THE SURVIVAL OF CIVIL CONSPIRACY: A QUESTION OF MAGIC OR LOGIC

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1 INTRODUCTION

The modern tort of conspiracy, after a tortuous evolution from uncertain origins to its present state of relative impotence, faces an uncertain future. It rests rather shakily on a notion of plurality which derives more from magic than reason. Its adoption of concepts such as "malice", "motive", "intention", has resulted not only in a terminological tangle, but also in uncertainty of scope and application. Judges have described it as "not of everyday occurrence",[1] "notoriously difficult to establish"[2] and "of waning importance".[3] Writers have said that "the separate tort of conspiracy is practically impotent in the sphere of economic relations",[4] "successful actions for conspiracy are rare",[5] and "its role assigned in modern law is indeed modest".[6] Such gloomy statements raise the question whether the tort of conspiracy should be expanded or allowed to atrophy.

It is possible to-day to define conspiracy with some degree of confidence. In 1868 Willes J. defined it as "the agreement of two or more to do an unlawful act or to do a lawful act by unlawful means".[7] This definition has been often quoted in the context of both civil and criminal conspiracy. It has been pointed out that "as a matter of logic the first of these two categories of conspiracy includes the second. If there is an agreement to do an unlawful act, there is a conspiracy. It is immaterial whether the act in question is the ultimate object of the agreement or one of the steps along the way to that object. In either case the reason for calling the agreement a conspiracy is that it contemplates the performance of an unlawful act".[8] But in considering the definition of Willes J. it is important to appreciate that there are two types of civil conspiracy: the distinction

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1 *Crofter Hand Woven Harris Tweed Co. Ltd.* v. *Veitch* [1942] A.C. 435, 472.
2 *Cunard Steam-Ship Co. Ltd.* v. *Stacey* [1955] 2 Lloyd's Rep. 247, 257.
3 *Pete's Towing Services* v. *N.I.U.V.* [1970] N.Z.L.R. 32, 55.
4 H. Street, *The Law of Torts* (5th ed., London: Butterworths 1972) p. 347.
5 *Winfield and Jolowicz on Tort* (9th ed., London: Sweet and Maxwell 1971) by J. A. Jolowicz, T. Ellis Lewis, and D. M. Harris, p. 474, fn. 25.
6 J. G. Fleming, *The Law of Torts* (4th ed., Sydney: Law Book Co. 1971) p. 616.
7 *Mulcahy* v. *R.* (1868) L.R. 3 H.L. 306, 317.
8 C. Howard, *Australian Criminal Law* (2nd ed., Australia: The Law Book Co. 1970) p. 272.

is not between unlawful act and unlawful means, but rather between a conspiracy which contemplates the performance of an unlawful act and one which does not. A conspiracy may be actionable although no unlawful act is contemplated or performed. In 1903 Hood J. referred to the principle that "a combination to hurt another in his trade or business, without just cause or excuse, is unlawful, but that a desire to advance or protect one's own interest even at the expense of another, affords an excuse, although in no event can a combination to so hurt another be lawful if unlawful means are adopted".[9] In other words, a combination to injure another in his trade may be actionable although no unlawful means to that end are contemplated or used. It is possible to reconcile this approach with the definition of Willes J. by saying that where the object of a combination or conspiracy is to injure another in his trade or business, this is an unlawful object.[10] But there is a sense in which the object is not unlawful. A party to a conspiracy can be liable even though if he were acting alone with the same object or intention he would not. Accordingly, the object cannot be described as unlawful unless it is entertained by conspirators. It is submitted that it is clearer and more accurate to say that there are two forms of unlawful conspiracy to injure, one involving an agreement to commit an unlawful act and the other involving no unlawful act.

A proper appreciation of the definition and scope of the tort of conspiracy requires a study of five leading House of Lords' decisions.[11] There is the "famous trilogy"[12] of *Mogul S.S. Co.* v. *McGregor, Gow & Co.*,[13] *Allen* v. *Flood*[14] and *Quinn* v. *Leathem*,[15] followed by *Sorrell* v. *Smith*[16] and *Crofter Hand Woven Harris Tweed Co. Ltd.* v. *Veitch*.[17] These decisions, together with the High Court's decision in *McKernan* v. *Fraser*,[18] deal with the situation where no unlawful act is involved. It has been rightly said that "the books are full of decisions, so many and so various that it would be an impossible task to reconcile either the decisions or the dicta".[19] It is not proposed in this article to attempt the impossible. Nevertheless, a résumé of the leading cases is desirable, to illustrate the

[9] *Martel* v. *Victorian Coal Miners' Association* (1903) 29 V.L.R. 475, 522. See also *McKernan* v. *Fraser* (1931) 46 C.L.R. 343, 362.
[10] See, e.g., *Rookes* v. *Barnard* [1964] A.C. 1129, 1204 per Lord Devlin: "There are, as is well known, two sorts of conspiracies, the *Quinn* v. *Leathem* type which employs only lawful means but aims at an unlawful end, and the type which employs unlawful means."
[11] "[P]erhaps no branch of the law of torts contains a higher proportion of House of Lords cases than conspiracy": H. Street, *The Law of Torts*, op. cit. p. 345.
[12] Per Viscount Cave L.C. in *Sorrell* v. *Smith* [1925] A.C. 700, 711.
[13] [1892] A.C. 25, hereinafter called the *Mogul* case.
[14] [1898] A.C. 1.
[15] [1901] A.C. 495.
[16] [1925] A.C. 700.
[17] [1942] A.C. 435, hereinafter called the *Crofter* case.
[18] (1931) 46 C.L.R. 343.
[19] Per Lord Dunedin in *Sorrell* v. *Smith* [1925] A.C. 700, 717.

context in which the cases have arisen, and to make more meaningful an attempted definition of what constitutes conspiracy today. In this area of law it is specially important, when considering what any particular decision stands for, to bear in mind the following comment of a learned writer: "When looking for the *ratio decidendi* of a case we are not trying to discover the pre-existing rule of law which was applied in the case. What we are trying to determine is the *rule of law the decision will support when all other existing law-making decisions have been taken into account.* As new law-making decisions are given and taken into account, a given decision may no longer support a given rule".[20]

2 THE FAMOUS TRILOGY

A convenient starting point in the development of civil conspiracy is the House of Lords' decision in the *Mogul* case.[21] The defendants were shipowners who formed themselves into an association with a view to obtaining for themselves a monopoly of the tea trade between China and Europe. They offered very low rates and a rebate of 5 per cent to all shippers and agents who would deal exclusively with vessels belonging to members of the association. They took away the agency of their vessels from persons who also acted as shipping agents for other shipowners outside the association. The plaintiffs, who were rival shipowners, were excluded by the defendants from all the benefits of the association and suffered economic loss. The House of Lords, affirming the decision of the Court of Appeal,[22] held that the plaintiffs' action for conspiracy was not maintainable. The defendants had no personal ill-will towards the plaintiffs, nor any intention to harm them beyond what was necessarily involved in attracting to the defendants' ships the entire tea freights. The acts of the defendants were done with the motive or object of protecting and extending their trade. The court refused to accept that there was some standard of "fairness" or "reasonableness" which competition in trade ought not to violate. The defendants had "done nothing more against the plaintiffs than pursue to the bitter end a war of competition waged in the interest of their own trade".[23]

Allen v. *Flood*[24] is one of the most significant and lengthiest cases in the law of torts. The plaintiffs, Flood and Taylor were shipwrights employed

20 A. Harari, *The Place of Negligence in the Law of Torts* (Sydney: Law Book Co. 1962) p. 17.

21 [1892] A.C. 25. Some judges and writers have said that the earlier decision of *Gregory* v. *Duke of Brunswick* (1844) 6 Man. & G. 953 stands for the proposition that it is an actionable conspiracy for members of a theatre audience to agree to hiss an actor off the stage. But this view of the case has been disputed: Newark (1959) 1 U. Malaya L.R. 111. cf. *Clifford* v. *Brandon* (1809) 2 Camp. 358, 369-70.

22 (1889) 23 Q.B.D. 598.

23 Ibid. 614 per Bowen L.J.

24 [1898] A.C. 1.

on repairs to the woodwork of a ship. Some ironworkers who were employed on the ironwork of the ship objected to the plaintiffs being employed on the ground that they had previously worked at ironwork on another ship. The ironworkers were members of a trade union which objected to employment of shipwrights on ironwork. The defendant Allen, who was a delegate of the union, was sent for by the ironworkers and told that they intended to leave off working. The defendant informed the employers that unless the plaintiffs were discharged all the ironworkers would be called out or knock off work (the evidence conflicted as to which expression was used). The employers discharged the plaintiffs, without breach of contract, and refused to employ them again. Kennedy J. ruled that there was no evidence of conspiracy or intimidation. In reply to questions put by him, the jury found that Allen maliciously induced employers (1) to discharge Flood and Taylor from their employment, and (2) not to engage them. Kennedy J. gave judgment for the plaintiffs, and the Court of Appeal affirmed that decision. Allen appealed to the House of Lords. The question considered was whether there was evidence on which the jury could properly find for the plaintiff. The House of Lords, by a majority, allowed the appeal.[25] Allen had not used any unlawful means in procuring the plaintiffs' dismissal, and a malicious motive could make no difference.

What did the court mean by "malicious"? Kennedy J., in his direction to the jury, said "maliciously" meant "with the intention of doing an injury to the plaintiffs in their business, . . . and in the knowledge that what they were doing would so injure them; . . . that it was not for the mere purpose of forwarding fairly Allen's own interests, but from the indirect motive of doing a mischief to the plaintiffs in their lawful business".[26] The trial judge said that there was no evidence of malice in the sense of personal ill-will.[27]

The House of Lords considered in effect that the findings of the jury did not disclose a cause of action. It would have been sufficient for the court to have said that the defendant here was bent on the object of furthering the interests of those he represented and not of maliciously injuring the plaintiffs. In other words, the verdict was not supported by the evidence. Indeed, it is possible to interpret the decision in this way.[28] As Lord Shand said: "The case was one of competition in labour which is

[25] Lords Watson, Herschell, Macnaghten, Shand, Davey and James of Hereford, Lords Halsbury L.C., Ashbourne and Morris dissenting. Eight other judges wrote opinions at the request of the House. Of these only two found for the defendant.
[26] [1898] A.C. 1, 163.
[27] Ibid. 162.
[28] See e.g., *Bond* v. *Morris* [1912] V.L.R. 351, 359-60 per Hodges J: "Now I take it that *Allen* v. *Flood* decided . . . that it is not a wrong for any man to advise an employer of labour to discontinue employing any particular man, although that advice may cause damage to that particular man, if such advice is given, not with a view to injuring that particular man but for the purpose of benefiting either the giver of the advice himself or the person advised."

in all essentials analogous to competition in trade."[29] As Lord Herschell asked: "What was the object of the defendant and the workmen he represented, but to assist themselves in their competition with the shipwrights? A man is entitled to take steps to compete to the best advantage in the employment of his labour, and to shut out, if he can, what he regards as unfair competition, just as much as if he was carrying on the business of a shipowner."[30] But it is generally believed that the House of Lords went further and held that there was no cause of action on the findings of the jury. Some of the judges made it plain that it would not matter what the motives of the defendant were. For example, Lord Macnaghten said: "I do not think that there is any foundation in good sense or in authority for the proposition that a person who suffers loss by reason of another doing or not doing some act which that other is entitled to do or to abstain from doing at his own will and pleasure, whatever his real motive may be, has a remedy against a third person who, by persuasion or some other means not in itself unlawful, has brought about the act or omission from which the loss comes, *even though it could be proved that such person was actuated by malice towards the plaintiff*, and that his conduct if it could be inquired into was without justification or excuse."[31] Lord Shand said: "there was no case of malice in the ordinary sense of the term, as meaning personal ill-will, presented to the jury; but I agree with those of your Lordships who hold that, *even if such a motive had existed* in the mind of the defendant, this would not have created liability in damages."[32]

Their Lordships appear to have had in mind a contrast between the position of the individual acting alone and that of conspirators. Lord Herschell said: "It is certainly a general rule of our law that an act prima facie lawful is not unlawful and actionable on account of the motive which dictated it. I put aside the case of conspiracy, which is anomalous in more than one respect."[33] Lord Macnaghten said that "in my opinion the decision of this case can have no bearing on any case which involves the element of oppressive combination".[34]

The third case in the trilogy, *Quinn* v. *Leathem*,[35] has been the subject of much criticism.[36] "It is exceedingly difficult to determine just that was decided in *Quinn* v. *Leathem*", said Lord Reid in 1964.[37] The plaintiff Leathem was a flesher who employed some non-unionists. The defendants,

[29] Op. cit. 164, see also 167. See further *Quinn* v. *Leathem* [1901] A.C. 495, 514.
[30] Ibid. 141. See also 129-30, 131-2.
[31] Ibid. 151 (Italics added). See also 152.
[32] Ibid. 167 (Italics added). See also Lord Davey 172; Lord Herschell 126, 138-9; Lord Watson 96 and 100.
[33] Ibid. 123-4.
[34] Ibid. 153. See also Lord Shand 169; cf. 168; Lord Davey 172; Lord Watson 108.
[35] [1901] A.C. 495.
[36] See e.g., *Ware and De Freville Ltd.* v. *Motor Trade Association* [1921] 3 K.B. 40, 67-8; *Crofter* case [1942] A.C. 435; 473-4.
[37] *Rookes* v. *Barnard* [1964] A.C. 1129, 1170. See also at 1216, per Lord Devlin.

officials of the local Butchers' Assistants' Union, were determined that Leathem should employ union men only. Leathem refused to discharge his men, but offered to pay all fines, debts and demands against his men and asked to have them admitted to the union. He was informed that his men could not be admitted and should walk the streets for twelve months. The defendants informed Munce, a butcher who had been buying meat from Leathem for several years, that immediately Leathem's beef arrived Munce's men would be called out. Munce ceased dealing with the plaintiff. The defendants also induced several of Leathem's servants to leave him. At the trial the judge instructed the jury that they should determine the intent of the defendants, and in particular their intent to injure the plaintiff in his trade as distinguished from the intent of legitimately advancing their own interests. The jury found that the defendants had maliciously conspired to induce the plaintiff's customers and servants not to deal with the plaintiff or not to continue in his employment.

The House of Lords refused to disturb the verdict. The defendants here had no defence of legitimate trade competition. In the words of Lord Shand: "Their acts were wrongful and malicious in the sense found by the jury—that is to say, they acted by conspiracy, not for any purpose of advancing their own interests as workmen, but for the sole purpose of injuring the plaintiff in his trade."[38] Lord Macnaghten explained: "Leathem had no difference with his men. They had no quarrel with him. For his part he was quite willing that all his men should join the union. He offered to pay their fines and entrance moneys. What he objected to was a cruel punishment proposed to be inflicted on some of his men for not having joined the union sooner. There was certainly no trade dispute in the case of Munce. But the defendants conspired to do harm to Munce in order to compel him to do harm to Leathem, and so enable them to wreak their vengeance on Leathem's servants who were not members of the union."[39] Lord Lindley was prepared to assume that the unionists "acted as they did in furtherance of what they considered the interests of union men", but this could not excuse the *coercion* of the plaintiff's customers and servants, and of the plaintiff through them.[40] "The defendants' conduct was the more reprehensible because the plaintiff offered to pay the fees necessary to enable his non-union men to become members."[41]

The judges distinguished *Allen* v. *Flood*[42] on a variety of grounds, e.g., there was no conspiracy in that case;[43] it merely decided that an act which does not amount to a legal injury cannot be actionable because it is done

[38] [1901] A.C. 495, 515.
[39] Ibid. 511-12. See also Lord Brampton at 528.
[40] Ibid. 536.
[41] Ibid.
[42] [1898] A.C. 1.
[43] [1901] A.C. 495, 507.

with a bad intent;[44] the purpose of the defendant in that case was to promote his own trade interest;[45] all that Allen did was to inform the employers of the plaintiffs that most of their workmen would leave them if they did not discharge the plaintiffs.[46]

3 LEADING POST-TRILOGY CASES

In *Sorrell* v. *Smith*[47] the plaintiff Sorrell was a member of a union of retail newsagents. At the request of the union he transferred his custom from a firm of wholesale newsagents called Ritchie Brothers to another wholesale firm called Watson & Sons. The union had requested this action as it advocated the policy of limiting the number of retail newspaper shops in a given area and asked its members to withdraw their custom from any wholesale newsagent, such as Ritchie Brothers in this instance, who supplied newspapers to a retailer opening a new shop without its approval. The defendants were a committee of circulating managers representing the proprietors of the newspapers. They disapproved of the retail union's policy, and at the request of Ritchie Brothers threatened to discontinue the supply of papers to Watson & Sons unless Watson & Sons ceased supplying the plaintiff. As a consequence, Watson & Sons ceased supplying the plaintiff who brought an action for an injunction to restrain the defendants from interfering in combination or otherwise with his right to continue contractual relations with Watson & Sons.

