1)

it is hereby provided that -

(a) No worker employed by any employer who is a party to the dispute shall discontunue or impede normal work, either totally or partially because of the dispute."

There is a similar provision to be found in S.117 (5) relating to the settlement of personal grievances.

Any worker who acts in breach of either of these clauses can be tried by the Industrial Court exercising its summary jurisdiction (18) and under S.148 (2) is liable to a penalty not exceeding $40. It should be noted, however that the clauses inserted in awards or collective agreements by sections 115 and 117 only contain reference to workers and not unions. This would make it almost impossible to maintain an action against a union the individual worker belonged to, even where a considerable number of workers had acted in breach of an award or collective agreement, because the 1973 Act does not contain any provisions similar to S.193 (3) of the I.C. & A. Act whereby the union can be deemed to have instigated the strike. The result is that any claim in tort based on the illegal act of breaching the implied clauses inserted in awards or collective agreements could only be made against individual workers - something that was discussed at the beginning of this paper and considered impractical. (19)

Another obstacle in relation to both S.81 and sections 115 and 117 is that the action does not become illegal until those involved have been convicted by the Industrial Court, and there is a very strong argument that such a decision could not be made by a civil court because under the Industrial Relations Act the Industrial Court is given the sole power to make such decisions. (20)

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(18) Under S.144 (2) the Industrial Court may recover fines in the same way as the Magistrates Court under the provisions of the Summary Proceedings Act, 1957.

(19) The breach of such a condition in an award or industrial agreement could be of relevance concerning the contract of employment - (part V post)

(20) For a full discussion of this issue - (part IV post)

Summary:

The Industrial Relations Act removes all blanket provisions prohibiting strikes which could constitute "illegal means" for the requirements of the economic torts. Those minor prohibitions on striking which remain are subject to the restrictions mentioned above.

IV THE RULE IN N.Z. DAIRY FACTORIES EMPLOYEES I.U.W. v N.Z. CO-OP. DAIRY CO.[21]

The case involved an action for an injunction declaring that notices of dismissal issued by the defendants were null and void. It was contended by the union that the actions of the company amounted to a lockout as defined in S.190 of the I.C. & A. Act, 1954.

It was held in the Supreme Court by Turner J. that the court didn't have jurisdiction, and he declined to decide the facts of the case. Following the House of Lords decisions in Institute of Patent Agents v Lockwood[22] and Barraclough v Brown[23] he said:

> "The only consequence in law, so far as counsel were able to instruct are, of being a party to a lockout as defined by S.190 of the I.C. & A. Act, is that by virtue of that Act such party is liable to a penalty of £500 at the suit of an inspector of awards in an action taken before a Magistrate with a right of appeal to the Court of Arbitration. Whether a lockout took place is therefore a question of fact, the resolution of which must be regarded as exclusively to be determined by such an action, for it is a question without legal relevance except to those proceedings. It would seem to me contrary to the whole current of the decisions of this Court (an the courts of comparable jurisdiction in the United Kingdom) if I were to attempt to resolve this question of fact now, only (possibly) to have the question answered to the contrary effect, later, by the Court to which the question is specifically referred by statute"[24]

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(21) [1959] N.Z.L.R.910
(22) [1894] A.C. 348
(23) [1897] A.C. 615
(24) [1959] N.Z.L.R. 910, 916

As a result of this decision it can be argued that a strike came into the same category under the I.C. & A. Act and therefore by parity of reasoning, the only remedy available was the fine provided for by the Act.

But, in practice this did not occur and where required to do so the courts were willing to enquire into the strike provisions and allow remedies other than those provided by the statute itself.(25) Thus there is danger in placing too much emphasis on this one decision and while the principle involved is undoubtedly correct, its application to such a broad provision as S.189 of the I.C. & A. Act was open to question.(26)

Therefore it must still be decided whether the principle in the N.Z. Co-op. Dairy case can be applied to the restrictions on strike action in the 1973, Industrial Relations Act.

The rule in the N.Z. Co-op. Dairy Case seems to be based on two factors:

- The statute must have created an offence which is only actionable because of that statute, so that but for the enactment creating the offence, the defendant has done nothing of which anybody would have a legal right to complain.

