A NEW TORT FOR MASS PICKETING: THE THOMAS CASE AND ITS IMPLICATIONS FOR AUSTRALIA

PART ONE

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Introduction

Picketing, whether for industrial, consumer, environmental or other purposes, is an activity designed to communicate information and/or to persuade and/or eventually to prevent certain things from occurring. In the U.K. and Australia, there is no right to picket, but on the other hand, there is no illegality attached to the mere act of picketing. The illegality or unlawfulness is determined by the ordinary law. “Lawful” pickets can, in theory, ensure that they avoid the legal pitfalls of, for example, nuisance, intimidation, conspiracy, assault, obstruction, trespass and being in breach of the peace. In practice, what may commence as an exercise in free speech with good intentions, often deteriorates into violence or threats of violence by the end of the day. This is no less true of picketing in support of an industrial dispute when, in order to prevent non-union (“scab”) labour from being used by an employer during a strike, or supplies from being brought into or from leav-

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ing strike bound premises, impetuous acts on the picket line are sometimes understandable since the success of the strike will often depend upon it. The nature of industrial picketing cannot be fully understood, however, merely by concentrating on the acts of the pickets. There must be, in addition, some indication of the purpose or purposes it seeks to achieve. This point was acknowledged by Bercusson:

The purposes which render picketing a form of rational behaviour are first, to communicate information about the strike to the unaware; secondly, to persuade non strikers to join the strike; and thirdly, to prevent, by moral pressure or physical obstruction, scabs from operating the plant. To arrive at an understanding of picketing, therefore, it is necessary not only to embrace the activity engaged in, but also the purposes which it sets out achieve. To examine the former while ignoring the latter renders the actions of pickets senseless.

Yet these purposes have never been treated by the courts as always justifying acts which are tortious or criminal.

Frustration is increased by the fact that there is no right to stop vehicles approaching the entrance to an employer’s premises, which makes it impossible to talk to drivers in order to explain to them the reasons for the strike. In the U.K., a natural response by unions and workers in recent years has been not to block the entrance with a mass of pickets which could give rise to prosecutions for obstructing the highway, actions for public nuisance, etc., but to have a small number of pickets strung across the road without impeding access and large numbers of workers along both sides demonstrating their support for the official pickets.

The legality of this response was considered in Thomas v. National Union of Miners (S. Wales Area) which arose from the bitterly

3 B. Bercusson, “One Hundred Years of Conspiracy and Protection of Property: Time for a Change” (1977), 40 Mod.L.Rev. 268
4 Kavanagh v Hiscock, [1974] Q.B. 600. The Industrial Relations Act, 1971 (U.K.) (now s. 16(1) of the Employment Act, 1980 (U.K.)) grants immunity from action or prosecution only in limited circumstances
5 A Code of Practice issued by the Secretary of State under section 3 of the Employment Act, 1980 (U.K.) suggested no more than six pickets at any entrance to a workplace (Employment Code of Practice (Picketing) Order 1980, section 1 1980/1757, section E, para. 31). Failure to comply does not constitute a criminal offence or tortious conduct, although a court may take the guidance contained in the Code into account
6 [1985] Ind Rel L R 136
fought 1984-85 national miners’ strike. The strike, lasting a whole year, failed in many areas due to the actions of the police, sometimes more provocative than was necessary, in keeping the mines operational. The importance of *Thomas* does not lie solely in its general contribution to tort liability for this type of mass picketing. Because injunctive relief was sought by miners who had continued to work despite the strike and who had not been physically prevented from working by the pickets, the case proved difficult for Scott, J. to fit within any of the accepted heads of tort liability for picketing (including public and private nuisance). He felt compelled to create a new tort which had been committed by the pickets, namely, unreasonable harassment of the plaintiffs in the exercise of their right to use the highway to go to work.