The House of Lords held that the plaintiff had no cause of action. There was no conspiracy to injure. The defendants were not actuated by any spite against the plaintiff. Their purpose was not to injure him but to forward or defend their own trade interests. They thought that the more people who tried to sell papers the better for the papers. The plaintiff's union thought that the fewer shops tried to sell papers the better for the shopkeepers. The moves of both plaintiff and defendant "were episodes in a trade war which was being waged between the retailers of newspapers on the one hand and the producers and wholesalers on the other, and were adopted in the supposed interests of one or the other side. Stroke and counter stroke, whether wise or not, were equally prompted by a desire to forward or protect trade interests".[48] In the course of his judgment Viscount Cave L.C. stated his oft-quoted proposition of law "as material for the decision of the present case": "(1) A combination of two or more persons wilfully to injure a man in his trade is unlawful and, if it

[44] Ibid. 508-9.
[45] Ibid. 514.
[46] Ibid. 532-4. On this assumption *Allen* v. *Flood* "does not decide anything at all, except that a man cannot have an action brought against him if he makes a statement as to something injurious which might occur, if afterwards it does happen to occur": per A'Beckett J. in *Martell* v. *Victorian Coal Miners' Association* (1903) 29 V.L.R. 475, 484.
[47] [1925] A.C. 700.
[48] Ibid. 715: per Viscount Cave L.C.

results in damage to him, is actionable. (2) If the real purpose of the combination is, not to injure another, but to forward or defend the trade of those who enter into it, then no wrong is committed and no action will lie, although damage to another ensues. The distinction between the two classes of case is sometimes expressed by saying that in cases of the former class there is not, while in cases of the latter class there is, just cause or excuse."[49]

Judicial minds, however, were bound to differ as to whether to infer from established facts an intention on the part of defendants to injure the plaintiff or an intention to forward the defendants' own interests. Two examples may be given. In *Martell* v. *V.C.M.A.*[50] the defendants and other members of the Coal Miners' Union determined that they would not work with the plaintiff who had broken the rules of another union; they informed the mine manager, and when the plaintiff was not dismissed called out the union members on strike. The plaintiff lost his employment and when work resumed was refused further employment. The members went on strike without giving fourteen days' notice as required by their contracts of employment. A'Beckett J. held there was no cause of action: "the mere intimation to an employer that a combination of workmen will not work if a certain person or certain men are retained in their employment, they giving that intimation not to gratify malice felt with reference to those men with whom they refuse to work, not prompted by a desire to injure those persons, but with the desire to strengthen their own combination by excluding from employment with them persons who are not, as they suppose, fit to be associated with them in their union, is not an illegal act, and I think that nothing more than that has been done in this case."[51] But on appeal this decision was reversed. Madden C.J. concluded that the same facts "show plainly that the defendants' primary, and indeed only, purpose and intention was to punish the plaintiff by depriving him of his means of living because he had offended another union, and that without intending to effect any other purpose, nor indeed having any purpose to effect, for their own advantage".[52]

McKernan v. *Fraser*[53] is another example in point. The plaintiffs were members of, and the defendant was secretary of, a seamen's union which had been deregistered. The plaintiffs refused to pay their contributions to the union until it became registered. They joined a rival seamen's union which attempted to register itself. The former union resolved that its members should refuse to sail with members who refused to pay their

[49] Ibid. 712.
[50] (1903) 29 V.L.R. 475.
[51] Ibid. 486.
[52] Ibid 507. Hood J. was of the same opinion, but both he and Hodges J. considered there was a conspiracy by unlawful means, i.e., breach of contract and procuring breach of contract.
[53] (1931) 46 C.L.R. 343.

contributions. The defendant told the shipping company that the men would not sign on if the plaintiffs were signed on. The men ultimately refused to sail with plaintiffs who were not signed on as a result. The High Court held by a majority that the plaintiffs action for conspiracy should fail. The minority judges pointed out: "The facts in the present case are not in dispute, though possibly all minds would not draw the same inferences from these facts."[54] They considered that the action of the defendant and his fellows was not dictated solely or at all by a desire to forward or protect their own interests. The overdue contribution of each plaintiff amounted to merely £1. The real object of their action was to punish the plaintiffs for supporting a rival union and prevent them from obtaining employment. The majority, however, considered that the action of the defendant was dictated by a desire to advance and protect the interests of the old union by preventing members of the rival union from gaining employment.

The most important case for an elucidation of the modern law of conspiracy is the *Crofter* case.[55] The seven plaintiffs were producers of tweed cloth on the Island of Lewis. They imported their yarn, already spun, from the mainland, and after having it hand-woven by crofters in their homes, sent it to the mainland for finishing. Five mill-owners, on the other hand, had yarn spun in their mills, and after having it hand-woven by the crofters in their homes, finished it off in the mills. The defendants were two officials of a union the membership of which included employees of the mill-owners and the dockers employed at the island port. The union asked the mill-owners for a rise in wages for the spinners and an agreement that only members of the union should be employed. The mill-owners said that it was impossible to meet this request in view of the competition from producers who imported yarn from the mainland. The defendants instructed the dockers to refuse to handle imports of mainland yarn and unfinished cloth destined for the mainland. The plaintiffs asked the court for an injunction to prevent the embargo. The House of Lords held unanimously that there was no conspiracy to injure. The purpose of the defendants was to promote the interests of the members of the union. Viscount Simon L.C. said the predominant purpose of the defendants was "to benefit their trade-union members by preventing under-cutting and unregulated competition, and so helping to secure the economic stability of the island industry. The result they aimed at achieving was to create a better basis for collective bargaining, and thus directly to improve wage prospects. A combination with such an object is not unlawful, because the object is the legitimate promotion of the interests of the combiners".[56] The defendants' object, said Lord Wright, "was to promote their union's

[54] Ibid. 351.
[55] [1942] A.C. 435.
[56] Ibid. 447.

interests by promoting the interest of the industry on which the men's wages depended".[57]

4 THE MODERN RECONCILIATION OF THE AUTHORITIES

The "famous trilogy" can only be appreciated in the light of subsequent cases. The significance of the distinction between the case of an individual acting alone and the case of individuals acting in combination emerged only gradually.[58] For example, it was possible to argue that the element of conspiracy was incidental rather than crucial in *Quinn* v. *Leathem*.[59] In 1921 Atkin L.J. said: "It appears to me to be beyond dispute that the effect of the two decisions in *Allen* v. *Flood* and *Quinn* v. *Leathem* is this: that on the one hand a lawful act done by one does not become unlawful if done with an intent to injure another, whereas an otherwise lawful act done by two or more in combination does become unlawful if done by the two or more in combination with intent to injure another."[60] The adoption of this view by the balance of judicial authority established civil conspiracy as an independent tort.[61]

5 THE TERMINOLOGY OF DEFINITION IN CONSPIRACY BY LAWFUL MEANS

It will be recalled that in *Sorrell* v. *Smith*[62] Viscount Cave said that if the real purpose of the combination was not to injure another, but to forward the trade of the combiner, then no wrong was committed. Unfortunately, this distinction between intention to injure and intention to forward trade interests pervades many of the cases. The difficulty is that combiners will often have *both* these intentions. In *McKernan* v. *Fraser*[63] Evatt J. said: "it is almost always possible to regard trade union action to prevent the employment in the industry of non-unionists or rival unionists, from two points of view, first as a combination for the purpose of damaging or injuring the non-unionists, secondly as a combination to protect or

[57] Ibid. 478.

[58] The development is traced in: E. I. Sykes, *Strike Law in Australia* (Sydney: Law Book Co. 1960) pp. 134-140.

[59] [1901] A.C. 495. But cf. at pp. 510, 529-30. This view was described by Lord Dunedin as "the leading heresy": *Sorrell* v. *Smith* [1925] A.C. 700, 719-20.

[60] *Ware and De Freville, Ltd.* v. *Motor Trade Association* [1921] 3 K.B. 40, 90-1. See also 84. Scrutton L.J. offers a similar rationalization of the famous trilogy at 67-8. See also Lord Dunedin in *Sorrell* v. *Smith* [1925] A.C. 700, 718-19.

[61] See e.g. *Osborne* v. *Greymouth Wharf Labourers' Union* (1911) 30 N.Z.L.R. 634, 643; *Sorrell* v. *Smith* [1925] A.C. 700, 719, 724; *Coffey* v. *Geraldton Lumpers' Union* (1928) 31 W.A.L.R. 33, 39-40; *McKernan* v. *Fraser* (1931) 46 C.L.R. 343, 351, 380; *Hughes* v. *Northern Coal Mine Workers' Industrial Union* (1936) 55 N.Z.L.R. 781, 786; *James* v. *The Commonwealth* (1939) 62 C.L.R. 339, 366; *Cabassi* v. *Vila* (1940) 64 C.L.R. 130, 143, 150; *O'Brien* v. *Dawson* (1942) 66 C.L.R. 18, 28; *Crofter* case [1942] A.C. 435, 442-3, 466, 474-5, 486-7; *Huntley* v. *Thornton* [1957] 1 W.L.R. 321, 342; *Rookes* v. *Barnard* [1964] A.C. 1129, 1233-4.

[62] [1925] A.C. 700, 712.

[63] (1931) 46 C.L.R. 343, 390.

advance the interests of the union."[64] In truth, the defendants who intend to forward their own interests will intend also to injure. The point is that they intend to injure in order to forward their trade interests. Their immediate purpose, then, is to injure; their ultimate aim or motive is to forward their interests.

On this analysis, once it is established there was an intention to injure, liability will depend on *why* the defendants intended to injure. In the *Crofter* case Viscount Simon recommends the use of the word "purpose" or "object" rather than "intention", as " 'intention' may be understood to cover results which may reasonably flow from what is deliberately done, on the principle that a man is to be treated as intending the reasonable consequence of his acts. Nothing of the sort appears to be involved here".[65] Moreover, he pointed out that strictly speaking the word "injury" is limited to actionable wrong, while "damage" in contrast means harm occurring in fact, whether actionable or not.[66] If the object of the defendants was to damage, they will still avoid liability if their motive was "legitimate". For example, in *Cox* v. *Journeaux*[67] Dixon J. said: "Even if the plaintiff could show that the defendants . . . did combine for a common end involving injury to him, . . . they were . . . impelled to do so by their desire to protect or secure the interests of themselves and other shareholders in the companies." But if the defendants' motive was not legitimate they will be liable. The plaintiff must prove that the defendants combined to damage him with a purpose other than that of advancing or protecting their legitimate interests. It is true that in some cases "intention" (or "object") and "motive" may be inextricably bound together. In *Brisbane Shipwrights' Provident Union* v. *Heggie*[68] Griffith C.J. gives the example of a man who forms the intention to kill another and does so: "His

[64] See also per Lord Sumner in *Sorrell* v. *Smith* [1925] A.C. 700, 742: "How any definite line is to be drawn between acts, whose real purpose is to advance the defendants' interests, and acts, whose real purpose is to injure the plaintiff in his trade, is a thing which I feel at present beyond my power. When the whole object of the defendants' action is to capture the plaintiff's business, their gain must be his loss."

[65] [1942] A.C. at 444. Cf. Viscount Maugham at 452: "when the question of the real purpose is being considered it is impossible to leave out of consideration the principle that men are in general to be taken as intending the direct consequences of their acts." In *P.T.Y. Homes Ltd.* v. *Shand* [1968] N.Z.L.R. 105, 111 Haslam J. expressed preference for Viscount Simon's view that the test is what is in truth the object in the minds of the combiners when they acted as they did. Such reasoning would be equally applicable in relation to the ultimate purpose or motive of the combiners.

[66] Ibid. at 442. See also the *Mogul* case (1889) 23 Q.B.D. at 612.

[67] (1935) 52 C.L.R. 713, 718. See also *Crofter* case [1942] A.C. at 469 per Lord Wright: "A competitive combination of traders to undercut prices may be said to have the immediate result of excluding rivals from the trade, but if its real object is the ultimate increase of business profits by the traders it is lawful: *Mogul* case."

[68] (1906) 3 C.L.R. 868, 701. See also *Crofter* case [1942] A.C. 435, 452 per Viscount Maugham: " 'motive' is clearly not the same thing as 'intention', but in many cases the one is the parent of the other, and they are so closely related that they cannot be separated."

motive for forming that intention may, or may not, be distinct from the intention. It may be a desire for revenge for a real or fancied injury, in which case the motive precedes, and is distinct from the intention. In other cases, it may be so involved in the intention as to be undistinguishable from it. When a man deliberately intends by his act to do harm to another, it is impossible to say that part, at least, of his motive is not the desire to produce that result. . . . But in general, the motive which induces a man to form an intention is distinct, and should be distinguished, from the intention itself." Where the defendants intend to injure another with no motive other than intention to bring about that result, there is clearly an absence of legitimate motive. One can agree with Lord Wright that "a desire to injure . . . may be motivated by wantonness".[69] But as Evatt J. pointed out in *McKernan* v. *Fraser*[70] it is not easy to picture such a case: "The whole thing would be stamped with wantonness, almost absence of meaning or significance."[71]

Often parties to a combination will have mixed motives, both justifiable and unjustifiable. In such cases the courts have adopted the test of *predominant* motive as the criterion of liability. In the words of Viscount Simon: "if there is more than one purpose actuating a combination, liability must depend on ascertaining the predominant purpose."[72] And Lord Wright: "it is for the jury or judge of fact to decide which is the predominant object."[73] Of course it is possible that no particular motive will predominate. "The case . . . may still have to be considered in which a jury holds that there were two equal concurrent purposes of a conspiracy, the one to further a trade dispute, the other something different."[74] In such a case it is submitted that the plaintiff must fail, as he has failed to establish that the defendants were predominantly motivated by a wrongful motive.

One problem related to the question of motive is whether "malice" is relevant to liability. The word "malice" (and "maliciously") is not easy to define with confidence. "Sometimes, indeed", said Lord Macnaghten in 1898, "I rather doubt whether I quite understand that unhappy expression myself."[75] In 1925 Lord Sumner said: "Disputes as to the meaning and place of the words 'malice' and 'maliciously' in the law of torts are now old and have not been wholly settled. Perhaps they never will be."[76] The relevance of "malice" to conspiracy depends on which of several possible meanings is given to the word. If it merely means

[69] *Crofter* case [1942] A.C. at 471.
[70] (1931) 46 C.L.R. 343, 399.
[71] Cf. Sykes, *Strike Law in Australia*, op. cit. p. 154, fn. 96.
[72] *Crofter* case [1942] A.C. at 445.
[73] Ibid., at 478. See also Lord Porter at 490, Viscount Maugham at 452.
[74] *Rookes* v. *Barnard* [1963] 1 Q.B. 623, 638: per Sach J.
[75] *Allen* v. *Flood* [1898] A.C. at 144. See generally Fridman, "Malice in the Law of Torts" (1958) 21 M.L.R. 484.
[76] *Sorrell* v. *Smith* [1925] A.C. at 737-8.

"intention to damage", then clearly it is a condition of liability in conspiracy. If it is simply another expression for wrongful motive or purpose, then again, as liability depends on the absence of wrongful motive, malice must be a condition of liability. But there is a third possible meaning, which is the meaning usually intended in this context, i.e., personal animosity, spite, enmity or malevolence.[77]

There is some judicial support for the view that malice in this third sense is essential to liability and is indeed the only type of wrongful motive. In *Sorrell* v. *Smith*[78] Lord Sumner said that if the defendants were motivated by selfish interests they would be exonerated, but if they really acted from some other motive they would be liable. "How, then", he asked, "can actual malice be excluded from the category of other motives or indeed what other motive can there be in such a matter, beyond selfishness and malice, except, indeed, mere irresponsible wantonness?" It may be, however, that by malice he meant wrongful motive generally, as earlier in his judgment he refers to malice as "connoting personal enmity or spite *or some other evil motive*".[79] In *McKernan* v. *Fraser*,[80] Evatt J. said that "malicious object" or "malevolence" is "a necessary ingredient in the proof of the tort of civil conspiracy".[81] He assumed that personal malice was the only form of wrongful motive.