- The statute must have nominated the Court that will have exclusive jurisdiction and this must be outside the Court structure where the alternative remedy

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(25) e.g. Blanche v McGinley (1912) 31 N.Z.L.R. 807

(26) Speight J. tried to distinguish the N.Z. Co-op. Dairy case in Pete's Towing case at pages 53 & 54 and although he cites no authority for the conclusion he reaches, it does show a desire on the part of the judiciary to avoid that decision.

is sought.

Are these two requirements fulfilled by the sections in the Industrial Relations Act?

Apart from that Act and the I.C. & A. Act which the former repealed, there is nothing in New Zealand which could lead to a striker being civilly or criminally liable without there being an express breach of an award or contract. The Legislature has, in effect, created a new offence.

Turning to the second factor, S. 147 of the 1973 Act provides that the Industrial Court shall have full and exclusive jurisdiction to deal with all actions for the recovery of penalties under this Act and its decision shall be final.(27) This means that no other court has authority to decide on these matters. As Lord Watson said in Barraclough v Brown(28)

> "It cannot be the duty of any Court to pronounce an order when it plainly appears that, in so doing the court would be using a jurisdiction which the Legislature has forbidden it to exercise."

Finally there is the intention of Parliament. What is the purpose of the sanctions against strikes?

In Phillips v Britannia Hygienic Laundry Co.(29) Atkin L.J. said:

> "One question to be considered is, Does the Act contain reference to a remedy for breach of it? Prima Facie if it does that is the only remedy. But that is not conclusive. The intention as disclosed by its scope and wording must still be regarded"

The Industrial Relations Act outlines a procedure to solve industrial problems through discussion without resort to direct action and the essential purpose of the penalty clauses is to avoid the whole object of that procedure being completely frustrated.

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(27) S. 151 (5)
(28) [1897] A.C. 615, 621
(29) [1923] 2 K.B. 832, 841

Thus the restrictions on strike action in the new Act are only meant to facilitate the conciliation processes it creates. By their restrictive nature they are certainly not intended to be used in areas totally unrelated to this. It is therefore argued that they could not be adopted as "illegal means" for the purposes of the economic torts. (30)

V COLLECTIVE AGREEMENTS, AWARDS & CONTRACTS OF EMPLOYMENT

Although as a result of the Industrial Relations Act it can be argued that strikes are no longer expressly prohibited, strike action can be caught in other ways, thereby becoming "unlawful means" for the purposes on the economic torts.

Most industrial awards and agreements contain what is known as a "disputes clause". These vary but the following example is a fairly common type:

> "The essence of this award being that the work of the employers shall not on any account whatsoever, be impeded, but shall always proceed as if no dispute or difference shall arise between the parties bound by this award .... every such dispute shall be referred to a committee ...." (31)

As can be seen, this disputes clause has the effect of prohibiting strike action, and it acts independently of the Industrial Relations Act.

It may bind the parties in any one of three ways, appearing:

(i) in a collective agreement
(ii) in an award
(iii) incorporated in an individual contract of service

Collective Agreement:

This results from a voluntary or conciliated settlement and is binding on the parties and every member of the union

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(30) A similar argument is advanced by Hansen, B.G.: Industrial Relations Reform in N.Z. (1974) 7V.U.W.L.R. 300, 322 - 323.

(31) Clause 21 of the Award of the Northern, Wellington, Nelson and Canterbury Metal Trade Employees (in Motor Assembly works) 19.3.71, No. 371. This clause is slightly different from S.116 (7) in that it is not specifically restricted to workers - page 11 (ante)

or association party to it under sections 65 (5) and 82 (4).[32] Where, however, a conciliation settlement is reached under S.82, it is also binding on an association, union or employer who, although not an original party, is or becomes connected with the industry within the area to which the agreement applies - S.83.

Thus, a collective agreement may result from either of the following:

(i) Voluntary Settlement
(ii) Conciliated Settlement

The Voluntary Settlement is very similar in form to a contract, the parties having specifically agreed to its terms, and by analogy if a disputes clause such as the one mentioned above is included, its breach would be almost identical to a breach of contract which is Rookes v Barnard [33] was held to constitute unlawful means.

A Conciliated Settlement, however, is different because a party bound by it may not have played any part in its formulation. Because of its similarity to an award, its legal effect will be discussed under that heading.