Picketing in Australia as a form of union industrial action has not assumed the central position that it has in the U.K. This may be attributed in part to the “dampening” effect of the federal and state Conciliation and Arbitration tribunals in taking hold of an industrial dispute at an early stage, and partly by the failure of large scale picketing in support of the notorious failed maritime, shearsers’ and miners’ strikes in the 1890’s. It is the purpose of this part of the article to examine the reasoning of the court in the *Thomas* case and, in the second part, to outline its significance for the Australian states.

Consideration will therefore be given to the nature and proper application in England of common law principles underlying the torts of assault, public and private nuisance, interference with the performance of a contract, and intimidation in the context of industrial picketing and the relevance of criminal legislation, such as the *Conspiracy and Protection of Property Act, 1875* (section 7) and later statutes, in providing protection for picketing. The extent of protection from criminal offences in the Australian states, and civil liability for the above torts through an examination of the judgments

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in *Williams v. Hursey* which essentially raises similar problems to those discussed in the *Thomas* case will then be addressed. Finally, an attempt will be made to summarise the applicability of offences equivalent to those in *Conspiracy and Protection of Property Act* (section 7) in Australia, and the main points of criticism of Scott, J.’s judgment on tort liability.

**Facts**

The facts of *Thomas v. National Union of Miners* were as follows. The National Union of Mineworkers (N.U.M.) was in dispute with the National Coal Board (N.C.B.) concerning the latter’s decision to close unproductive pits throughout the country. The response of the N.U.M. was to call for strike action, coordinated by the National Coordinating Committee (N.C.C.), and in the South Wales area there was total support for the strike until November 1984 when some members of the South Wales union, including twelve of the plaintiffs, decided to return to work at the collieries. The South Wales union then organised, through their local lodges, picketing at the gates of those collieries in South Wales, at collieries outside that area, and at industrial premises other than collieries, both inside and outside the South Wales area.

This situation was still in existence when the plaintiffs sought an interlocutory injunction restraining the South Wales union on the grounds that picketing at the gates of the five collieries where they were employed was unlawful and that the picketing within or outside the South Wales area was both unlawful and *ultra vires* the rules of the South Wales union to organize or fund by paying fines for picket-line offences or otherwise. In addition, the plaintiffs sought an injunction against members of the N.C.C. which would prevent them from continuing to induce or encourage *ultra vires* secondary picketing by the South Wales union at other industrial premises.

**Judgment**

Scott, J., in the High Court (Chancery Division) however, denied injunctive relief; first, in respect of picketing in other collieries in

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8 (1959), 103 C.L.R. 30.
the South Wales area where none of the plaintiffs were working, because even if the acts of the union were *ultra vires* no working miners had come forward to complain and there was insufficient evidence of actual conditions at individual pits; and secondly, in respect of secondary picketing at industrial premises other than collieries, because such action was capable of being carried out lawfully and was authorised under an objects clause. Secondary picketing was not necessarily criminal, although probably inevitably tortious as an interference with contract. Consequently, Scott, J. held that the use of union funds by the South Wales union to support the secondary picketing was not unlawful. He also held that the actions of the N.U.M. and members of the N.C.C. did not induce the South Wales union and its officers to breach its rules by encouraging *ultra vires* secondary picketing.

Despite these setbacks, the plaintiffs were able to persuade the court to grant a number of important injunctions. One was directed to preventing the South Wales union from implementing an Executive Committee resolution that "those who have been arrested once should not put themselves in risk of arrest again", although in the event of a conviction "any subsequent fines will be paid by the National Union of Miners". On the authority of *Drake v. Morgan* this resolution was held to be contrary to public policy and void of effect. However, there was nothing to prevent the union from giving financial assistance to one of its arrested members towards the cost of legal expenses and fines imposed, subject only to a possible challenge in the courts, if in any particular case the decision of the management was so perverse that no reasonable person could suppose it to be in the interests of the union.