It is clear today that malice in its third sense "is neither an essential element in the offence nor conclusive of the offence having been committed".[82] First, malice is not an *essential* element. Its absence is not conclusive of absence of liability. In the *Crofter* case[83] Lord Wright said: "As to the authorities, the balance, in my opinion, is in favour of the view that malevolence as a mental state is not the test. I accordingly agree with the appellants' contention that they are not concluded by the finding that the respondents were not malevolent."[84]

Second, malice is not necessarily *sufficient* to establish conspiracy. If the combiners are promoting their legitimate interests, some ill-will may well be generated in the conflict. Professor Grunfeld states: "it is elementary psychology that the deliberate pursuit of a course of conduct which will inflict damage on another is generally accompanied by a surge of *animus* against that other symptomatic of aggressiveness and guilt. For

77 "When I want to express spite or ill-will, I shall use the word malevolence": per Lord Wright, *Crofter* case at 463.
78 [1925] A.C. at 739.
79 Ibid. at 738 (italics added).
80 (1931) 46 C.L.R. 343.
81 Ibid. 404. See also 388.
82 Per Viscount Cave in *Sorrell* v. *Smith* [1925] A.C. at 714. But his view that this is true when malice means "personal enmity or spite or *some other evil motive*" is questionable, as wrongful motive is the essence of actionable conspiracy by lawful means.
83 [1942] A.C. at 471.
84 See also, ibid. 469, 450, per Viscount Maugham. See further: *Eastham* v. *Newcastle United Football Club Ltd.* [1964] 1 Ch. 413, 453.

legal purposes, such animus is to be ignored."[85] The point is made by Lord Wright in the *Crofter* case, where he says: "I cannot see how the pursuit of a legitimate practical object can be vitiated by glee at the adversary's expected discomfiture."[86]

Nevertheless, the presence of malice may be sufficient to establish liability, This is so if, in the words of Lord Sumner, for "pure commercial selfishness" is substituted "independent malevolence towards others".[87] "Independent" or "disinterested" malevolence means malice that is irrelevant to the defendants' legitimate interests.[88] If the defendants have evinced dislike of or hostility towards the plaintiff this must be examined "in order to ascertain whether it is a motive related to a clash of economic or professional interests and arises from strong opinions as to the plaintiffs' own conduct in relation thereto; whether, on the other hand, the hostility or dislike is not a result of the feelings and attachments of the defendants to the economic and professional interests which they allege they are advancing or defending, but has its true source in personal hatred or bitterness".[89] If the latter is the case, then provided that is the predominant motive, liability is made out. In Lord Wright's opinion, "proof of malevolent feelings, coupled with proof that the combiners had in view no tangible benefit to themselves would clearly . . . be enough to show that the combination was wrongful".[90] On the facts of *McKernan* v. *Fraser*[91] Evatt J. considered that the purpose of the action taken by McKernan and the greasers against the plaintiffs was to further the interests of the old trade union and its members by preventing the members of the rival union from gaining employment in the industry: "whatever dislike or hostility was displayed" towards the plaintiffs "was at once the result of the struggle for supremacy between rival groups".[92]

So far it has been assumed that all the parties to the combination have the same motive. But what if one or more is acting from one motive and others from a different motive? In such a case it appears that provided the motives, albeit different, are of a justifiable kind, there is no conspiracy. In the *Crofter* case[93] it was held by one judge and assumed by three that there was a combination between the unionists and the mill-owners. The

[85] C. Grunfeld, *Modern Trade Union Law* (London: Sweet and Maxwell 1966) 417.
[86] [1942] A.C. at 471. See also ibid. 445; *Sorrell* v. *Smith* [1925] A.C. at 742; *Martel* v. *Victorian Coalminers Association* (1903) 29 V.L.R. 475, 513: "if (the defendant) is only doing what by law he is at liberty to do, it does not matter whether he succeeds with malevolent gloating or with honest sympathy at the loss which the man complaining sustains." (per Madden C.J.).
[87] *Sorrell* v. *Smith* [1925] A.C. at 737.
[88] See Evatt J. in *McKernan* v. *Fraser* (1931) 46 C.L.R. at 397, 404.
[89] Ibid. 403.
[90] *Crofter* case [1942] A.C. at 469. See also, Evatt J. in *McKernan* v. *Fraser* (1931) 46 C.L.R. at 394; *Martel* v. *Vic. Coal Miners Assoc.* (1903) 29 V.L.R. at 510.
[91] (1931) 46 C.L.R. 343.
[92] Ibid. 404.
[93] [1942] A.C. 435.

plaintiffs argued there was a conspiracy because the parties combining had substantially different and even opposed, objects. This argument was rejected by the House of Lords. Viscount Maugham said there was no conspiracy "if all the various combining parties have their own legitimate trade or business interests to gain, even though these interests may be of differing kinds . . . I think reasonable self-interest in trade or business is 'a just cause or excuse' for those combining even though each of them 'has his own axe to grind' ".[94] But he insisted there must be "a certain identity of object".[95] Lord Wright agreed, and pointed out that "both employers and workmen have a common interest in the prosperity of their industry, though the interest of the one may be in profits and of the other in wages".[96]

A situation may arise where parties A and B to a combination have a wrongful or unjustifiable motive and the others, C and D, have justifiable motives. Is there a conspiracy between all the parties to the combination? In 1918 McCardie J. said, obiter, that "where persons acting in combination to achieve such a purpose as that which is shown in the present case, then the proved malice of one or more may be attributed to the other participants in the combination".[97] The same approach was suggested by Viscount Maugham in the *Crofter* case when, speaking of the defence of self-interest in trade, he said: "If indeed some of these parties were actuated merely by hate or vindictive spite or with no just excuse at all, I should doubt very much whether the defence would succeed."[98] In the same case, however, Lord Porter implied that the malice of one could not be so easily attributed to another. "If . . . one of the parties had no purpose but to vent his own vindictive spite and *if the other knew of and countenanced* that purpose by giving his assistance to the malicious acts of the first, it may be that the other would then be a participant in the wrong planned by the first to which he gave his assistance."[99]

Lord Porter's opinion is preferable, and is supported by the earlier and more elaborate opinion of Evatt J. in *McKernan* v. *Fraser*.[100] He said that if A and B did not know of the malicious motives of C and D they would not be liable; the malice of C and D cannot be imputed to A and B: "hatred or grudge does not, on any principle of law, become a motive imputable to those who are either unaware of it or who, being aware of it,

94 Ibid. 453.
95 Ibid. 454.
96 Ibid. 479; see also 495 (Lord Porter). See also: *Reynolds* v. *Shipping Federation* [1924] 1 Ch. 28, 39.
97 *Pratt* v. *B.M.A.* [1919] 1 K.B. 244, 279. (The purpose of the defendants was to molest the plaintiff in the exercise of his professional calling, by coercion and threats.)
98 [1942] A.C. at 453.
99 Ibid. 495.
100 (1931) 46 C.L.R. at 399-409.

condemn."[101] Moreover, he considered that C and D would not be liable unless they communicated the existence of their malice to one another. Thus if it could be shown that C and D for the purpose of satisfying their hatred of the plaintiff agreed between themselves to procure acts to be done by A and B and themselves for the purpose of injuring the plaintiff, such agreement would be a *separate* conspiracy to injure: C and D would be liable.[102]

If A is guilty and B innocent of evil motive, not only are A and B not liable for conspiracy, but A is not liable alone. For "it is not possible . . . to adjudge that A conspired with B, but that B did not conspire with A. As a general rule, unless both are liable, neither is liable".[103] On the principle of *Allen* v. *Flood*,[104] the bad motives of an individual in doing lawful acts, and acting alone, cannot affect the lawfulness of his actions. The further fact that his actions were in pursuance of a combination to which others without bad motives were also parties, cannot make him liable for the tort of conspiracy to injure, unless the others are equally liable with him.[105]

If A and B have a justifiable motive and C has a wrongful motive, it would follow from the argument presented so far that if A and B *know of* C's evil motive and still combine with him, all parties will be liable in conspiracy. But Evatt J. suggests the question is as to the "malicious nature of the whole combination".[106] The fact that A and B know of C's unjustifiable motive may arguably not render the combination predominantly malicious. Professor Sykes states: "if the combination as such has a predominantly innocent purpose, the fact that A and B knew of C's motive would not appear to change the legal picture".[107] But if ten people combine, and one, to the knowledge of the others, has a wrongful motive, it is submitted that they should all be liable if the wrongfully-motivated member could reasonably have been excluded. Moreover, in certain circumstances the wrongfully motivated person may be crucial to the effectuating of the conspiracy, so that his inclusion in the combination may be said to give it a predominantly evil character.

The confusion of terminology in defining conspiracy, especially the motive aspect, may account in part for conflicting judicial opinions regarding the incidence of the burden of proof. In the *Mogul* case, Bowen L.J. spoke in terms of parties agreeing to the "intentional doing of some act

101 Ibid. 408. See also *Huntley* v. *Thornton* [1957] 1 W.L.R. 321, 343; *P.T.Y. Homes Ltd.* v. *Shand* [1968] N.Z.L.R. 105, 110.

102 Ibid. 401-2. What if C knew of D's malice, but D did not know of C's?

103 Ibid. 407: "except in the rare instances where evidence admissible against one party only, authorizes a finding to be made against him alone."

104 [1898] A.C. 1.

105 (1931) 46 C.L.R. at 409.

106 Ibid. 408.

107 *Strike Law in Australia*, op. cit. 157.

to the detriment of the plaintiff's business *without just cause or excuse*".[108] To speak of *excusing* the doing of some intentional act may suggest that once the plaintiff has proved the intentionally inflicted injury the burden is then on the *defendants* to prove some excuse. But it is possible, using the same terminology, to say that the *plaintiff* must prove *absence* of excuse. In 1925 Lord Sumner said there were "conflicting opinions on the question, whether . . . a plaintiff has to show that the defendants' action was not within the *Mogul* rule or whether, on proof of an interference with his business, he shifts to the defendants the burden of excusing their action by praying that rule in aid".[109]

There was at one stage in the development of civil conspiracy, a view that it is prima facie unlawful for an individual (a fortiori, a combination) to interfere with the right of a person to trade or dispose of his labour.[110] No doubt it could be argued on such a view that the defendant ought to prove, if possible, that his interference was justifiable. But this view was largely discredited by the House of Lords in *Allen* v. *Flood*,[111] at least as regards an individual acting alone. In the case of a combination there is some support for the view that a deliberate interference with the trade of another without just cause or excuse is actionable, perhaps implying that the interference itself is prima facie unlawful and the burden is on the defendant to justify it if he can.[112] But the balance of judicial opinion is in favour of placing the burden of proof on the plaintiff. In the *Crofter* case, Lord Wright indicated that it is a question of what is the cause of action.[113] He said the appellants do not prove they have been damnified by tortious action "by showing that they have been harmed by acts done by the respondents in combination, these acts being apart from any question of combination otherwise within the respondents' rights. It is not then for the respondents to justify these acts. The appellants must establish that they have been damnified by a conspiracy to injure, that is, that there was a wilful and concerted intention to injure without just cause, and consequent damage. . . . The plaintiff has to prove the wrongfulness of the defendants' object".[114]

What are the essential ingredients of the cause of action? First, an intention to damage. This the plaintiff must prove. Second, the plaintiff must prove that the defendants' predominant motive was wrongful or that there was an absence of any legitimate motive. Wrongful motive cannot be

[108] (1889) 23 Q.B.D. 598, 617 (Italics added).
[109] [1925] A.C. at 742.
[110] See e.g., Lord Lindley in *Quinn* v. *Leathem* [1901] A.C. 495, 532-43.
[111] [1898] A.C. 1: see e.g. at 139.
[112] See per Viscount Maugham, *Crofter* case [1942] A.C. at 449, 451.
[113] Ibid. 472.
[114] Ibid. 471-2; see also Lord Porter at 495. See further *Sorrell* v. *Smith* [1925] A.C. at 726-8 (Lord Dunedin), 747-8 (Lord Buckmaster); *Stratford* v. *Lindley* [1965] A.C. 269, 298-9; *P.T.Y. Homes Ltd.* v. *Shand* [1968] N.Z.L.R. 105, 110-11; *McKernan* v. *Frazer* (1931) 45 C.L.R. at 390.

simply inferred from an intention to damage. We have seen that an intention to damage with no motive other than to cause damage is sufficient to establish liability. But it is difficult to prove a negative, i.e. the *absence* of any legitimate motive. The plaintiff would attempt to prove a positive, i.e. the existence of a wrongful motive. But even then, proof that a wrongful motive predominated involves proof that legitimate motives were absent or subsidiary. In most cases of course, it will not matter who has the burden of proof. It may be going too far to say "we are reduced to a mere question of words";[115] but it is true that in this area, where the final result depends largely on findings of fact, "if the task of analysing the customary volume of evidence be conscientiously discharged, the legal burden, so far as relates to the intention of the defendants, may have diminished practical importance".[116] Any difficulty facing a plaintiff would be best overcome by placing a provisional burden of proof on the defendant, once the plaintiff has proved intention to damage. If the plaintiff proves this intention it should rest with the defendant *to raise the issue* of legitimate motive indicating what that motive is. At the end of the day the burden of proving, on the balance of probabilities, the absence of any legitimate motive raised by the defendant or the predominant presence of a wrongful motive, would rest on the plaintiff. If there were no provisional burden on the defendants to raise the issue of legitimate motive, the plaintiff, in theory, would be obliged to disprove the existence of every conceivable legitimate motive.[117]

6 THE RATIONALE OF CONSPIRACY

To justify the existence of an independent tort of conspiracy it is necessary to explain why an act done with wrongful motives should result in liability if done by two or more but not if done by one. In 1925 Lord Dunedin said it was "a very natural question to ask why should motive or intention be immaterial in the case of an act done by one and yet go to make the whole difference when the act is done by a combination of persons?"[118] A conspiracy involves at least two parties, but what is the magic of plurality? "A juristic principle cannot rest on a mere appeal to the vocabulary of vituperation."[119] In the *Crofter* case, Viscount Maugham said: "I have never myself felt any difficulty in seeing the great difference between the acts of one person and the acts in combination of two or of a multitude."[120] But in the same case Lord Wright said: "The rule may

[115] *Crofter* case, at 451, per Viscount Maugham.
[116] *P.T.Y. Homes* v. *Shand* [1968] N.Z.L.R. 105, 111. See also *Stratford* v. *Lindley* [1965] A.C. 269, 299.
[117] The burden of proof of justifying a conspiracy *by unlawful means* (if it is possible to justify), rests on the defendant: see *Crofter* case [1942] A.C. at 495-6.
[118] *Sorrell* v. *Smith* [1925] A.C. 700, 724.
[119] Per McCardie J., *Pratt* v. *B.M.A.* [1919] 1 K.B. 244, 255.
[120] [1942] A.C. at 448.

seem anomalous",[121] and: "The distinction between conduct by one man and conduct by two or more may be difficult to justify."[122]

The main argument put forward to justify conspiracy is simply that there is strength in numbers: "a man may encounter the acts of a single person, yet not be fairly matched against several";[123] "a combination may make oppressive or dangerous that which if it proceeded only from a single person would be otherwise".[124] It is true that a combination of persons may be more effective than one, but equally it may not be: it depends on the circumstances. "Some men are a host in their individual selves: are lions; some multitudes are asses: e.g. Napoleon: Bismark: and the nations whom they crushed."[125] Pollock considered "the vexed question of whether there is any magic in 'plurality' will never be settled until some powerful corporation (being, of course, only one person in law) does some of the things which . . . one person may do with impunity but two or more may not".[126] It may be argued that a combination is *more likely* to be oppressive, but it is doubtful whether this would justify a principle of liability which is applicable to combination but not individuals.[127]

A second argument to justify liability for conspiracy is that a combination spells wrongful motive: "the very fact of the combination may show that the object is simply to do harm, and not to exercise one's own just rights";[128] "any combination to injure involves an element of deliberate concert between individuals to do harm".[129] But the fact of combination to injure does not necessarily imply wrongful motive: it may be easier to prove wrongful motive in the case of agreement between individuals than in the case of an individual acting alone, but such a matter of proof should not affect principle.

A third argument concerns the historical antecedents of civil conspiracy. Conspiracy as a crime was developed by the Court of Star Chamber and later became a common law misdemeanour. The courts developed the theory that an action in the nature of an action on the case would lie for

121 Ibid. 462.
122 Ibid. 467.
123 The *Mogul* case [1892] A.C. at 45, per Lord Bramwell.
124 Ibid. (1889) 23 Q.B.D. at 616. See also *Taffs* v. *Beesley* (1894) 16 A.L.T. 59, 61; *Boots* v. *Grundy* (1900) 82 L.T. 769, 772; *Quinn* v. *Leathem* [1901] A.C. 495, 511, 530, 531.
125 Argument of counsel in *Quinn* v. *Leathem* [1901] A.C. 495, 503-4. See also *Crofter* case [1942] A.C. at 443, 487-8.
126 (1925) 41 L.Q.R. 369. There is the possibility, however, that the corporation has conspired with its directors (see infra).
127 "The common law may have taken the view that there is always the danger that any combination may be oppressive, and may have thought that a general rule against injurious combinations was desirable on broad grounds of policy.": per Lord Wright, *Crofter* case [1942] A.C. at 468.
128 *Mogul* case (1889) 23 Q.B.D. at 616 per Bowen L.J.
129 *Crofter* case at 468 per Lord Wright.

damages at the suit of a person suffering from damage inflicted by defendants who combined for the purpose of inflicting it.[130] But this is an explanation rather than a justification of the present law. Moreover, Lord Porter said in 1942 "in recent times I do not think that it has been held criminal merely to combine to injure a third party provided no unlawful means are used or contemplated and it is doubtful whether such a combination ever was criminal".[131]

As a special rule for two or more combining cannot be satisfactorily justified a question arises as to whether conspiracy by lawful means is itself justifiable as a tort. Alternatively, is the principle of *Allen* v. *Flood*[132] justifiable? The principle has been criticized. In 1903, Madden C.J. said: "If the House of Lords could overrule any of its own decisions, I think it would, and should, overrule *Allen* v. *Flood*, and moreover, I believe that, so far as it can go towards overruling it, it will go."[133] In 1931 Evatt J. said: "It may be that if A, inspired by bad motives, does an act which is not unlawful but which designedly cause injury to B, a proper system of jurisprudence should hold A liable."[134] But he considered it a matter for legislative intervention, not judicial reaction.

It is submitted that it is not beyond the power of the courts to reconsider the principle of *Allen* v. *Flood*,[135] and adopt the principle enunciated by Bowen L.J. in the *Mogul* case:[136] "intentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that other person's property or trade, is actionable if done without just cause or excuse." The adoption of such a principle would "solve the antimony".[137] Moreover, there is some authority for this view.[138] Quite recently Lord Devlin seemed to regard

130 Ibid. 443-4 per Viscount Simon.

131 Ibid. 488; see also, Sykes, *Strike Law in Australia*; op. cit. 152. Contra: Lord Dunedin in *Sorrell* v. *Smith* [1925] A.C. at 725. The Criminal law does impose liability for conspiracies which, if executed, would not involve illegalities of any kind, e.g. conspiracy to effect a public mischief: *Shaw* v. *D.P.P.* [1962] A.C. 220, *Knuller* v. *D.P.P.* [1972] 2 All E.R. 898, *Reg* v. *Withers* [1974] 2 W.L.R. 26 cf. Howard, *Australian Criminal Law*, op. cit. 276: "It is impossible to justify punishing an agreement to do something which, if done, is not unlawful in any sense."