Awards:

> "An award is, in effect, a code of rules for the regulation of the industry concerned during the currency of the award." (34)

It arises where the Industrial Commission has adjudicated on matters that remain unsettled after conciliation proceedings and is binding as if it were a collective agreement resulting from a conciliated settlement. [35]

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(32) Because of these provisions it cannot be argued in New Zealand that a collective agreement is unenforceable as was held in Ford Motor Co. Ltd. v Amalgamated Union of Engineering and Foundry Workers [1969] I W.I.R. 399

(33) [1964] A.C. 1129

(34) N.Z. Waterside Workers Fed. I.A.W. v Frazer [1924] N.Z.L.R. 689, 708 - 9

(35) S.89

The legal effect of a type of disputes clause in an award was discussed in Ruddock v Sinclair.(36) In that case the defendant and other workers employed in a freezing works intimated to their employer that they would not work with the plaintiff. To show they meant business they reduced the killing rate with the result that the employer placed him in alternative employment at a reduced wage. The plaintiff brought an action against the defendants for having illegally compelled his dismissal.

The award declared that work of the employer should always proceed in the customary manner and should not on any account whatsoever be impeded.

It was held by Sim J. that the defendant acted in breach of the award.

> "The reduction by the defendants of their rate of killing to the serious injury of the business of the company, constituted, I think a violation of the duty imposed by this clause and amounted to a breach of an award." (37)

Thus the breach of a disputes clause in an award is unlawful, (the same rule also applying to a conciliated settlement under the 1973 Act since it is binding in the same way) but can this be called "unlawful means" for the purposes of the economic torts.

It could be argued that the breach of a disputes clause is only unlawful as between the parties to the award or collective agreement and any third party who wants to rely on this breach for the unlawful means requirement (as is normally the case) is barred from doing so by privity of contract.

This proposition was rejected by the House of Lords in Rookes v Barnard.(38) The argument there is best summed up in the following statement.

> "The point is that the weapon, ie. the means, which the defendant uses to inflict loss on the plaintiff may be unlawful because it involves conduct wrongful towards a third party."(39)

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(36) [1925] N.Z.L.R. 677

(37) At page 681

(38) [1964] A.C. 1129

(39) "Winfield and Jolowicz on Tort" (9th Ed.) P. 466

Thus, the following question should be asked - Is the breach of an award or collective agreement an act wrongful towards a third party?

The only New Zealand authority on the point, Ruddock v Sinclair[40] answered this question in the affirmative.

The Contract of Employment:

A disputes clause can finally be incorporated into individual contracts of employment. When a worker accepts employment in a job covered by an award or an industrial agreement all the important terms of his contract of service will be derived from that award or industrial agreement.

> "When a person is employed to do any work to which an award applies the parties are bound by a contract. Their legal relations are in part determined by the contract between them and in part by the award. The award governs their relations as to all matters with which it deals.(41)

(Similarly for industrial agreements - in Rookes v Barnard it was conceded that a "no strikes" clause in a collective agreement was incorporated into each individual contract of employment).

The result is that where a contract containing a disputes clause is interfered with, such interference is "unlawful". This is very important because it means that Lord Denning's distinction between direct and indirect interference in the Torquay Hotel Case[42] to preserve the right to strike is irrelevant. The simple act on the part of the employees of stopping work is an unlawful act and trade union officials

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(40) [1925] N.Z.L.R. 677, 681

(41) Amalgamated Collieries of W.A. v True (1938) 59 C.L.R. 417 p423 (emphasis added). Although the decision was reversed on appeal to the Privy Council this point was specifically upheld by Lord Russell of Killowen at [1940] A.C.537, 544. Also in Canterbury Bakers Union v William (1905) 8 G.L.R. 160 the Court of Arbitration held that an award by implication evidenced the terms of the contract of service.

(42) [1969] 2 Ch 106, 138: footnote 67 post

proposing such action would be interfering by unlawful means and would not be protected even if damage resulted indirectly.

It has been suggested that the Supreme Court has no power to determine breaches of collective agreements, awards or contracts of employment,[43] but this contention is open to considerable doubt. While the Industrial Relations Act gives the Industrial Court powers in relation to awards and collective agreements, a disputes clause is not created by the Act but rather by agreement between the parties in the case of a voluntary settlement, and the adjudication of the Industrial Commission otherwise. For this reason the rule in the N.Z. Dairy Factories[44] Case cannot be applied.