Three other injunctions granted were of limited importance and were aimed at preventing individual lodges from organising or encouraging isolated acts of violence or harassment outside the col-

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9 See later discussion of alleged heads of the South Wales union's tortious liability for the colliery gate picketing.

10 [1978] Ind Cas R. 56

11 An injunction to restrain the South Wales union from using its funds in support of a strike was not granted because the strike in South Wales was called in accordance with the union's rules and was therefore official. On this ground, *Taylor v. U National Union of Miners (Derbyshire Area)*, (1985) Ind Rel L R. 99, was distinguished.
liery gates, at the homes of two of the plaintiffs and at the training college of a third. But the most significant five injunctions granted were aimed at preventing what had occurred and continued to occur at the colliery gates of the five pits, for it was there that the main thrust of the union campaign was directed from early November 1984 until early February 1985.

The facts disclosed that on average 50-70, sometimes 200, striking miners attended at the colliery gates daily, in what the union called a “spontaneous demonstration”. Six were selected as “official” pickets (that is, recognised by the union and by the police) and these were permitted to stand close to the gates in an attempt to persuade the “scabs” not to work. The rest were placed back from the road behind a police cordon, so as to allow vehicles carrying the working miners to pass. Abuse was hurled at the men as they drove into the colliery, but no physical acts of violence occurred.

As regards responsibility for the picketing, it was vital for the plaintiffs to establish the liability of the South Wales union, because none of the officers of the local lodges were named as defendants. Scott, J. accepted that officers at local lodges saw it as their duty to organize and participate in picketing at the colliery gates, and had exercised their authority in choosing the six official pickets without on any occasion discouraging attendance at the colliery gates. The organisation was solely the concern of local lodges and only local union members were involved in the picketing at each pit. This was clearly both the policy and the practice of the South Wales union. There was no evidence to suggest that picketing had been or was being organised by the Area Executive or by the National Executive. But his Lordship thought that if the picketing was tortious, the South Wales union was vicariously liable, applying the traditional test used by Lord Wilberforce in Heaton’s Transport (St. Helens) Ltd. v. Transport and General Workers Union.¹²

In that case, the question whether a union against which an injunction had been granted was liable for contempt of court for the acts of one of its shop stewards in breach of the injunction was raised. The House of Lords held that the union was liable because it had not taken adequate steps to try and ensure that the order was obeyed.

The Court of Appeal had come to the opposite conclusion, placing importance on the fact that the shop steward was an agent rather than a servant, but, according to Lord Wilberforce, the test is the same for both principal-agent and master-servant relationships: "...was the servant or agent acting on behalf of, and within the scope of the authority conferred by the master or principal?"

The powers and duties of the lodges were left to custom, but the objects of the South Wales union were wide enough to put general responsibility for the conduct of an official strike, which this clearly was, in the South Wales union. Moreover, a resolution of the South Wales Union Area Executive Council in early November 1984 to step up picketing, led Scott, J. to the conclusion that this policy was made known to the lodges and required to be implemented by them, so that the lodge officers were acting on behalf of and within the scope of the authority conferred by the South Wales union.

However, by far the most significant part of this case lay in the elucidation and application of existing legal principles to the "mass" picketing at the colliery gates. Because the plaintiffs were asserting rights under civil law, the relevant legal principles were found to be in the law of tort, not in the criminal area. The plaintiffs' contention that the picketing was "unlawful" was quite properly described as both "unhelpful and misleading".

Tortious Picketing at the Colliery Gates

A number of grounds were alleged by counsel for the plaintiffs on which the picketing could be held to be tortious: under section 7 of the Conspiracy and Protection of Property Act, 1875 (U.K.), assault, obstruction of the highway (public nuisance), private nuisance, interference with contract and intimidation. It is proposed to examine these areas of the law in some detail and to attempt to assess the correctness of Scott, J.'s judgment that intimidation, and the new tort of unreasonable harassment of highway users, existed on the facts, while assault, public nuisance and interference with contract did not.