132 [1898] A.C. 1.

133 *Martel* v. *Victorian Coal Miners' Association* (1903) 29 V.L.R. 475, 508.

134 *McKernan* v. *Fraser* (1931) 46 C.L.R. at 410. "From this distance it seems clear that the 'liberal' majority in *Allen* v. *Flood* made a short term gain for trade union immunity from property-holding juries, at the cost of losing theoretical consistency and a practical weapon against intolerable conduct": J. D. Heydon, *The Economic Torts*, (London: Sweet & Maxwell 1973) 24.

135 [1898] A.C. 1.

136 (1889) 23 Q.B.D. at 613; see also 608, 610.

137 Per Lord Wright in *Crofter* case [1942] A.C. at 468.

138 See e.g. *Quinn* v. *Leathem* [1901] A.C. 495, 537 (Lord Lindley); *Giblan* v. *N.A.L.U.* [1903] 2 K.B. 600, 619-20 (Romer L.J.); *Martel* v. *V.C.M.A.* (1903) 29 V.L.R. 475, 512; *Bond* v. *Morris* [1912] V.L.R. 351; *Pratt* v. *B.M.A.* [1919] 1 K.B. 244, 260, 263. The last two decisions interpret *Allen* v. *Flood* in a way that would permit recovery against an individual where his acts involved malice, coercion or threat.

what was described in 1936 as "one of the most disputed topics in English law",[139] as still open.[140]

If the principle of *Allen* v. *Flood*[141] were rejected and the position of the individual assimilated to that of conspirators, the traditional distinction between persuasion to break a contract[142] and persuasion not to enter a contract (liability in the former, no liability in the latter) would be diminished. "I think there is a chasm between them", said Lord Herschell in *Allen* v. *Flood*.[143] In the words of Lord Davey: "In the former case, if the persuasion is successful, the other party is deprived of the benefit of having his contract completed. In the latter case, he loss nothing to which he has a legal right, and he has no legal ground of complaint against the person who refuses to contract with him."[144] If A persuades B to cease dealing with C, and C thereby loses B's custom, C has no action against A. Moreover, "if it should appear or be admitted that A made his request or demand for no other reason than because he disliked C and wished to injure him, that, according to the doctrine of *Flood* v. *Allen*, would make no difference".[145]

Lord Esher, delivering a judgment in 1893, thought that the distinction between inducing to break and inducing not to enter a contract could not prevail.[146] "It seems rather a fine distinction to say that, where a defendant maliciously induces a person not to carry out a contract already made with the plaintiff and so injures the plaintiff, it is actionable, but where he injures the plaintiff by maliciously preventing a person from entering into a contract with the plaintiff, which he would otherwise have entered into, it is not actionable."[147] Even if this distinction no longer prevailed, and the position of the individual were assimilated to that of conspirators, there would still be less scope for justification in the case of inducing breach of contract than in the case of inducing not to enter contract. Justification is defined more narrowly in the tort of inducing breach of contract than in conspiracy.[148]

Before concluding whether the courts ought to reject *Allen* v. *Flood*[149] or conspiracy, it is desirable to consider the actual scope of conspiracy by lawful means as interpreted by the courts. How is a line drawn between justifiable and unjustifiable motives?

139 *De Getley Marks* v. *Greenwood* [1936] 1 All E.R. 863, 873.
140 *Rookes* v. *Barnard* [1964] A.C. 1129, 1215-16. See also *Conway* v. *Wade* [1909] A.C. 506, 511-12.
141 [1898] A.C. 1.
142 A well established tort: *Lumley* v. *Gye* (1853) 2 E. & B. 216.
143 [1898] A.C. at 121.
144 Ibid. at 171.
145 *Scottish Co-op. Society* v. *Glasgow Fleshers' Association* (1898) 35 Sc. L.R. 645, 651 per Lord Kincairney. See also *Midland Cold Storage* v. *Steer* [1973] 3 W.L.R. 700, 712: per Megarry J.
146 *Temperton* v. *Russell* [1893] 1 Q.B. 715, 728.
147 Ibid.
148 See *Pete's Towing Services Ltd.* v. *N.I.U.W.* [1970] N.Z.L.R. 32, 56.
149 [1898] A.C.I. 1.

7 THE SCOPE OF CONSPIRACY BY LAWFUL MEANS

(a) *The context of conspiracy actions*

Successful actions in conspiracy by lawful means are rare because of the wide scope given to the notion of a legitimate motive or the forwarding or protecting of legitimate interests. The cases have largely arisen in the context of trade or business competition and industrial conflict. The typical parties have been employees or employers suing trade union officials, or traders suing traders. Thus it has been said that a combination "to injure a man in *his trade*" is actionable;[150] so also "to do acts which necessarily result in injury to the *business* or interference with the means of *subsistence* of a third person".[151] But it is clear that conspiracy is not restricted to the context of trade competition and industrial disputes; it may extend, for example, to the affairs of a profession.[152] A combination to hiss an actor off the stage in order to ruin him might be actionable.[153] In fact outside the areas of labour, business and profession, a combination to injure is perhaps more likely to be actionable as it is less likely that the interests of the combiners will be legitimate: at least the combiners will be outside the area where the interests of combiners are broadly established as legitimate.

It is impossible to define exhaustively what interests are or are not legitimate. A great variety of interests are possible. One cannot "lay down with precision an exact and exhaustive proposition like an algebraical formula which will provide an automatic answer in every case".[154] The point was well made by Romer L.J. in 1903 when discussing the meaning of "justification": "I can only say that regard must be had to the circumstances of each case as it arises, and that it is not practically feasible to give an exhaustive definition of the word to cover all cases."[155] Nevertheless it is possible to assert certain general propositions regarding justification which provide some guidelines. The following statement of Evatt J. is helpful: "If it be the protection or advancement of trading, professional or economic interests common to the defendants, there is no liability. If it be the carrying out of some religious, social or political object, the law prefers to examine the motive or object in each case before pronouncing an opinion. The pursuit of economic ends is most favoured."[156]

150 *Sorrell* v. *Smith* [1925] A.C. 700, 712 (italics added).
151 *Crofter* case at 451 (italics added). See also 446-7.
152 *Crofter* case at 478; *Pratt* v. *B.M.A.* [1919] 1 K.B. 244; *Thompson* v. *N.S.W. Branch of the B.M.A.* [1924] A.C. 764.
153 Ibid., referring to *Gregory* v. *Duke of Brunswick* (1844) 6 M. & G. 953.
154 Ibid. at 446 per Viscount Simon.
155 *Giblan* v. *N.A.L.U.* [1903] 2 K.B. 600, 618. See also *Crofter* case at 476; "the objects or purposes for which combinations may be formed are clearly of great variety.": per Lord Wright at 479.
156 *McKernan* v. *Fraser* (1931) 46 C.L.R. at 400.

(b) *Trade competition*

In the area of trade competition from the outset a very wide scope was given to the notion of legitimate interests. The courts accepted the traders pursuit of his own business interests as legitimate, and readily accepted that his predominant purpose was not to injure his rival but to pursue his own legitimate interests. "English law . . . has for better or worse adopted the test of self-interest or selfishness as being capable of justifying the deliberate doing of lawful acts which inflict harm, so long as the means employed are not wrongful."[157] Pursuit of one's own selfish ends, one's own prosperity, is a justification for the deliberate infliction of economic harm. As Madden C.J. said firmly in 1903: "It is in the nature of things that the strong will prevail, and the weak will go to the wall!"[158]

Various reasons have been given by the judges for this endorsement of selfishness. First, the courts could not draw the line between fairness and unfairness in this area. "To draw a line between fair and unfair competition between what is reasonable and unreasonable, passes the power of the Courts."[159] Again, in the words of Lord Wright: "we live in a competitive or acquisitive society, and the English common law may have felt that it was beyond its power to fix by any but the crudest distinctions the metes and bounds which divide the rightful from the wrongful use of the actor's own freedom, leaving the precise application in any particular case to the jury or judge of fact."[160] It was thought that the question of fairness if introduced as a criterion of lawfulness, would be relegated to the idiosyncrasies of individual judges.[161] On the other hand, these arguments have not prevented the courts from determining the reasonableness or otherwise of restraint of trade in contract cases. Second, the doctrine of freedom of trade was thought to justify the non-interference of the courts in competitive conflicts, even where a combination of traders, by means of monopoly and restrictive trade practices, was calculated to cripple the freedom of others to trade. To hold that the commercial motive of traders in attracting to themselves the total trade in a certain area was unjustifiable "would be to convert into an illegal motive the instinct of self-advancement and self-protection, which is the very incentive to all trade".[162] But there is surprisingly little consideration of whether the practices and aims of traders in any particular case are for the public benefit. Sometimes a judge will say he does not know, for lack of evidence. "I do not know whether harm

157 *Crofter* case, at 472 per Lord Wright. See also 496.

158 *Martell* v. *V.C.M.A.* (1903) 29 V.L.R. at 514. But cf. *Midland Cold Storage* v. *Steer* [1972] 3 W.L.R. 700, 718: "it is the function of the law to protect the weak against unfair use of power": per Megarry J.

159 Per Fry L.J. in *Mogul* case (1889) 23 Q.B.D. 598, 625-6.

160 *Crofter* case, at 472.

161 *Mogul* case [1892] A.C. at 51 per Lord Morris. See also Lord Herschell in *Allen* v. *Flood* [1898] A.C. at 119: "this suggested test makes men's responsibility for their actions depend on the fluctuating opinions of the tribunal before whom the case may chance to come as to what a right-minded man ought or ought not to do in pursuing his own interests."

162 Per Bowen L.J. in *Mogul* case (1889) 23 Q.B.D. at 615.

is caused or not", said Lord Kincairney, speaking of the effects of a combination.[163] On other occasions a judge will opine that the combination is probably for the public good, despite the lack of evidence on this question.[164] A point not yet considered, as one writer points out, is whether "the defendants' interests in maintaining a monopoly should generally be treated as less important than the public interest in maintaining a competitive market".[165] The policy of the courts has been to impose no fetters or restrictions on competition which is unaccompanied by specific wrongs such as those involving fraud or violence. If there should be further regulation or control that is considered a matter for the legislature. "If peaceable and honest combinations of capital for purposes of trade competition are to be struck out, it must . . . be by legislation, for I do not see that they are under the ban of the common law."[166] It may well be that courts are not suitable forums for considering the wider consequences of competition in its various forms, and a referral of such matters to the legislature is justifiable.

(c) *Industrial disputes*

The attitude of the courts towards organized labour was originally much less accommodating. A narrower view was taken of the legitimate interests of trade unionists, and the courts were more inclined to find that the predominant motive of the combiners was to injure the plaintiff rather than forward and protect legitimate interests. "It is an undoubted fact that the application of this part of the law of civil wrongs to combinations of workmen inflicting injury or damage without the use of unlawful means, has frequently resulted in liability whereas in analogous cases of trade combinations, liability has seldom, if ever, resulted."[167] Before 1875 the courts in England could treat combinations of workmen pursuing strike action as *criminal* conspiracies, even though no act was committed which if done by one person would be a criminal or civil wrong.[168] In 1875 the British Parliament enacted the *Conspiracy and Protection of Property Act*, section 3 of which read: "An agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute . . . shall not be indictable as a conspiracy if

[163] *Scottish Co-op. Society* v. *Glasgow Fleshers' Association* (1898) 35 Sc. L.R. 645, 652.

[164] See e.g. *Mogul* case (1888) 21 Q.B.D. at 548; (1889) 23 Q.B.D. at 628; [1892] A.C. at 45-6. See further: *Ware and De Freville* v. *Motor Trade Association* [1921] 3 K.B. 40, 71.

[165] Heydon, *Economic Torts*, op. cit. 16. See also W. Arthur Lewis "Monopoly and the Law", (1942) 6 M.L.R. 97.

[166] *Mogul* case (1889) 23 Q.B.D. at 620 per Bowen L.J. See also *Crofter* case [1942] A.C. at 472.

[167] Per Evatt J. in *McKernan* v. *Fraser* (1931) 46 C.L.R. at 381. For example, compare the *Mogul* case with *Temperton* v. *Russell* [1893] 1 Q.B. 715 and *Quinn* v. *Leathem* [1901] A.C. 495; and *Jenkinson* v. *Nield* (1892) 8 T.L.R. 540 with *Trollope* v. *London Building Trade Federation* (1895) 72 L.T. 342.

[168] See e.g. *R.* v. *Rowlands* (1851) 117 E.R. 1439.

such act committed by one person would not be punishable as a crime."[169] If the purpose of this provision was to exclude conspiracy altogether from the area of trade disputes, it was unsuccessful, as the courts considered that *civil* conspiracy was still available. The lack of successful conspiracy actions against commercial combination proved at first to be no precedent for actions against labour combinations. What was merely the "exercise of a right" in the former context tended to become "coercion" in the latter context.[170]

Even before the end of the nineteenth century, however, there were indications of a change of attitude on the part of the judiciary. In *Allen* v. *Flood*[171] Lord Herschell issued the following warning: "It is not for your Lordships to express any opinion on the policy of trade unions, membership of which may undoubtedly influence the action of those who have joined them. . . . The members of these unions, of whichever class they are composed, act in the interest of their class. . . . If they do not resort to unlawful acts they are entitled to further their interests in the manner which seems to them best, and most likely to be effectual." This attitude was generally adopted by the courts after the first world war: trade union objects were treated as legitimate.[172] The object of achieving better terms of employment or increasing the effective strength of a trade union[173] justified the deliberate infliction of economic loss on the employer. Professor Grunfeld has summed up the modern position by saying that "in the broad area of labour-management relations, the tort of conspiracy in its general form does not impede unions in bringing economic pressure to bear on management or employer or individual employee for a comprehensive range of recognized economic purposes".[174]

(d) *The neutrality of the courts*

The courts have taken the view that if the defendants are acting bona fide in the pursuit of their legitimate purpose it does not matter that in the court's opinion their conduct is unwise, improper, irrelevant, inexpedient, irresponsible or harsh.[175] Viscount Simon said: "it is not for a court of

[169] This provision was introduced into Australia: See *Employers and Employees Act* 1958 (Vic.) s. 48; *Criminal Code* 1889 (Qld.) s. 543A; *Conspiracy & Protection of Property Act* 1889 (Tas.) s. 2; *Criminal Code* 1913 (W.A.) s. 561; *Criminal Law Consolidation Act* 1935-1960 (S.A.) s. 260.

[170] See, for example, Lord Lindley's attempt in *Quinn* v. *Leathem* [1901] A.C. at 539, to distinguish cases such as the *Mogul* case and *Scottish Co-op. Society* v. *Glasgow Fleshers' Association* (1898) 35 Sc. L.C. 645.

[171] [1898] A.C. 1, 129-30.

[172] See e.g., *Reynold* v. *Shipping Federation* [1924] 1 Ch. 28; *White* v. *Riley* [1921] 1 Ch. 1; *Crofter* case.

[173] *Crofter* case 493.

[174] C. Grunfeld, *Modern Trade Union Law*, op. cit. p. 429.

[175] See: *Bowles* v. *Lindley* [1965] Lloyd's Rep. 207, 208; *Crofter* case at 481 ("muddle-headed, obstinate and prejudiced, but still honestly desirous of doing what they considered beneficial to their trade union"); *Mogul* case (1889) 23 Q.B.D. at 618 ("selfish or unreasonable"), [1892] A.C. at 54 ("It is absolutely unnecessary to consider whether these grounds were morally or commercially justifi-

law to consider . . . the expediency or otherwise of a policy adopted by a trade union. Neither can liability be determined by asking whether the damage inflicted to secure the purpose is disproportionately severe: this may throw doubts on the bona fides of the avowed purpose, but once the legitimate purpose is established, and no unlawful means are involved, the quantum of damage is irrelevant."[176]

There are judicial statements in the cases which suggest that the courts have gone further than merely maintaining neutrality as to the wisdom or ethical propriety of the defendants' actions in pursuing legitimate objects. They appear to have gone to the extent of suggesting that the legitimate interests of the combiners are *as they conceive them to be.* In the *Crofter* case it was said that the defendants "were seeking to advance what they conceived to be the interests of their trade union".[177] And in *Stratford* v. *Lindley*[178] Lord Reid said that there was nothing to indicate the defendants acted from any motive "other than to forward what they believed to be the interests of the union and fundamental trade union principles". But it is submitted that these statements cannot be taken as meaning that provided trade unionists or others conceive some object or purpose to be a legitimate object or purpose the courts are obliged to accept it as such. In a broad sense the combiners must be honestly pursuing what the court accepts as a legitimate purpose, even though it does not matter that in the particular circumstances the action adopted is not in fact in the interests of the combiners: it does not matter that the action is not in fact in the interests of the combiners if the combiners honestly believe it is in their interests. The neutrality of the courts does not and should not extend to characterization of an ultimate purpose as legitimate or not legitimate. If it did there could be no conspiracy unless the combiners were not convinced of the justification of their own motives.