As far as a breach of an individual contract of employment is[45] concerned the civil courts certainly have jurisdiction and this constitutes perhaps the most "useful" unlawful means for a prospective plaintiff in New Zealand.

Therefore it is submitted that although strike action is not expressly prohibited in the Industrial Relations Act sanctions still exist against the right to strike in New Zealand and it can constitute "unlawful means" for the purposes of the economic torts and imposing liability on trade unions.

VI THE ECONOMIC TORTS:

On occasions it has been suggested that the economic torts are not in reality applicable to trade union liability.

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(43) Hansen B.G. (1974) 7 V.U.W.L.R. 300, 321 - 322

(44) [1959] N.Z.L.R. 910

(45) The Court of Appeal did not even find it necessary to consider this point in Northern Drivers' Union v Kawau Island Ferries (June 1974 - unreported at the time of writing)

In this section it is proposed to briefly discuss the scope of these torts at the present time in the industrial situation.(46)

This paper is primarily concerned with the "unlawful means" requirements of the economic torts. Of the four, three can be based directly on its existence:

(i) Conspiracy;

(ii) Intimidation;

(iii) Interference with trade, business or employment by unlawful means;

while the fourth, interference with contractual relations requires unlawful means when the interference is indirect.

Conspiracy:

An agreement or combination of two or more persons to do:

- an otherwise lawful act with an unlawful object.
- an unlawful act, or a lawful act by unlawful means.

As regards the first, it was settled in Crofter Hand Woven Harris Tweed Co. v Veitch (47) that provided the predominant purpose of the combination was the promotion of the legitimate interests of those combining there can be no liability. It is therefore of little importance in Industrial liability because that case covers nearly all the industrial objectives pursued by trade unions today including interests which go beyond a purely material nature.(48)

The second branch of conspiracy does not rest on the motive or purpose of those combining but rather on the legality of the methods used.

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(46) The summary that follows is only intended to outline the law and the reader should refer to one of the more detailed texts on the subject. e.g. J.D. Heydon "Economic Torts" Sweet & Maxwell (1973), London.

(47) [1942] A.C. 435

(48) e.g. Action against racial discrimination: Scala Ballroom (Wolverhampton) Ltd v Radcliffe [1958] 3 All E.R. 220.

The use by those combining of independently unlawful means [49] has the effect of denying the right to advance legitimate interests to justify the action taken, [50] and so where some strike action can itself be declared unlawful the defence in the Crofter Case is of no use to a defendant trade union.

Intimidation:

> "Procuring economic harm to another by the use of unlawful threats to curtail that other's freedom of action."(51)

The tort has the following three requirements:

- A threat issued by the defendant with the intention of harming the plaintiff.
- Action based on this threat.
- resulting harm to the plaintiff.

It was revived in Great Britain by the well known case of Rookes v Barnard [52] although in New Zealand the action was recognised at an early stage.[53]

It is of great value where unlawful strike action has been "threatened" but this must be distinguished from mere "warnings". Therefore in Pete's Towing Case it could be argued that the defendant's actions were only warnings to the third party of the results of continuing to deal with the plaintiff and not "threats".

> "There is no evidence to show that this would be illegally done; or that Arvidson (the defendant) ever brought himself to the point of even contemplating what steps he might have to take or his union might have to take."(54)

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(49) A line of Canadian Cases culminating in Gagnon v Foundation Marine Ltd (1960) 23 D.L.R.(2d.) 721, 727 established that the breach of labour relations legislation was the basis for an action in conspiracy.

(50) Crofter Case [1942] A.C. 435, p462

(51) Pete's Towing Case [1970] N.Z.L.R. 32, p.41

(52) [1964] A.C. 1129:

(53) See Blanche v McGinley (1912) 31 N.Z.L.R. 807

(54) [1970] N.Z.L.R. 32, p.44

In each case this question of "threat" or "warning" is one of fact.

Also, where an illegal strike has actually taken place it seems to be difficult to find the requirements of the tort. To succeed the injured party must show that he complied with the demand, whereas a strike usually takes place when the threatened party has not acceded to the unions demands.

Finally it should be noted that the question is still open as to whether the defence of justification is allowed.(55)

But even taking these factors into consideration there is still considerable scope for trade union liability where strikes have been "threatened" and there exists restrictions on this form of direct action.

Interference with trade, business or employment by "unlawful means"

This tort is exactly what its title states it to be and although it was recognised at the end of the 19th century in Allen v Flood (56) it was almost totally neglected until quite recently. The tort was established in New Zealand early this century by the case of Fairbairn, Wright & Co. v Levin & Co.(57) where the Court of Appeal made it clear that a trader who had been injured in his business by a trade rival by unlawful means had a right of action.

The most complete statement concerning its present existence is found in Acrow Ltd v Rex Chainbelt(58)

> "If one person without just cause or excuse deliberately interferes with the trade or business of another, and does so by unlawful means, that is, an act which he is not at liberty to commit then he is acting unlawfully"

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(55) See Morgan v Fry [1968] 2 Q.B. 710, 729
(56) [1898] A.C.1
(57) (1914) 34 N.Z.L.R. 1, 17-18
(58) [1971] 1 W.L.R. 1676 - Lord Denning at p.1682, following his own decision in Torquay Hotel Ltd v Cousins [1969] Ch 106 - see statement at page 139

The only requirements to satisfy this economic tort are:(59)

- Intention
- Actual damage suffered by the plaintiff
- An unlawful Act by the defendant that caused the damage.

This means it can almost be considered a general principle of tortious liability for economic loss, containing the basic requirements of most of the other economic torts, but without their trimmings. For instance the "narrow" form of conspiracy - combining to commit an unlawful act comes under this tort without even having to prove that there was in fact a combination.

What results is tremendous scope for actions against trade unions where strike action can be classified as unlawful means because only intention and damage need to be proved. In the Acrow Case Lord Denning implies that justification could be a defence but this point has yet to be decided.

Interference with Contractual Relations:

Knowingly and intentionally interfering with a contract to which the plaintiff is a party.

In this area of liability it is necessary to distinguish between direct and indirect interference.

Where the interference is direct it is sufficient that the defendant persuaded the contracting party to break his contract with the plaintiff. Simply interfering with the sanctity of contract constitutes the offence.

On the other hand indirect interference occurs when the acts are not directed at the contracting parties, but rather at some third person not a party to the contract. - in industrial situations usually the employees of those contracting. Here the act of the third party has to be unlawful apart from the fact that it may lead to a breach of contract. In Torquay Hotel Ltd v Cousins(60) Lord Denning considered that it was essential to preserve this distinction to retain the right to strike in the United Kingdom, where striking is not forbidden by statute.

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(59) The tort was revived in New Zealand in the recent decision of Emms v Brad Lorett Ltd [1973] 1 N.Z.L.R.282

(60) [1969] 2 Ch. 106, p 138

There are five elements:

- a valid existing contract
- knowledge of the contract on the part of the defendant
- wrongful interference by the defendant with that contract (in either way specified above although the interference doesn't have to result in a breach[61])
- damage to the plaintiff
- absence of justification

In the case of South Wales Miners' Fed. v Glamorgan Coal Co.[62] the House of Lords held that the defence of justification was not available merely because the Miners' Federation and its officers were acting in the interests of members as had been held for the tort of conspiracy.

Pete's Towing Case, however seems to authorise justification as a defence in limited circumstances.[63]

> "Here the inducement of Ready Mixed (the third party) was not being used as a sword to procure financial betterment but as a shield to avoid involvement in industrial discord."

In other words the defendant was acting in the interests of industrial harmony rather than any particular union.

Similarly in the very recent case of Northern Driver's Union v Kawau Island Ferries Ltd. concerning an action for inducing a breach of contract the Court of Appeal said[64]

> "It may be .... permissable to take into account a moral duty resting on an industrial union to protect its members."

But these statements must still be regarded as dicta and the law as presently constituted allows[65] plenty of scope to sue trade unions especially where some strike action can be declared unlawful.

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(61) Torquay Hotel Case (Supra) : Here there was no actual breach of contract because a clause in that contract excused performance in the case of labour disputes.