(e) *Purposes: legitimate or not legitimate*

Outside the area of recognized economic purposes of organized businessmen and organized labour, there has been little elaboration as to the legitimacy or otherwise of purpose. It seems that a non-economic purpose can be legitimate. In *Scala Ballroom Ltd.* v. *Ratcliffe*[179] the defendants would not permit the members of their union (the Musicians' Union, which

able"); *Thompson* v. *Deakin* [1952] 1 Ch. 646, 673 ("we are not . . . concerned with the propriety upon ethical or social grounds of anything that any of the parties to the action have done."); *Stratford* v. *Lindley* [1965] A.C. 269, 300 ("however selfish, tyrannous and irresponsible"); *White* v. *Riley* [1921] 1 Ch. 1, 28 cf. *Ware & De Freville* v. *M.T.A.* [1921] 3 K.B. 40, 71.

176 *Crofter* case at 447.
177 Ibid. at 456.
178 [1965] A.C. 269, 323; also 282. See further *White* v. *Riley* [1921] 1 Ch. 1, 31; *Morgan* v. *Fry* [1968] 2 Q.B. 710, 728. Contra: *Quinn* v. *Leathem* [1901] A.C. 495, 536.
179 [1958] 1 W.L.R. 1057.

included many coloured musicians) to perform in the orchestra at the plaintiffs' ballroom, because the plaintiffs excluded coloured visitors from the dance floor. The plaintiffs argued that legitimate interests meant strictly material interests, and there were no material interests of the defendants to be safeguarded here. The Court of Appeal rejected the argument that the interests which can be lawfully protected are confined to material interests in the sense of interests which can be reflected in financial terms,[180] and declined to grant the plaintiffs relief. The interests and welfare of the members were being advanced. Moreover, the court accepted the statements in an affidavit of one of the defendants that the defendants believed that material advantage to their members was involved. Apart from this case there is little authority on the question of non-material motives. It may be that a combination of parishioners to withhold their subscriptions from the incumbent with the predominant purpose of promoting the religious interests of the parish, is not actionable.[181] The action of a medical association in excluding a member whose conduct offended against the repute of the profession and prohibiting other members from consulting with him professionally, is justifiable if the motive is to keep up the discipline and morale of members of the association, and promote the association's interests.[182] In such a case the motivation is at least not purely economic.[183]

On the question of wrongful motive, *Huntley* v. *Thornton*[184] shows that trade unionists may be actuated by motives which render them liable in conspiracy. The defendants included members of a district committee which flouted the executive council's decision not to sanction the plaintiff's expulsion from the union. "The district committee . . . entirely lost sight of what the interests of the union demanded, and thought only of their own ruffled dignity . . it had become a question of the district committee's prestige; they were determined to use any weapon ready to their hand to vindicate their authority, and grossly abused the quite frightening powers at their command."[185]

In the *Crofter* case it was suggested that if the defendants had taken the action they did merely to demonstrate the power of the trade union to control the trade of the island in every detail, this would not be a

180 Ibid. 1062 (Hodson L.J.), 1063 (Morris L.J.).

181 See *Crofter* case, at 478.

182 See *Thompson* v. *B.M.A.* [1924] A.C. 764, 769-70.

183 Cf. *Pratt* v. *B.M.A.* [1919] 1 K.B. 244. McCardie J. considered that for the B.M.A. to injure and boycott the plaintiff for the protection of financial as distinct from professional interests was not a legitimate purpose (see 272-3). If this is true then a group of professional men is less favoured by the law of conspiracy than a group of traders.

184 [1957] 1 W.L.R. 323.

185 Ibid. 341. "They were not furthering a trade dispute, but a grudge": 350. See further: *Evaskow* v. *International Brotherhood of Boilermakers* (1970) 9 D.L.R. (3rd) 715.

furtherance of legitimate interests.[186] A "mere demonstration of power by busybodies"[187] is not justified. Further, if combiners are induced to injure another by a payment of money, it appears that they are liable. Thus in the *Crofter* case Viscount Simon said: "if . . . the millowners . . . had promised a large subscription to the trade union funds as an inducement to bribe the respondents to take action to smash the appellants' trade, I cannot think that the respondents could excuse themselves for combining to inflict this damage merely by saying that their predominant purpose was to benefit the funds of the union thereby."[188] He considered that such an "indirect gain" could not provide a justification.[189] One would have thought that a payment of money was a "direct" gain. But in the example given there is no conflict or competition between the plaintiff and the defendants; the defendants' interests are not threatened by the plaintiffs' activities; selfishness is a justification where it is an incentive to trade, and in the example given the defendants are in no sense traders.

Self-interest is again not regarded as a justification where the motive of the combiners in injuring the plaintiff is to force him to pay them an outstanding debt. Thus the officers of a trade union are not justified in combining to prevent a workman from obtaining employment with the object of compelling him to pay a debt to the union. The reason for this is given by Stirling L.J. in *Giblan* v. *N.A.L.U.*:[190] "If he failed to pay a just debt, the law provides ample means for enforcing payment of it. . . . If the existence of the default or debt were admitted as a valid excuse for depriving a . . . debtor of his employment, a punishment might be inflicted on him far greater than that which is allowed by law."[191]

Lord Justice Stirling refers to the infliction of punishment on a debtor: is punishment always a wrongful motive? It has certainly been argued as a factor relevant to determining the legitimacy or otherwise of defendants' motives.[192] But it is insufficient for a plaintiff to show that the defendants in some sense wished to punish him: the purpose of the punishment must be considered. In *Allen* v. *Flood*[193] it was argued that because the plaintiffs were not at the time in question engaged upon ironworks, the motive of the defendant and the boilermakers must have been the punishment of the plaintiffs for what they had previously done. Lord Herschell considered that the use of the word "punishment" in this argument was misleading. "That word does not necessarily imply that *vengeance* is being

186 At 449. See also 445.
187 Ibid. 451. See also 491.
188 [1942] A.C. at 446.
189 Ibid. 447. See also Viscount Maugham (451); Lord Thankerton (460). Lord Wright left the matter open (480).
190 [1903] 2 K.B. 600.
191 Ibid. 624.
192 See e.g. *Pratt* v. *B.M.A.* [1919] 1 K.B. 244, 278; *Eastham* v. *Newcastle United Football Club* [1964] 1 Ch. 413, 453-4.
193 [1898] A.C. 1.

wreaked for an act already done, though no doubt it is sometimes used in that sense. When a Court of Justice, for example, awards punishment for a breach of the law the object is not vengeance. The purpose is to *deter the person* who has broken the law from a repetition of his act, and to *deter other persons* also from committing similar breaches of the law."[194] His Lordship considered that the object of the defendant, and those whom he represented was to prevent the plaintiffs from doing work in the future which was not within their province but within that of the ironworkers. As Lord Shand said, deprecating the use of the word "punishment" to describe the boilermakers' action: "Their object was to benefit themselves in their own business as working boilermakers, and to prevent a recurrence in the future of what they considered an improper invasion of their special department of work."[195] If defendants "punish" a plaintiff by keeping him out of work for not paying a debt or repaying defalcations, the motive may be vindictive vengeance or deterrence, or simply a desire to get the money, or a combination of these factors.[196] We have seen that the protection of the well-being of members of a group is a legitimate motive. Well-being includes both material and other aspects of personal welfare, such as dignified working conditions. The motive of wreaking vengeance for non-payment of a debt does not promote well-being, whereas it might be argued that the purpose of deterrence, or of simply obtaining payment, does. But these distinctions are difficult to draw in practice. It does not seem realistic to say that if the predominant motive is to wreak vengeance on the plaintiff for non-payment, then the motive is wrongful, but if the predominant motive is deterrence, or a desire to get the money, the motive is legitimate. Perhaps none of these motives justify the industrial action taken, as recourse should be had to the courts.

What if the combination to injure the plaintiff is motivated by a dislike of his religion, politics or race? For example, the members of a club agree to transfer their custom from one trader to another on account of the former's religion, politics or race. Or a group of employees agree to withdraw labour with a view to having another employee discharged on account of his religion, politics or race. Should the trader in the first example or the employee in the second example be able to sue those who combined to cause them economic loss? Judicial dicta suggests the answer is yes. "If a number of persons, because of political or religious hatred, or from a spirit of revenge for previous real or fancied injury, combine to oppress a man and deprive him of his means of livelihood for the mere purpose of so-called punishment, I think the sufferer has his remedy."[197]

194 Ibid. 131 (Italics added).
195 Ibid. 164.
196 See *Crofter* case at 475.
197 *Boots* v. *Grundy* (1900) 82 L.T. 769, 773; see also *Crofter* case at 451. But see the contrary view in *Sweeney* v. *Coote* [1907] A.C. at 223-4.

But writers are divided on the question.[198] There may be no simple answer to this sort of question. The facts of each case must be considered, and inevitably a value judgment made. Surely members of a Jewish club can decide to withdraw custom from a retailer whom they discover is a member of the Nazi party? Should they not be able to induce others to withdraw their custom? And yet if a group of employees who happen to be Nazis combine to bring pressure on their employer to discharge a Jewish employee because he is Jewish, one might well think the result should be different. In both cases, however, the plaintiff may be economically ruined. As racism is evil, the politics of racism is evil, and this could justify a different result in the two cases. But what if a group of Jewish employees bring pressure to bear on their employer to discharge another employee because he is a Nazi?

In *Scala Ballroom Ltd.* v. *Ratcliffe*[199] the defendants disliked the plaintiffs' racist policies: the enforcement of a colour bar. Some of the musicians in the defendants' union were coloured and their peace of mind was naturally affected. The defendants were justified in combining to force an end to the colour bar. But if the musicians were all white, and threatened to withdraw or induce the members of their union to withdraw, the result might be different. In such a case, as indeed in all cases concerned with the question whether motive is legitimate, a value judgment must be made: in this instance a choice between promoting good race relations on the one hand, and freedom of speech and action on the other. If there had been no coloured musicians in the musicians' union and the members were simply opposed to colour bars of any kind, then it could not be argued they were forwarding or protecting their own interests as they did not belong to the race discriminated against. If this is nonetheless admitted as a case of legitimate motive, it might well be argued that the combiners need not restrict their attention to the particular enterprise where their members are employed. The combiners might be opposed to the racist policies of another country, and decline to handle goods imported from that country.

There are statements in the *Scala Ballroom* case which seem to justify combinations to injure in these situations. Diplock J. in the court below said that it was the right of all citizens to advocate policies in which they bona fide believed, and to use all lawful means to attain the objects they sought.[200] In the Court of Appeal, Morris L.J. said: "it seems to me that if the defendants honestly believe that a certain policy is desirable and if they honestly believe that it is the wish of their members that such policy should prevail, and that there should be no colour bar discrimination, it can be said that the welfare of the members is being advanced."[201] If these

[198] See C. Grunfeld, *Modern Trade Union* op. cit p. 416; *Citrine's Trade Union Law* (3rd ed., London: Sweet & Maxwell 1967) by M. A. Hickling, p. 92.
[199] [1958] 1 W.L.R. 1057.

statements, especially Diplock J.'s, are taken literally, and not read in the context of the facts of the particular case, then the scope of justification is indeed broad. The enforcement of a colour bar would be a justifiable motive. So would the promotion of a purely political object, e.g., withdrawals of labour in order to effect changes of government policy on, say, nuclear tests, old age pensions, nationalization of banks, etc.: matters which may have no direct connection with the combiners' conditions of labour. It is submitted that the courts should not take such a neutral stand in conspiracy cases, and should undertake the task, admittedly difficult, of balancing the various interests involved in any particular case. However, the example of the early stand of the courts against organized labour indicates that courts to-day should be cautious in finding a motive wrongful in conspiracy cases. A court should not be quick to find, for example, that the purpose of a given combination "would undermine principles of commercial or moral conduct".[202]

It has been suggested that the test of liability in conspiracy cases is not the social worthiness of the combiners' aims, but whether the interests *of that group* are being promoted. In other words, one must look at the group or combination, consider its nature and purpose, and then consider whether the activities in question are appropriate. For example it would be appropriate for a religious group, albeit fanatical, to use pressure tactics against another religious group, while it may be inappropriate for a trade union.[203] The question would be: is the action *intra* or *ultra* vires? Such a test would certainly limit the undue breadth of Diplock J.'s test: it would mean that there must be some connection between the ends sought and the nature and purpose of the group.[204] On the other hand the test is not acceptable as it leaves the court powerless to determine the social worthiness of the combiners' aims. Plaintiffs would receive little or no protection against combinations as any group could legitimate its aims and purposes simply by incorporating them in its official constitution, or reconstituting itself with new aims.

8 CONSPIRACY BY UNLAWFUL MEANS

(a) *Is an allegation of conspiracy mere surplusage?*

In *Sorrell* v. *Smith*[205] Lord Dunedin said that "if a combination of persons do what if done by one would be a tort, an averment of conspiracy so far as founding a civil action is mere surplusage". It is true that if a person

200 Ibid 1059.
201 Ibid. 1063.
202 *Crofter* case, at 439.
203 Sykes, *Strike Law in Australia*, op. cit. p. 149; p. 155 fn. 98. The test may explain the decision in *Pratt* v. *B.M.A.* [1919] 1 K.B. 244.
204 Such a test might help solve the case where the defendants combine to compel the plaintiff to subscribe to an extraneous charitable fund: *Crofter* case 493.
205 [1925] A.C. 700, 716.

has committed an actionable wrong then the existence of a conspiracy to commit that wrong will neither add to nor subtract from its actionability. For this reason, no doubt, Lord Dunedin's statement has been cited with approval in subsequent cases.[206] It has been said that "this type of conspiracy action would now appear to be redundant",[207] and that the "prior agreement merges in the tort".[208] Where it is established that the defendants have participated in the commission of a tort e.g., the creation of a nuisance, the court may not consider it "necessary or desirable to investigate whether the participation of the (defendants) in the creation of the nuisance was in pursuance of a previous conspiracy or not".[209] Moreover, if an action in tort is unsuccessful, a subsequent attempt to sue in conspiracy on substantially the same facts will be treated as an abuse of the process of the court and stayed under the courts inherent jurisdiction.[210]

Occasionally plaintiffs have claimed in conspiracy to commit a wrong as well as, or rather than, for the wrong itself, in order to obtain a certain advantage. In *Ward* v. *Lewis*[211] Denning L.J. said that certain advantages could not be gained by this means. "It is sometimes sought, by charging conspiracy, to get an added advantage, for instance in proceedings for discovery, or by getting in evidence which would not be admissible in a straight action in tort, or to overcome substantive rules of law, such as here, the rules about republication of slanders. When the court sees attempts of that kind being made, it will discourage them by striking out the allegation of conspiracy." Again, the rule that a plaintiff cannot sue in respect of false or defamatory statements made by witnesses in judicial proceedings, cannot be circumvented by suing the witness in conspiracy to commit perjury or conspiracy to defame.[212] The same reasons of public policy which justify the immunity of witnesses apply whatever the cause of action. In civil conspiracy, as distinct from criminal conspiracy, it must be shown that the antecedent agreement is carried into effect by overt acts causing damage to the plaintiff. Where the overt acts are the giving of evidence by witnesses in court, such acts cannot be made part of any cause of action.[213] It is submitted that if a plaintiff tried to circumvent the rule that death bars actions in defamation by suing in conspiracy to defame, he would be unsuccessful. The policy of the legislature that such

[206] E.g., *Cabassi* v. *Vila* (1940) 64 C.L.R. 130, 143, 151; *Watters* v. *May Bros. Ltd.* [1932] S.A.S.R. 418, 424; *O'Brien* v. *Dawson* (1942) 66 C.L.R. 18, 27.

[207] *Pete's Tow Services Ltd.* v. *N.I.U.W.* [1970] N.Z.L.R. 32, 55, per Speight J.

[208] *Ward* v. *Lewis* [1955] 1 W.L.R. 9, 11: per Denning L.J.

[209] *Bird* v. *O'Neal* [1960] A.C. at 922. See also *Torquay Hotel Co.* v. *Cousins* [1969] 2 Ch. 106, 120 per Stamp J.

[210] *Wright* v. *Bennett* [1948] 1 All E.R. 227.

[211] [1955] 1 W.L.R. 9, 11. See further: *Rubenstein* v. *Truth & Sportsman Ltd.* [1960] V.R. 473, 477.

[212] *Cabassi* v. *Vila* (1940) 64 C.L.R. 130; *Marrinan* v. *Vibart* [1963] 1 Q.B. 234 and 528.

[213] *Marrinan* v. *Vibart* at 238-9,

actions in defamation are too personal to merit survival should apply to conspiracy actions.

The main advantages and permitted use of conspiracy as a cause of an action in cases where wrong has been committed is to make those who combined liable as joint tortfeasors. "Since it is unlawful for an individual wilfully and knowingly to induce and procure a breach of contract, the allegation that more than one person acted in combination to do so is mere surplusage *except* to make them liable as joint tortfeasonrs."[214] If the defendants are joint tortfeasors, then all are liable regardless of which one of them actually committed the wrong. To prove a conspiracy is one way of establishing joint liability at common law. Two or more persons are joint tortfeasors where there is concerted action between them to a common end. "Broadly speaking, this means a conspiracy where all the conspirators are active in the furtherance of the wrong."[215] In effect, each party to a conspiracy is the authorized agent of the others for the purpose of carrying it out. Thus it is said that if a plaintiff "is able to show that all the defendants were parties to the conspiracy, then the actions of them in furtherance of the objects of their conspiracy will be treated as the actions of all of them".[216] In *Martell* v. *V.C.M.A.*[217] Madden C.J. stated this principle[218] and, in applying it to the facts of the case before him, said: "even if the individual defendants would have wished it otherwise they are . . . affected by the violence resorted to by the co-conspirators in furtherance of the common object. Whoever starts a fire is liable for the mischief which it does."[219]

It does not follow from these principles that conspirators are liable for every act which a co-conspirator chooses to commit. "The existence of a common purpose gives no authority to every party to it, to act as he thinks best on behalf of the other parties, for the attainment of the common purpose."[220] If the unlawful act was one envisaged by the conspirators, then all will be jointly liable for it. In *Williams* v. *Hursey*[221] the unlawful acts relied on by the plaintiffs included breaches of the *Stevedoring*

214 Per Williams J. in *O'Brien* v. *Dawson* (1942) 66 C.L.R. 18, 41. (Italics added) cf. 27-8.
215 Glanville Williams, *Joint Torts* (London: Stevens 1951) p. 10.
216 *Thompson* v. *Deakin* [1952] 1 Ch. 646, 674. See further: *Quinn* v. *Leathem* [1901] A.C. 495, 521. One of the reasons why criminal conspiracy prosecutions are advantageous to prosecutors, as compared with other criminal prosecutions, is the evidentiary rule admitting hearsay by co-conspirators. "The reason for the admission of such evidence is that it tends to prove the conspiracy because the acts or statements in question were done or made by a co-conspirator in furtherance of the conspiracy; but the consequence of this reasoning is that the evidence is admitted in order to prove a conspiracy, the existence of which is assumed in order to make it admissible": Howard, *Australian Criminal Law*, op. cit. pp. 281-2.
217 (1903) 29 V.L.R. 475.
218 Ibid. 503.
219 Ibid. 504.
220 Per Evatt J. in *McKernan* v. *Fraser* (1931) 46 C.L.R. 343, 407.
221 (1959) 103 C.L.R. 30.

Industry Act. Referring to the breaches of these provisions and reserving his opinion as to whether they should be regarded as creating private rights, Taylor J. said: "if it were necessary to put the plaintiffs' rights to relief on that ground alone I would find it difficult to attribute liability to each of the defendants in respect of every infringement. No such difficulty, however, arises when it is seen what occurred took place *in furtherance of a common design that a course which involved breaches of these provisions should be pursued.*"[222] It is submitted that conspirators should also be liable for acts of any one of them which might be reasonably anticipated as a means employed for attaining the common end.

It has been pointed out by Professor Street that the rule that the actions of any one conspiratory are to be treated as the action of all of them, is, strictly speaking not an advantage of conspiracy as such, but an example of the rule that he who instigates another to commit a tort is also liable for that tort.[223] McCardie J. apparently took this view in *Pratt* v. *B.M.A.*[224] He said: "If the tort be committed, then all who have aided or counselled, directed or joined, in the commission are joint tortfeasors. . . . The liability, however, of each is independent of the mere circumstance of combination."[225] He added, however, that the circumstance of combination "is . . . only relevant to the question of the agency of one to bind the other by his acts".[226] No doubt it is possible to have a person aiding, counselling, directing or instigating another to commit a tort, where the two are not co-conspirators;[227] but as the plaintiff in a conspiracy action must show overt acts causing damage to himself, for practical purposes conspiracy and instigation, etc., will usually amount to much the same thing. An agreement implies mutual instigation; instigation of one by another, followed by action, implies an agreement.

A conspirator may be liable not only for a tort which he himself did not actually commit, in the sense of striking the actual blow, but also for a tort which he *could not* commit. For example, the tort of intimidation may be committed by threat of breach of contract. In *Rookes* v. *Barnard*,[228] the plaintiff who was dismissed from his employment by B.O.A.C., sued three defendants Barnard, Fistal and Silverthorne (union officials) for conspiracy by unlawful means i.e., intimidation. The defendants were held jointly liable as they had induced B.O.A.C. to dismiss the plaintiff by threatening breach of contract. Silverthorne, however, unlike the other two defendants, had no contract of employment with B.O.A.C. He was

222 Ibid. 109. (Italics added). The question of non-tortious unlawful acts constituting the "unlawful means" in conspiracy is considered infra.
223 H. Street, *Torts* op. cit. 343, fn. 3.
224 [1919] 1 K.B. 244.
225 Ibid. 254.
226 Ibid. 254-5.
227 Cf. *Independent Oil Industries* v. *Shell Co. of Australia* (1937) S.R. (N.S.W.) 394, 416; *Larkin* v. *Long* [1915] A.C. 814, 826.
228 [1964] A.C. 1129.

apparently held liable as a party to the conspiracy to threaten breach of contract. As Lord Devlin said, the plaintiff may sue "the doer of the act and the conspirators if any, as well".[229] The same point was made in 1903 by Madden C.J.[230]

A plaintiff who establishes a conspiracy to commit a wrong as well as the wrong itself, may gain some advantage by way of relief available. Aggravated[231] or exemplary[232] damages may be awarded; or the court may be prompted to exercise its discretion in favour of injunctive relief. No doubt, too, the existence of a conspiracy may help to establish the requisite intent for a particular tort, i.e., intimidation, or inducing breach of contract. It has been suggested that the plaintiff in an action for conspiracy to induce breach of contract need not show a breach of contract.[233] But in civil conspiracy the plaintiff must establish an overt act causing damage, and in the type of conspiracy under discussion, the act must be an unlawful one. Merely to show the defendants agreed to induce breach of contract, but did not do so, would not be sufficient.[234]

So far we have considered whether an allegation of conspiracy to commit a tort is otiose where the tort itself has been committed. If, however, actionable conspiracy to commit an unlawful act comprises acts which albeit unlawful are not civilly actionable when committed by an individual acting alone, then clearly the allegation of conspiracy is far from otiose. The question must be considered: what unlawful acts are relevant for the purpose of conspiracy?

(b) *What constitutes "unlawful means" in conspiracy?*

In some of the early cases the view was expressed that conspiracy could be described as involving "unlawful means" where there was "coercion", "moral intimidation", or "threats" in its execution. It was said, too, that where the acts of an individual acting alone could be so characterized he

229 Ibid. 1211. See *Morgan* v. *Fry* [1968] 2 Q.B. 710, 729. Silverthorne could not be liable for *inducing* the others to break their contracts, as the Trade Disputes Act 1906 s. 3 precluded such an action. "[O]ne might say that it was because Silverthorne participated in organizing the meeting which culminated in the transmission of the unlawful threat to management that he could be validly described as conspiring with Barnard and Fistal to threaten the Corporation with unlawful strike action by the members of the union, including Fistal and Barnard.": C. Grunfeld, *Modern Trade Union Law* op. cit. p. 438; see further: [1964] C.L.J. 168-71 (Hamson).

230 *Martell* v. *V.C.M.A.* (1903) 29 V.L.R. 475; but cf. *O'Brien* v. *Dawson* (1942) 66 C.L.R. at 33.

231 "As to the measure of damages, it may be that there are cases in which the proof that a joint tort was done in pursuance of a conspiracy to do it, will justify some increase of the damages to be awarded for the tort itself, though none has occurred to me.": per Viscount Sumner in *Clark* v. *Urquhart* [1930] A.C. 28, 50.

232 See *Denison* v. *Fawcett* (1958) 12 D.L.R. (2nd) 537. "It is unnecessary to express any opinion upon the question whether in an ordinary or simple action for deceit, exemplary or retributory damages may be awarded. The plaintiffs' action in this case is framed in conspiracy to defraud and in deceit." (at 543).

233 *See Poole Construction Co.* v. *Horst* (1965) 47 D.L.R. (2nd) 454, 462.

234 See *De Getley Marks* v. *Greenwood* [1936] 1 All E.R. 863, 872.

would be liable on the same basis.[235] Thus in *Pratt* v. *B.M.A.*[236] McCardie J. considered that it was an actionable wrong for an individual or a group to molest a person in the exercise of his calling by coercion and threats. "I can draw no distinction between a threat to cause a strike and a threat to inflict upon a man the slur of professional dishonour. Each may produce intimidation."[237] Later in his judgment he said: "It is with respect to the question, inter alia, of coercion as a result of threats that the element of combination or conspiracy may assume importance."[238] In other words, the combination was relevant to the proof of coercion or intimidation. *Allen* v. *Flood*[239] was said to decide only that "it is not actionable for a single person merely to induce another not to enter into a contract with a third person, even though loss results to the third person from such inducement . . . there was no evidence whatever of intimidation or coercion or threat".[240]

Later cases, however, established that if a person was lawfully entitled to do something, he was entitled to *threaten* to do it. "Threats to do or abstain from doing a perfectly lawful act cannot, as I regard the law, be wrongful."[241] In *Ware and DeFreville* v. *M.T.A.*[242] the Court of Appeal deprecated the use of the vocabulary of vague vituperation—threats, menace, intimidation, coercion, compulsion, molestation, etc.—as question-begging.[243] Atkin L.J. said: "if the layman wishes to keep within the law, high judicial authorities refuse to give him any guidance; he may be told that he must not be guilty of 'oppressive misconduct', which is not of much assistance."[244] He went further and suggested that "to . . . apply as legal propositions wide prohibitions of misty import may well lead to greater oppression than the evil sought to be repressed".[245]

The "unlawful means" in conspiracy must be an act which is independently unlawful, i.e. unlawful in itself.[246] If this is proved, then unlike

[235] See e.g., *Valentine* v. *Hyde* [1919] 2 Ch. 129; *Davies* v. *Thomas* [1920] 2 Ch. 189; *De Getley Marks* v. *Greenwood* [1936] 1 All E.R. 863, 873; *Bond* v. *Morris* [1912] V.L.R. 351, 359, 360-1.

[236] [1919] 1 K.B. 244.

[237] Ibid. 261.

[238] Ibid. 263.

[239] [1898] A.C. 1.

[240] Op. cit. 257.

[241] Per Lord Buckmaster in *Sorrell* v. *Smith* [1925] A.C. 700, 747; see also at 714, 730. See further: *White* v. *Riley* [1921] 1 Ch. 7, 13-15; *Ware and De Freville* v. *M.T.A.* [1921] 3 K.B. 40, 69.

[242] [1921] 3 K.B. 40.

[243] Ibid. at 69, 79.

[244] Ibid. 81.

[245] Ibid. 91. In *Crofter* case [1942] A.C. at 466-7, Lord Wright pointed out that words like threats, intimidation, coercion, "are not terms of art and are consistent with legality or illegality".

[246] There is some support, however, for the view that an immoral act will suffice. "Two or more persons are guilty of conspiracy if they agree together to do an act which they know to be unlawful *or immoral*." Per Jordan C.J. in *Independent Oil Industries Ltd.* v. *The Shell Co. of Australia* (1937) 37 S.R. (N.S.W.) 394 (Italics added). For example, it may be that lies or deliberate dishonesty are

conspiracy by lawful means a good motive cannot generally provide a justification. "Honesty or disinterestedness of motive cannot justify the employment of illegal means."[247] But this is subject to the qualification that the unlawful act itself may be justified, e.g. a conspiracy to commit the tort of inducing breach of contract will be justified if the requirements of justification for that tort are fulfilled. In such cases the burden of proving justification is on the defendant.

Broadly speaking the "unlawful means" in conspiracy[248] comprises tort, breach of contract and crime. Thus there may be a conspiracy to commit the tort of intimidation[249] or the crime of extortion.[250] In 1964 Lord Devlin left open the question whether breach of contract constituted unlawful means for the purpose of conspiracy. "I am saying", he said, "that in the tort of intimidation a threat to break a contract would be a threat of an illegal act. It follows from that that a combination to intimidate by means of a threat of a breach of contract would be an unlawful conspiracy; but it does not necessarily follow that a combination to commit a breach of contract simpliciter would be an unlawful conspiracy."[251] Nevertheless, it seems that if a threat of breach of contract is an unlawful threat for the purposes of intimidation, an actual breach of contract must be unlawful for the purposes of conspiracy.[252] This means that in the context of industrial relations, a union official who is not an employee, may be liable not only for inducing breach of contract, but also as party to a conspiracy to break contracts of employment.[253]

Where the unlawful act is a tort or breach of contract the victim of the tort or breach of contract will have a civil remedy for damages regardless

sufficient even though neither the tort of deceit nor any crime is made out. Note: *Wright* v. *Bennett* [1948] 1 All E.R. 227; *Greenhalgh* v. *Mallard* [1947] 2 All E.R. 255; *Reg.* v. *Withers* [1974] 2 W.L.R. 26 (criminal conspiracy).

247 Per McCardie J. in *Pratt* v. *B.M.A.* [1919] 1 K.B. 244, 266. See also: *Martell* v. *V.C.M.A.* (1903) 29 V.L.R. 475, 522; *Brisbane Shipwrights' Provident Union* v. *Heggie* (1906) 3 C.L.R. 686, 702; *Crofter* case [1942] A.C. at 462; *Southam* v. *Gouthro* [1948] 3 D.L.R. 178, 185; *Williams* v. *Hursey* (1959) 103 C.L.R. 30, 124. For an opposing view see: Heydon, "Justification in Intentional Economic Loss" (1970) 20 Univ. of Toronto Law Journal 139, 178-82.

248 "Unlawful means" (or "unlawful act") is an element in other torts, too: e.g. intimidation, indirect procurement of breach of contract, interference by unlawful means, and the rule in *Beaudesert Shire Council* v. *Smith* (1966) 120 C.L.R. 145. "It would make for brevity, logic and elegance if the principle could be stated that the definition of 'illegal' or 'unlawful' was the same under all . . . rubrics . . . unhappily no such clear principle emerges from the authorities.": *Clerk and Lindsell on Torts* (13th ed., London: Sweet & Maxwell 1969) by A. L. Armitage, at pp. 805-6.

249 *Rookes* v. *Barnard* [1964] A.C. 1129.

250 *McKinnon* v. *Woolworth* (1968) 70 D.L.R. (2d) 280.

251 *Rookes* v. *Barnard* [1964] A.C. 1129, 1210.

252 See *Martell* v. *V.C.M.A.* (1903) 29 V.L.R. 475, 523; *Williams* v. *Hursey* (1959) 103 C.L.R. 30, 122; *O'Brien* v. *Dawson* (1942) 66 C.L.R. 18, 28.

253 Cf. *O'Brien* v. *Dawson* (1942) 66 C.L.R. 18, 33. For discussion of the difficulties of holding a person liable as conspirator with another to break that other's contract, as distinct from or as well as to induce breach of the other's contract, see: Wedderburn (1961) 24 M.L.R. 581-3; (1964) 27 M.L.R. 267-8.

of any conspiracy. Where the unlawful act is a crime this is not necessarily so. There are non-tortious crimes. A breach of a statutory provision may be a criminal offence, but it is a question of statutory interpretation whether a person injured by the breach has a civil remedy. Actions for conspiracy, however, have been allowed even where the unlawful act is a breach of a statutory provision which does not give rise to a civil remedy for breach of statutory duty. In Australia this has proved to be of special significance because of the large extent to which trade union activity is regulated by statute. In particular, the extent to which strikes have been made illegal by statute or industrial award. Australian legislatures have approached the question of industrial disputes from a different standpoint from that of England. "Here, the act of striking has frequently been made punishable. This has not been because Australian legislative bodies have been hostile to the claims of organized labour. The reason is that they have established courts, tribunals and boards, for the very purpose of making recourse to the instrument of strike and lock-out unnecessary. Collective bargaining has always had behind it the actual or implied threat of strike or lock-out. But such bargaining has to a very large extent been replaced by compulsory fixation of industrial conditions by a specified tribunal. It is as a logical corollory, that recourse to lock-out or strike has been made unlawful."[254] It is probably because of the existence of industrial tribunals which have jurisdiction to determine matters affecting the mutual relations of employers and employees that actions for civil conspiracy in the ordinary courts have been comparatively rare.[255]

As the system of compulsory arbitration has usually been accompanied by the imposition of penalties for striking, the element of "unlawfulness" in combined union action has not been difficult to find.[256] Either a strike or the threat of a strike has been held sufficient. In *Coal Miners Union of W.A.* v. *True*,[257] Dixon C.J. said: "the individual defendants all contemplated the dismissal of the plaintiff . . . and . . . they combined their wills to that end. The means they used were a threat of a strike, a threat they knew would be carried into effect, if it did not prove a sufficient intimidation in itself. As a strike is unlawful by the law of the state of Western Australia it was a threat of an unlawful act. A combination to threaten and if necessary carry out an unlawful act as a means of securing an end is actionable as a civil conspiracy."[258]

254 Per Evatt J. in *McKernan* v. *Fraser* (1931) 46 C.L.R. at 373.
255 Cf. the position in New Zealand: *P.T.Y. Homes Ltd.* v. *Shand* [1968] N.Z.L.R. 105, 109.
256 Ibid. 380.
257 (1959) 33 A.L.J.R. 224.
258 Ibid 227. See also 230 per Menzies J. See further: *Blackmore* v. *Gas Employees' Union* (1916) 16 S.R. (N.S.W.) 323, 338-9; *Southan* v. *Grounds* (1916) 16 S.R. (N.S.W.) 274, 280; *Ruddock* v. *Sinclair* (1925) 44 N.Z.L.R. 677; *Coffey* v. *Geraldton Lumpers' Union* (1928) 31 W.A.L.R. 33, 41; *McKernan* v. *Fraser* (1931) 46 C.L.R. 343, 359-61, 371-8.