(62) [1905] A.C.239

(63) [1970] N.Z.L.R. 32, p.51

(64) Page 11 of the Judgment - June 1974 (unreported at the time of writing)

(65) Glamorgan Coal Case [1905] A.C.239

The purpose of this section is to show that there is plenty of scope for the use of the economic torts against trade union defendants. All four to varying degrees could be invoked by those who suffer loss as the result of industrial action using the restrictions on strike action discussed in this paper as "unlawful means".

The interesting thing is that some of the distinctions in the economic torts arose because of the need to preserve the right of trade unions to take strike action. Lord Denning in the case of Daily Mirror Newspapers Ltd v Gardner(66) saw no need for the difference between direct and indirect interference in the tort of interfering with contractual relations but he later retracted this statement in Torquay Hotel Co. v Cousins(67) for the very reason that otherwise:

> " .... we should do away with the right to strike altogether. Nearly every trade union official who calls a strike - even on due notice .... knows that he may prevent employers from performing their contracts. He may be taken to even intend it. Yet no-one has supposed hitherto that it was unlawful and we should not render it unlawful today."

In England striking is not illegal but in New Zealand where some forms of strike are unlawful this distinction is often not relevant.

Up until the late 1960's in New Zealand one could be excused for arguing that this did not really matter because suits against trade unions based on the economic torts were only sporadically initiated and these were, without exception, actions by individual workers adversly affected by trade union activities.(68) The old maxim "management has to live with the union"(69) seemed to be true.

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(66) [1968] 2 Q.B. 762, p.782

(67) [1969] 2 Ch.106, p.138

(68) Blanche v McGinley (1912) 31 N.Z.L.R. 807
Ruddock v Sinclair [1925] N.Z.L.R. 677
Hughes v Northern Coal Mine Workers [1936] N.Z.L.R. 781

(69) E.I. Sykes "Strike Law in Australia" P166
Law Book Co. of Australia Pty. Ltd. (1960)

Since the late 1960's, however, things have changed drastically: The actions have become more frequent and they have been brought by employers and third parties rather than individual workers.(70)

Furthermore, at the time of writing this trend seems to be continuing with a good deal of controversy within the trade union movement because of the use of court injunctions based on the economic torts, by employers and others.

VII CONCLUSIONS:

The repeal of the I.C. & A. Act and its replacement by the Industrial Relations Act means that strike action on the part of a trade union can no longer be dubbed "illegal" per se, and although the 1973 Act does place some restrictions on the right to strike it has been argued in this paper that these could not be used in a civil court to support a claim based on the economic torts. Rather their use is restricted to the jurisdiction given to them by the Act.

Such a move is highly desirable in the writer's opinion. The Department of Labour made no prosecutions under Part X of the I.C. & A. Act and although it was amended in 1962 to enable others to enforce the anti strike provisions, they were only successfully invoked on one occasion. The reason was that the enforcement process did little to assist negotiations and the main object while any strike is in process is to get those who are striking back to work. Therefore, from the point of view of their original purpose there was no need to reproduce Part X in the New Act.

Its omission is even more desirable when the effect of declaring some strike action illegal is seen in relation to the economic torts.

The aim of the Industrial Relations Act is to improve industrial relations by providing an efficient conciliation and arbitration process through which the parties get the chance to sit around the negotiating table and "iron out" their differences.

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(70) Hudson Steam Ship Co. v N.Z. Seamens I.U. (unrep.1969)
H.B. Motor Co. v H.B. Road Transport Drivers I.U.W. "
Pete's Towing Case [1970] N.Z.L.R.32
Flett v Northern Transport Drivers I.U.W. [1970] N.Z.L.R. 1050
Northern Drivers Union v Kawau Island Ferries Ltd.(unrep. 1974)

This can be compared with the purpose of the economic torts; remedying employers and other injured parties for economic loss. The effect of such actions, not surprisingly is to create antagonism rather than industrial harmony.

The topical case of the Northern Drivers I.U.W. v Kawau Island Ferries Ltd [71] is a very good example of this. A dispute arose in Auckland between the company and the Seamen's Union over the staffing of the hydro-foil "Manu-wai". This was taken to the shipping tribunal who decided in favour of the Union. The Company applied to the Supreme Court for an order to review this decision and in the meantime attempted to put into service another vessel as a substitute for the hydro-foil - the "Motonui". This vessel was declared "black" by the Seamen's Union and the Northern Drivers Union, which joined in for the purposes of union solidarity, with the result that fuel was not delivered to the "Motonui".