In *Brisbane Shipwrights' Provident Union* v. *Heggie*[259] Griffith C.J. found an unlawful act in a violation of s. 543 of the Queensland Criminal Code which prescribed that any person who conspires with another to injure any person in his trade or profession is guilty of a misdemeanour. But if there is an intention to injure (as distinct from an intention to forward legitimate interests) then there is a civil conspiracy by lawful means anyway.[260] It seems confusing to say that there is a conspiracy by unlawful means because the same acts constitute a criminal conspiracy.

Another High Court decision on the question (inter alia) of unlawful means in conspiracy is *Williams* v. *Hursey*.[261] The plaintiffs, father and son, were members of the Hobart Branch of the Waterside Workers' Federation. After a resolution of the majority of its members the branch imposed a levy for the assistance of the Australian Labor Party. The Hurseys refused to pay this levy. They were members of a rival party, the Anti-Communist Labor Party. The Federation claimed that they had ceased to be members of the Federation. Nevertheless, the Stevedoring Industry Authority still rostered the plaintiffs for work. Drastic action was taken by members and officials of the Federation to prevent the plaintiffs from working. Their tactics included picketing by human barricades which prevented the plaintiffs from reaching the pick-up point at the wharf. When the picketing ceased, members of the Federation selected to work with the plaintiffs would walk off the job, leading to the dismissal of the gang. The High Court held that the political levy was valid, and that the plaintiffs had ceased to be members of the Federation. Moreover, as members of the Federation were entitled to preference, the Stevedoring Industry Authority should not have rostered the plaintiffs for work. The court held, however, that the plaintiffs had an action in conspiracy: conspiracy by unlawful means. There was no conspiracy by lawful means, as the defendants, although partly inspired by hostility to the plaintiffs on political grounds, were acting bona fide in the interests of their union: "the members of the union generally were not actuated by mere personal hostility to the Hurseys. They, for their part, thought no doubt that they were defending two important principles—majority rule and a monopoly of waterside work for members of the Federation."[262]

On the question of "unlawful means" there were several possibilities. First there were the torts of assault (threats of violence) and an action on the case for obstructing passage.[263] These wrongs were emphasized by Fullager J., with whom Dixon C.J. and Kitto J. agreed. Second, there were possible violations of s. 44(1) and (2) of the *Stevedoring Industry*

259 (1906) 3 C.L.R. 686, 702.
260 The defendants were also held liable on this basis: see ibid. 703.
261 (1959) 103 C.L.R. 30.
262 Ibid. per Fullagar J. at 83; see also 105 (Taylor J.) and 123-4 (Menzies J. and trial judge).

Act. Section 44(1)(b) provided: "A person shall not by violence to the person, . . . by threat, intimidation . . . prevent, hinder or dissuade—(b) a registered waterside worker from offering for, obtaining or accepting employment as a waterside worker in stevedoring operations." Section 44(2) provided: "A registered waterside worker shall not, without reasonable cause or excuse, refuse to accept employment or work in stevedoring operations with another person who is a registered waterside worker." Taylor J. considered that there were breaches of both these provisions: "That being so, the plaintiffs clearly succeeded in showing that they suffered damage as a result of the unlawful acts of the defendants . . . performed in furtherance of a common agreement to prevent them, by those means, from obtaining employment."[264] (He thought it unnecessary to consider whether the statutory provisions should be regarded as capable of creating private rights and duties.)[265] Menzies J. agreed, at least as regards s. 44(1)(b).[266] Fullager J. said that there were violations of s. 44(1)(b) and s. 44(2) but these provisions created no civilly enforceable right or duty. Whether he thought that this latter consideration foreclosed the possibility of the statutory offences constituting unlawful means for purposes of conspiracy is not entirely clear.[267] But it is submitted that it is not essential that the breach of statutory provision should give rise to a civil right on the basis of statutory duty. Canadian authority supports this view.[268] English authority is not clear.[269]

In the context of trade competition we saw that the courts endorsed the businessman's point of view as to what constituted his legitimate interests. Equally, the courts refused to accept that merely because a conspiracy involved an agreement in restraint of trade, this constituted "unlawful means". In the *Mogul* case[270] it was argued by the plaintiffs that the defendants' association was illegal, as being in restraint of trade. The court rejected this argument. In the words of Bowen L.J.: "The term 'illegal' here is a misleading one. Contracts . . . in restraint of trade, are not . . . illegal in any sense, except that the law will not enforce them. It does not prohibit the making of such contracts; it merely declines, after they are made, to recognize their validity. . . . No action at common law will lie or ever has lain against any individual or individuals for entering into a contract merely because it was in restraint of trade."[271] We have

263 See *Bird* v. *Jones* (1845) 7 Q.B. 742 per Patteson J.
264 (1959) 103 C.L.R. 30, 108.
265 Ibid. 109.
266 Ibid. 125.
267 Ibid. 79-80.
268 E.g., *Southam* v. *Gouthro* [1948] 3 D.L.R. 178, 187; *Gagnon* v. *Foundation Maritime Ltd.* (1961) 28 D.L.R. 174, 197-8.
269 E.g., *Cunard SS v. Stacey* [1955] 2 Lloyd's Rep. 247; *Crofter* case [1942] at 462.
270 [1892] A.C. 25; (1889) 23 Q.B.D. 598.
271 (1889) 23 Q.B.D. 598, 619; see also at 626-7; [1892] A.C. 25, 39, 42, 47, 51, 57, 58. See further: *Eastham* v. *N.U.F. Club Ltd.* [1964] Ch. 413, 453; *Davies* v. *Thomas*

seen that the courts adopted the policy of not restricting or controlling competition provided no specific wrongs were committed; if there was need for further regulation that was for the legislature. The legislature in both England and Australia, has in fact stepped in and restricted or controlled competition. The question arises whether, apart from any remedy or sanction the legislation may provide, the violation of a relevant legislative provision may constitute "unlawful means" for the purposes of civil conspiracy. A very similar question has arisen in England in relation to "unlawful means" for the purpose of the tort of interference by unlawful means. In *Daily Mirror Newspapers Ltd.* v. *Gardner*[272] the defendants, who were retailers of newspapers, instructed the members of their union to boycott the plaintiff's newspaper. The Court of Appeal held that this boycott instruction was a restrictive agreement registrable under the *Restrictive Trade Practices Act* 1956 and "deemed to be contrary to the public interest" under s. 21 of that Act. Accordingly, the actions of the union amounted to an interference with the plaintiff's business relations by unlawful means.[273] Such a transition from "contrary to the public interest" to "unlawful" could also be made for purposes of conspiracy by unlawful means. The result would be that while a combination to act in restraint of trade to the plaintiff's detriment, is not actionable, a combination to injure the plaintiff by means of an arrangement deemed to be contrary to the public interest under the Act is. As Pennycuick V.C. said in a later case: "This may appear to be a fine distinction, and it is one which may, perhaps, . . . be further elaborated in a higher tribunal."[274]

The development of the tendency to use statutory offences, or breach of statutory prohibitions, to provide the element of "unlawfulness" in civil conspiracy is not inconsistent with the rather limited cause of action for breach of statutory duty.[275] Apart from the requirement in conspiracy that an agreement between at least two persons must be shown there is also the fundamental requirement that the defendants combine to injure the plaintiff, e.g., their acts must be directed at the plaintiff. The courts have been anxious in the field of pure economic loss to avoid the problem of too many plaintiffs, and this probably accounts for the tendency to favour

[1920] 2 Ch. 189, 202-3; *Brekkes* v. *Cattel* [1971] 2 W.L.R. 647, 651-2 (interference by unlawful means).

272 [1968] 2 Q.B. 762.

273 The decision is criticized in (1968) 84 L.Q.R. 314-17.

274 *Brekkes* v. *Cattel* [1971] 2 W.L.R. 647, 652. See (1968) 84 L.Q.R. at 316: "there is no more ground for saying that an agreement which is contrary to the public interest constitutes unlawful means for the purposes of common law torts than a contract in restraint of trade, which is contrary to public policy." See also *Byrne* v. *Kinemograph Renters Society* [1958] 1 W.L.R. 762, 777-8.

275 This cause of action depends on the intention of the legislature, which is apparently not the test of whether a statutory offence can constitute "unlawful means" in conspiracy. But cf. *Cory Lighterage* v. *T.G.W.U.* [1973] 1 W.L.R. 792, 816.

liability for intentional infliction of economic loss, but not for negligent infliction. In *Vickery* v. *Taylor*[276] it was argued that the injury complained of was the result of an unlawful act (fraud). Street J. in rejecting the argument, said: "there is nothing on the face of the statement of claim to show that the conspiracy complained of was *aimed at* the plaintiff or that in carrying out that conspiracy anything was done *intentionally to damage him* which did in fact damage him."[277] Moreover, it seems clear that even if harm is aimed at the plaintiff, not every casual or collateral illegality committed will be sufficient to establish the unlawful means for purposes of conspiracy. Professor Sykes suggests the unlawful act must be "part and parcel of the design or necessarily involved as an incident in its unfolding".[278] Thus the unlawful means would not be established by the mere fact that e.g. pickets parade, or park their cars, without a permit. The illegality is incidental rather than essential, if the injury to the plaintiff could have been just as effectively achieved without it, or if it could have been removed by compliance with mere formalities. Unless limitations of this kind are introduced conspiracy by unlawful means would become too potent a weapon in the hands of plaintiffs who are merely incidental victims of combined action involving merely incidental or trivial illegalities. In *Stratford* v. *Lindley*[279] Viscount Radcliffe said that the procuring of breaches of contract in that case was not "a satisfactory or . . . realistic dividing line between what the law forbids and what the law permits". The law should treat the action of the defendants "according to its substance, without the comparatively accidental issue whether breaches of contract are looked for or involved". It is unlikely that the courts at this stage would treat all illegalities as accidental, and simply look at the substance, but it is important that the suggested limitations on the use of unlawful means to determine actionability in conspiracy should be maintained.[280]

A situation can arise where breach of a statutory provision is the only wrong committed, but the statutory provision is not interpreted to give

[276] (1911) 11 S.R. (N.S.W.) 119.

[277] Ibid. 132 (Italics added). See further, examples in: Grunfeld, op. cit. p. 430 (postmen delaying post in criminal violation of Post Office Act not liable to businessman who loses a valuable order because of delay); Sykes, *Strike Law in Australia*, op. cit. 165 (drivers of public transport engaging in illegal strike not liable to members of public for expenses of alternative transport).

[278] *Strike Law in Australia*, op. cit. p. 164, cf. Grunfeld, *Modern Trade Union Law*, op. cit. p. 430: "the unlawful act must be the means or form an integral part of the means used to bring to bear the injurious economic pressure in question."

[279] [1965] A.C. at 330.

[280] It has been held that the tort of trespass *simpliciter* is not sufficient illegal means for criminal conspiracy. See *Reg.* v. *Kamara* [1973] 3 W.L.R. 198. At 214-15 Lord Hailsham said: "The Willes definition . . . does not mean that all acts which can be described as unlawful are indictable if done in combination. If it did, all illegal contracts, all acts which are in fact tortious, however innocent or trivial, and all agreements in the execution of which contracts are broken, might be indictable at the prosecution of any individual, and not merely the police."

rise to an action for breach of statutory duty in favour of the plaintiff.[281] If that wrong is capable of constituting "unlawful means" for purposes of civil conspiracy, it might be thought that civil conspiracy is the only means available for claiming damages. If this is so, an allegation of conspiracy is far from mere surplusage in this context. Nevertheless, to the extent to which the torts of interference by unlawful means or unlawful threats (intimidation) are available the allegation of conspiracy is mere surplusage—except to the extent of bringing in as joint tortfeasors those who did not actually do the wrongful act. In other words, if the plaintiff can show that a defendant has intentionally caused him economic loss by "unlawful" acts or threats it is likely to-day that he has a claim for damages: just because the unlawful act is a non-tortious crime does not mean the plaintiff must rely on conspiracy in order to recover damages. Thus in *Cabassi* v. *Vila*.[282] it was assumed that but for reasons of public policy, the act of committing perjury in order to injure the plaintiff would give rise to a claim for damages, so that conspiracy would be mere surplusage.[283]

9 STATUTORY IMMUNITY

In Queensland s. 72(1) of the *Industrial Conciliation and Arbitration Acts* 1961-1964 provides as follows: "An act done in pursuance of an agreement or combination by two or more persons shall, if done in contemplation or furtherance of an industrial dispute, not be actionable unless the act, if done without any such agreement or combination, would be actionable." This provision, which has not been enacted in other Australian states, is modelled on s. 1 of the *Trade Disputes Act* 1906 (U.K.)[284] except that the expression "industrial dispute" is substituted for "trade dispute". In the English Act, the expression "trade dispute" was defined in s. 5(3) as "any dispute between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment, or the terms of the employment, or with the conditions of labour, of any person"; the expression "workmen" was defined as "all persons employed in trade or industry, whether or not in the employment of the employer

[281] In *Cory Lighterage* v. *T.G.W.U.* [1973] 1 W.L.R. 792, 816 Lord Denning said the question whether conduct which offended against the *Industrial Relations Act* 1971 could be actionable in tort was "a question of construction of the statute". If this is the test in all cases where the alleged unlawful means is a breach of statute then the tort of interference by unlawful (statutory) means becomes closely assimilated to the cause of action for breach of statutory duty. Lord Denning, however, was speaking in the context of a statute which provided that a complainant must ordinarily seek his remedy before an industrial court. He accordingly held that an "unfair industrial practice" under the Act, was not "unlawful" for tort purposes.

[282] (1940) 64 C.L.R. 130.

[283] Ibid. 143-4, 151.

[284] See now *Industrial Relations Act* 1971 s. 132.

with whom a trade dispute arises".[285] In s. 5 of the Queensland Act, "industrial dispute" is given a wider definition than the equivalent expression in the English Act of 1906.

The 1906 provision was passed in order to deal with what appeared to trade unionists as biased treatment at the hands of the judiciary. But after 1906 the common law itself adopted a more sympathetic attitude to the trade union movement and recognized as legitimate its main aims and interests. As a result, the statutory provision in question became largely otiose: the common law protected most conspiracies arising in the context of trade disputes, provided unlawful means were not used.

The provision gives protection unless the act if done without any combination would be actionable. On a literal interpretation it might be thought that if the act of one person would have been *ineffectual* in the circumstances of the case, then the act in question could not be described as actionable in the absence of combination: without the combination no harm would have been done to the plaintiff. But the House of Lords adopted a difference approach in *Rookes* v. *Barnard*.[286] It was argued that no single defendant could have persuaded B.O.A.C. to dismiss Rookes, therefore it could not be said that the acts in question "if done without any . . . combination, would be actionable". Lord Devlin, however, said the section means that "the *nature of the act* must be such as to make it actionable even if done without any agreement or combination . . . it is sufficient that intimidation is not of its nature a tort that cannot be committed by a single person".[287] Lord Reid also rejected the argument that no action could be brought unless the *precise act* complained of could have been done by an individual without previous agreement. He said: "the section requires us to find the nearest equivalent act which could have been so done and see whether it would be actionable."[288] Therefore one could suppose that Barnard had said that he intended to induce the other employees to strike if B.O.A.C. did not get rid of Rookes. This is supposition, as the threat was not one to procure breaches of the service contracts of other union men. Lord Evershed preferred the view that Barnard was an official of the union and "his threat was (and clearly understood to be) that he in common with all his union colleagues would break their service contracts unless Mr Rookes' services were determined".[289] On this view the threat had a substantial coercive force.

The section appears to be concerned with what Lord Devlin described as the "*Quinn* v. *Leathem* type" of conspiracy.[290] In other words, it

[285] See now *Industrial Relations Act* 1971, s. 167(1).
[286] [1964] A.C. 1129.
[287] Ibid. 1211 (Italics added). See also Lord Evershed at 1189 ("the quality of the acts . . ."); Lord Pearce, 1235; Lord Hodson, 1202; see further: [1964] M.L.R. at 271-2 (Wedderburn).
[288] Ibid. 1171.
[289] Ibid. 1189.
[290] Ibid. 1206.

protects conspiracies which involve lawful means, but not conspiracies which involve unlawful means. But the word "actionable" probably means civilly actionable. We have seen that "unlawful means" in conspiracy comprises crimes as well as civil wrongs. In such cases if the act in question would give rise to criminal liability only and not civil liability, in the absence of combination, the section would still provide protection. A strike may involve the commission of offences in breach of statutory provisions (without any tort or breach of contract) and in such a case it could be said that there would be no *civil* liability in the absence of combination: therefore the section protects the combiners from liability.[291] It is submitted, however, that this situation is unlikely to arise, as in most cases, if not all, the tort of interference by unlawful means will be established. Thus there will be an actionable wrong in the absence of combination. Where, however, the criminal offence is not one *capable* of being committed by a single person, e.g. the act of striking itself, which necessarily involves concerted action, then the section will protect the combiners from liability. In such a case, if there is no combination or agreement, then there is no strike, and no unlawful act on which to found a civil (or criminal) action.[292]

No protection is provided by the section unless the act is done "in contemplation or furtherance of an industrial (or trade) dispute". It has been said of the English section of the 1906 Act that it has advantages over the common law as a protective measure. "First, proof that there is a trade dispute, and that the act complained of was done in contemplation or furtherance of it, dispenses with the need for establishing anything about the predominant motive of the actors. Secondly, the definition of a trade dispute, covering as it does sympathetic action, means that the protection of the section can be invoked even if the predominant motive was to promote someone else's legitimate interest."[293] On the other hand, the common law notion of legitimate interests is, as we have seen, broad and may be broader than the statutory notion of a trade or industrial dispute. Usually, however, the question whether trade unionists were forwarding legitimate interests will be identical with the question whether they were acting in furtherance of a trade dispute.[294] Trade unionists who are predominantly motivated by a personal grudge will be protected under neither heading.[295]

[291] But, curiously, the combiners could be liable for criminal conspiracy as the Australian equivalent of s. 3 of the *Conspiracy and Protection of Property Act* (U.K.) (see fn. 169 supra) would not protect them. It is submitted that it could not be argued that because there is a criminal conspiracy followed by damage to the plaintiff, that therefore a civil action would lie.

[292] Cf. Sykes, *Strike Law in Australia*, op. cit. p. 181.

[293] Royal Commission on Trade Unions and Employers' Association (1965-1968) Cmnd. 3623, para. 853. See also: *Conway* v. *Wade* [1909] A.C. at 512.

[294] Cf. *Stratford* v. *Lindley* [1965] A.C. 269.

[295] *Huntley* v. *Thornton* [1957] 1 W.L.R. 321, 341, 350.

10 THE COMBINATION

(a) *Proof of the combination, the parties to it, and its execution*

In some cases the written records of the defendants will furnish evidence of the combination and the policy adopted by it.[296] In other cases, "the mutually consensual basis of the conspiracy may be manifested only in the external concerted acts of the combining parties".[297] The combination in such cases is proved by inference from the words and deeds of the parties. The concurrence of time, character, direction, sequence and result must be such as to lead to the inference that separate acts were the outcome of pre-arrangement.[298] There is a distinction between agreement and a mere coincidence of aims.[299]

As well as proving the agreement, the plaintiff must prove *overt acts* done in pursuance of the agreement causing damage to him.[300] "The interests of justice usually require that when allegations of conspiracy are levelled, particulars should be given. The persons charged should know what is the case alleged against them and what overt acts are intended to be proved."[301] In some cases the overt acts will serve the double purpose of proving the existence of the agreement, and its execution.

Cases inevitably arise where it is difficult to decide whether a particular person was a party to the combination or not. We have seen that a defendant must have the relevant intention and motive: "it is necessary for the plaintiff to prove a design, common to the defendant and to others, to damage the plaintiff, without just cause or excuse."[302] But it is not necessary for all the conspirators to join the combination at the same time.[303] Moreover, "a party to a conspiracy is not liable for the damage flowing from the conspiracy before the date of his joining it".[304] A person must play a sufficiently active role in order to be a conspirator. Merely to be present at a meeting which forms part of the conspiracy would not be sufficient.[305] Moreover, it is possible to lend assistance to conspirators without becoming a conspirator.[306]

296 E.g. *Ware & de Freville* v. *M.T.A.* [1921] 3 K.B. 40.
297 *P.T.Y. Homes Ltd.* v. *Shand* [1968] N.Z.L.R. 105, 110.
298 *Williams* v. *Hursey* (1959) 103 C.L.R. 30, 107; *Roscoe* v. *Wells* (1909) 11 W.A.R. 184, 189-91.
299 See Howard, *Australian Criminal Law*, op. cit. p. 278.
300 *Crofter* case at 461; *McKernan* v. *Fraser* (1931) 46 C.L.R. at 407; *Thomas* v. *Moore* [1918] 1 K.B. 555. A nexus between the conspiracy and the damage must be alleged and proved: *Ward* v. *Lewis* [1955] 1 W.L.R. 9.
301 *McKernan* v. *Fraser* (1931) 46 C.L.R. at 364. See also *Qatar Petroleum Co.* v. *Thomson* [1959] 2 Lloyds Rep. 405. It is not essential that every overt act alleged should be proved: *Quinn* v. *Leathem* [1901] A.C. 495, 522.
302 *Sweeney* v. *Coote* [1907] A.C. at 222.
303 *Huntley* v. *Thornton* [1957] 1 W.L.R. 321, 343.
304 Glanville Williams, *Joint Torts*, op. cit. p. 66.
305 Cf. *Morgan* v. *Fry* [1968] 1 Q.B. 521, 548 (joint tortfeasors).
306 *Williams* v. *Hursey* (1959) 103 C.L.R. 1, 108. See also *Bird* v. *O'Neal* [1960] A.C. 907, 921.

(b) *The requirement of plurality*

There must be a least two parties to a conspiracy, but there may be many more. It is not necessary for the plaintiff to sue every conspirator. If the only two parties to the combination are husband and wife an action for conspiracy will probably not lie.[307] It is doubtful whether anti-social and harmful agreements between husband and wife should be so privileged. Where the parties are employer and employee (or in some analogous relationship), special difficulties arise. Only a brief outline of the problems can be attempted here.

In the *Crofter* case, Viscount Simon said that if a person "could be regarded as only obeying orders received from his superior, the combination would still exist if he appreciated what he was about".[308] Lord Wright said the fact that a "sole trader employed servants or agents in the conduct of his business would not *per se* . . . make these others co-conspirators with him".[309] It is submitted that simply labelling a party as a servant or agent will not be conclusive of whether he is or can be a conspirator with his superior or principal. If he is acting under orders he may not be a voluntary participant, he may not be cognizant of all the facts including the motive of his superior, and he may have the legitimate motive of retaining his job. On the other hand, a servant can be a voluntary, and fully cognizant participant. In *Huntley* v. *Thornton*[310] one of the defendants was secretary of a district committee of the union. Harman J. said that this defendant could not escape liability on the ground that he was only the committee's servant: "I formed the conclusion not merely that he identified himself with the committee's acts but that he was the instigator and prime mover of them."[311] It is true, however, that in other contexts an employee has been treated as the *alter ego* of the employer. On this basis, for example, it has been held that "if a servant acting bona fide within the scope of his authority procures or causes the breach of a contract between his employer and a third person, he does not thereby become liable to an action of tort at the suit of the person whose contract has thereby been broken".[312] If an employee is regarded as the *alter ego*

[307] At least the cases on criminal conspiracy suggest this. See: Clerk and Lindsell, *Torts*, (13th edn.) p. 414, fn. 60. *R.* v. *Whitehouse* (1852) 6 Cox C.C. 38.

[308] [1942] A.C. at 441. See also *Morgan* v. *Fry* [1968] 1 Q.B. 521, 548.

[309] Op. cit. 468.

[310] [1957] 1 W.L.R. 321.

[311] Ibid. 342-3.

[312] *Said* v. *Butt* [1920] 3 K.B. 497, 506; otherwise "whenever either a managing director or a board of directors, or a manager or other official of a company, causes or procures a breach by that company of its contract with a third person, each director or official will be liable to an action for damages". (Ibid. 504). See also *Scammell & Nephew* v. *Hurley* [1929] 1 K.B. 419; *Rutherford* v. *Poole* [1953] V.L.R. 130; *O'Brien* v. *Dawson* (1942) 66 C.L.R. 18, 32-3, 34. But cf. *De Getley Marks* v. *Greenwood* [1936] 1 All E.R. 863, 872-3: "I think it is true that directors in a board meeting could not induce or conspire to induce the meeting to break a contract—at any rate, not without malice. But I think that some at any rate, if not all, of the directors could conspire, before the board

of his employer it is difficult to see how one can conspire with the other. Where the employer is a company there is the added difficulty that although the company is clearly a distinct legal person, it can only act through directors, managers or other agents. If a company acts through its director, it does not make much sense to talk of the company conspiring with that director.[313] In the case of a "one man" company it is particularly artificial to talk of a conspiracy between the company and its director: "it would not be right to say there were two persons or two minds."[314] The person who represents the company cannot conspire with it, as he is its *alter ego*. But it may be possible for a company through one of its agents to conspire with another of its agents provided the latter is not the agent of the company for purposes of entering upon the conspiratorial activity.

In Australia it has been held that a trade union can conspire with its own members.[315] This view is based on the theory that a trade union has some kind of corporate entity distinct from its members. It has been said that there is "nothing illogical in suggesting that individual members of the union, whether they are office bearers or not, might enter into communication with either the governing body of the union or its general meeting—might even solicit from them authority to carry out illegal acts, and therefore in a very true sense be said to have entered into a conspiracy with them to do those illegal acts, and that this might be followed by a resolution on the part of the union's meeting or its executive that those acts be carried out by the agents".[316] There is, however, the same difficulty as with other corporate or quasi-corporate bodies. These can only act through agents. If the corporate body authorizes the commission of an illegal act through an agent, it is difficult to see how it can be said to have entered into a conspiracy with that agent: the agent is its *alter ego*.

It has been said that "there seems no reason why an employer should not be vicariously liable for a conspiracy involving his servants".[317] In one case, however, this view was rejected as involving "the proposition that the defendant by its servants A, B and C conspired with the defendant by its servants X, Y and Z—that is to say, that the conspirator was the

meeting was held, to induce the board as a whole wrongfully to break a contract." (per Porter J.)

313 *O'Brien* v. *Dawson* (1942) 66 C.L.R. 18, 32; *Williams* v. *Hursey* (1959) 103 C.L.R. 30, 128.

314 *Reg.* v. *McDonnell* [1966] 1 Q.B. at 245 (criminal conspiracy). But cf. *R.* v. *Blamires Transport Services* [1964] 1 Q.B. 278 (conspiracy between a company and its managing director to commit a summary offence).

315 *Egan* v. *Barrier Branch of Amalgamated Miners' Assoc.* (1917) 17 S.R. (N.S.W.) 243; *Blackmore* v. *Gas Employees Union* (1916) 16 S.R. (N.S.W.) 323; *Roscoe* v. *Wells* (1909) 11 W.A.L.R. 184; *Coal Miners Industrial Union* v. *True* (1959) 33 A.L.J.R. 224, 230; *Williams* v. *Hursey* (1959) 103 C.L.R. 30, esp. at 129. See also *Pratt* v. *B.M.A.* [1919] 1 K.B. 244.

316 *Egan's* case (1917) 17 S.R. (N.S.W.) 243, 257-8. The Court relied on *Brisbane Shipwrights' Provident Union* v. *Heggie* (1906) 3 C.L.R. 686.

317 *Winfield and Jolowicz on Torts*, op. cit. p. 476.

defendant; thus the element of plurality of parties, essential to conspiracy, is lacking".[318] Of these two views the former is more compatible with the traditional theory of vicarious liability; while the latter is more compatible with the so called "master's tort" theory.[319]

11 IS CIVIL CONSPIRACY PARASITIC ON CRIMINAL CONSPIRACY?

An essential difference between criminal and civil conspiracy is that in the former it is sufficient to show the agreement, but in the latter it is essential to show the execution of the agreement to the plaintiff's detriment. "It is true that the crime of conspiracy is the very agreement of two or more persons to effect an unlawful purpose and any overt acts done in pursuance of the agreement are merely evidence to prove the fact of agreement. The tort of conspiracy, however, is complete only if the agreement is carried into effect so as to damage the plaintiff. Accordingly, the acts done in pursuance of the agreement are an integral part of the tort."[320] Moreover, it has been repeatedly stated in the cases that if a criminal conspiracy is established then a person who suffers damage as a result of the conspiracy has a civil right of action. In the *Mogul* case[321] Fry L.J. said that "whenever persons enter into an agreement which constitutes at law an indictable conspiracy, and that agreement is carried into execution by the conspirators by means of an unlawful act or acts which produce private injury to some person, that person has a cause of action against the conspirators." But this is only true if the acts of the defendants were aimed at the plaintiff and intended to damage him. A conspiracy "may be punished criminally by indictment, or civilly by an action on the case in the nature of conspiracy if the damage has been occasioned to the person against whom it is directed".[322]

Some judges have gone further and said that there cannot be a civil conspiracy unless there is a criminal conspiracy. Thus in 1931 Evatt J. said: "apart from the special dispensation given by statute, it now seems clear that the tort of civil conspiracy cannot be established unless the plaintiff proves (*inter alia*) the existence of a criminal conspiracy punishable in the criminal jurisdiction."[323] But it is doubtful today if civil

[318] *Carpenter's Investment Trading Co. Ltd.* v. *Commonwealth of Australia* (1952) 69 W.N. (N.S.W.) 175, 176.

[319] See P. S. Atiyah, *Vicarious Liability in the Law of Torts* (London: Butterworths 1967) pp. 6 et seq.

[320] *Marrinan* v. *Vibart* [1963] 1 Q.B. 234, 238: per Salmon J. This distinction has been repeatedly emphasized in the cases: e.g. *Temperton* v. *Russell* [1893] 1 Q.B. 715, 729-30; *Crofter* case [1942] A.C. 435, 439, 461.

[321] (1889) 23 Q.B.D. 598, 624; see further at 610. See also e.g. *Boots* v. *Grundy* (1900) 82 L.T. 769, 772; *Martell* v. *V.C.M.A.* (1903) 29 V.L.R. 475, 510-11.

[322] *Quinn* v. *Leathem* [1901] A.C. 495, 528. (Italics added). See also *Vickery* v. *Taylor* (1911) 11 S.R. (N.S.W.) 119, 129-31, 132.

[323] *McKernan* v. *Fraser* (1931) 46 C.L.R. 343, 364; also at 381. See further: *Sorrell* v. *Smith* [1925] A.C. 700, 725.

conspiracy is or should be parasitic on criminal conspiracy in this way. When certain conspiracies ceased to be criminal by virtue of s. 3 of the *Conspiracy and Protection of Property Act*, 1875 (U.K.), civil liability remained.[324] Moreover, we have seen that it is debatable whether conspiracy to injure a person in his trade or business by lawful means, ever gave rise to criminal liability.[325] Again there may be conspiracies by unlawful means where the "unlawfulness" is sufficient for civil purposes but not for criminal. Accordingly it would not be accurate to state categorically: "If in fact there is such an agreement that would base a civil action for conspiracy, that would undoubtedly amount to a criminal act."[326]

12 CONCLUSIONS

Conspiracy by lawful means is not a strong weapon in the hands of plaintiffs. The courts have interpreted "legitimate interests" or "just cause or excuse" in favour of defendants. They have largely opted out of attempting to determine what is unfair or unreasonable in the sphere of commercial competition and industrial disputes, wisely leaving regulation and control to the legislature and special tribunals. But there still remains protection at common law for the plaintiff who is injured by a combination which is actuated by the worst motives. This protection is limited, but necessary. The problem is that there is no sufficient reason why the protection so accorded should be restricted to the plaintiff who is injured by two or more defendants rather than one. The power of one may be as great as that of two, his motives may be as bad, and he may economically ruin the plaintiff as effectively as a combination.[327] To allow recovery would admittedly require rejection of judicial attitudes expressed in *Allen* v. *Flood*[328] and *Bradford Corporation* v. *Pickles*;[329] but it would hardly open the floodgates any more than conspiracy has. It was said in *Allen* v. *Flood*[330] that "Against spite and malice the best safeguards are to be found in self-interest and public opinion" and "Much more harm than good would be done by encouraging or permitting inquiries into motives . . . to say nothing of the probability of injustice being done by juries in a class

[324] See: *Quinn* v. *Leathem* [1901] A.C. 495, 542 per Lord Lindley.
[325] *Crofter* case at 488. But the contrary view has been expressed. See: *Quinn* v. *Leathem* [1901] A.C. 495, 530; *Mogul* case (1889) 23 Q.B.D. at 617, (1885) 25 Q.B.D. 476, 483-4. See further, *Reg.* v. *Kanara* [1973] 3 W.L.R. 198, 217.
[326] *Taffs* v. *Beesley* (1894) 16 A.L.T. 59, 61 per Madden C.J. On the other hand, if a combination directed at and injuring the plaintiff is not actionable, it should not be indictable: *Boots* v. *Grundy* (1900) 82 L.T. 769, 772. See further (1952) 15 M.L.R. at 213.
[327] E.g. *Tuttle* v. *Buck* (1909) 119 N.W. 946. For other examples in the U.S. see: W. L. Prosser, *Law of Torts* (4th ed., St Paul, Minnesota: West Publishing Co. 1971) p. 955 fns. 17 and 19.
[328] [1898] A.C. 1.
[329] [1895] A.C. 587.
[330] Op. cit. at 152-3 per Lord Mcnaghton. See also *Boots* v. *Grundy* (1900) 82 L.T. 769, 771, and *Midland Cold Storage* v. *Steer* [1972] 3 W.L.R. 700, 712.

of cases in which there would be ample room for speculation and wide scope for prejudice". But inquiry into motive is allowed in cases of conspiracy, and although difficulties may arise in determining what actuates a person, "the tribunal must ascertain the motive in the best way it can upon the evidence presented to it".[331] As a result of the suggested reform there would no longer be any magic in numbers.

Conspiracy by unlawful means has proved a more potent weapon in the hands of plaintiffs, owing to the fairly broad interpretation given to the definition of "unlawful means", and also to the fact that legitimate motives are generally no justification. It is submitted that conspiracy by unlawful means is acceptable as a tort provided the unlawful act is not trivial, or incidental, and provided the combination is directed at the plaintiff. But again there should be no magic numbers; an individual defendant acting alone should be liable where he intentionally injures the plaintiff by the same unlawful act or threat. The only significance attaching to conspiracy by unlawful means should be, and probably is, that it enables the plaintiff to sue defendants other than the one who actually committed the unlawful act.

331 *Brisbane Shipwrights' Provident Union* v. *Heggie* (1906) 3 C.L.R. 686, 701. For example, it would be difficult to decide whether a soldier fired for the purpose of defending his country or for some unjustifiable motive: see (1933) 49 L.Q.R. at 328.