The Company sought an interim injunction to stop this action pending the hearing of a claim for a permanent injunction and damages. This was granted by the Supreme Court and upheld on appeal. Therefore, when the Unions refused to comply with the order, the Drivers' Union Secretary was arrested on a charge of contempt of court.

The result was industrial unrest throughout the whole country and what amounted to a political settlement was reached - the ban would be lifted if the Auckland Regional Authority commenced negotiations to take over the ferry service and if changes were forthcoming in the law relating to tort injunctions.

This discussion shows very clearly that the courtroom is not the place for the settlement of industrial disputes, in fact any resort to the economic torts has the effect of creating greater antagonism between the parties. Thus the removal of any tortious "illegal means" from the Industrial Relations Act, as argued in this paper, is seen by the writer as a step in the right direction. It seems strange to provide in legislation meant to bring the parties together, the means by which one party can bring an action having exactly the opposite effect based on the economic torts.

It should not be concluded however, that as a result

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(71) June 1974 - (unreported at the time of writing)

the tortious liability of trade unions will completely disappear. Other "unlawful means" exist in the form of breaches of disputes clauses in industrial awards and agreements and contracts of employment.(72)

The classification of such breaches as "unlawful" still means that a trade union in taking strike action can become a victim of the economic torts. But what is the purpose of a disputes clause? It is almost identical to the purpose of Sections 81 (a) and 116 (7) of the Industrial Relations Act - to persuade the parties to use the concilation facilities available rather than resort to direct action. Like the above mentioned sections they are not intended to be used as the grounds for bringing a civil action which will have exactly the opposite result.

Unfortunately it is difficult to introduce an argument similar to the rule in the N.Z. Dairy Factory Case(73) especially in the light of decision in Ruddock v Sinclair(74) and so it looks as if the solution is in the hands of parliament. Something must be done to give trade unions and workers an unfettered right to take "legitimate" strike action.

It is suggested there are two solutions to the problem: The first would involve a statutory extension of the defence in the Crofter Case to cover all the economic torts. Thus, if a defendant trade union could successfully argue that the predominant purpose of the direct action was to promote the "legitimate" interests of its members it would be exempted from liability.(75)

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(72) Discussed in part V. Also criminal and tortious acts.

(73) [1959] N.Z.L.R. 910 - part IV ante

(74) [1925] N.Z.L.R. 677 - page 18 ante

(75) The Judiciary seems to be developing such a defence. See page 25 (ante); Pete's Towing Case [1970] N.Z.L.R. 32, 51 and the Kawau Island Ferries Case (1974 - unreported at the time of writing) - p.11.
See also the judgment of Haslam J. in P.T.Y. Homes v Shand [1968] N.Z.L.R. 105 where bona fide fulfilment of a public duty was a legitimate interest.

The second solution might be statutory recognition of the right to take legitimate strike action.(76)

The problem of course arises in deciding what is "legitimate" and the answer is really one of policy, but if the first alternative were to be adopted there is the risk that the courts might be too restrictive in their interpretation and for this reason the writer favours the second solution. The drafting of such legislation would give everyone concerned an opportunity to voice their opinion and would increase the chances of the final definition satisfying all parties.

Whatever solution is arrived at it is vital that legitimate strike action is not classified as "illegal" or "unlawful" for the purpose of the economic torts because such a classification, in placing blame solely on one party, does nothing to solve the problem - strikes are not "bolts out of the blue."

> "While it is the workers who usually commit the final act of stopping work, which is the illegal act, (77) this final act may only be the culmination of a sequence of events to which both sides have probably contributed in one way or another .... Where both sides have contributed to a situation it would be manifestly unfair to penalise only one."(78)

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(76) An example of this type of enactment is the English Trades Disputes legislation which provides a defence for trade unions for "acts done in furtherance or contemplation of a trades dispute."

(77) in 1968 under the I.C. & A. Act.

(78) N.S. Woods: "Report on Industrial Relations Legislation" Pages 16 -17

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