13 Ibid, 99
14 Supra, 145
15 Ibid, 145
16 Partly repealed by the Trade Disputes Act, 1906 (U.K.), s 2(2)
1. Section 7 of the *Conspiracy and Protection of Property Act, 1875* (U.K.).

This section, which has been interpreted in two completely different ways, provides that:

Every person who with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing, wrongfully and without legal authority,

(1) uses violence to or intimidates such other person or his wife or children, or injures his property, or

(2) persistently follows such other person about from place to place, or

(3) hides any tools, clothes or other property owned or used by such other person or deprives him of or hinders him in the use thereof, or

(4) watches, or besets the house or other place where such other person resides, or works or carries on business, or happens to be, or the approach to such house or place, or

(5) follows such other person with two or more other persons in a disorderly manner in or through any street or road ... commits an offence.

But attending at or near the house or place where a person resides or works, or carries on business or happens to be, or the approach to such house or place, in order merely to obtain or communicate information, shall not be deemed a watching or besetting within the meaning of this section.

The plaintiffs' main contention was that the picketing was a criminal offence under section 7 and therefore tortious. This apparently unsatisfactory argument does, however, derive some support from dicta in the Court of Appeal judgments in *Lyons v. Wilkins.* 17 In that case, picketing was organised by the defendants (union officials), who, in the course of an industrial dispute with the plaintiffs, peacefully picketed the plaintiffs' business premises and that of a sub-contractor. The plaintiffs sought and gained an interlocutory injunction which was confirmed by the Court of Appeal 18 on the ground that persuading people not to enter into their employment constituted the criminal offence of watching and besetting under section 7 and was also tortious. But if the picketing was merely to communicate information, it was permitted by the exception mentioned in section 7 and was neither criminal nor tortious.

17 [1896] 1 Ch 81 (interlocutory appeal), [1899] 1 Ch 255.
18 Lindley, Kay, and A.L. Smith, L.J.
On appeal, both Lindley, M.R. and Chitty, L.J. expressed the view that to watch and beset a man's house for the length of time and in the manner and with the purpose proved would constitute a nuisance at common law independently of section 7.19 Vaughan Williams, L.J. agreed, but only insofar as he felt bound by the judgments already given in the interlocutory appeal. He added, however, that there was a clear contrast between crime and tort, and that at common law a watching, apart from the law of conspiracy, might or might not be so conducted as to amount to a nuisance.

This contrary view was reiterated by him and accepted by another Court of Appeal judge in Ward, Lock and Co. Ltd. v. The Operative Printers' Assistants Society.20 The defendants had stationed pickets outside the plaintiff's business premises and he brought a civil action for damages. The court held that on the facts there was no evidence of nuisance, and that the words "wrongfully and without legal authority" were introduced so as to limit the section to acts which were at least tortious at common law. No criminal offence was therefore committed either for "watching or besetting" or for any of the other acts mentioned unless they were independently either criminal or tortious. Moreover, the proper interpretation of the exception was that acts amounting to communication of information were prevented from being criminal under the first part of the section but could still be tortious.21

The more liberal Ward, Lock approach to the "watching or besetting" provisions has been taken in the U.K. in a number of cases. In Fowler v. Kibble,22 it was argued that section 7 of the 1875 Act gave rise to a civil action even though the Trade Disputes Act, 1906 had provided certain tortious immunity for acts done in contemplation or furtherance of a trade dispute. This was rejected by the Court of Appeal which unanimously followed Ward, Lock and Co. Ltd. in holding that no new right of action was created by the section.23

19 Ibid., 267 and 271, respectively.
20 (1906), 22 Trade Union R 327. The other judge was Fletcher Moulton, L.J. Stirling, L.J., agreed but gave no detailed reasons for his decision.
21 Ibid., Fletcher Moulton, L.J., 329. However, tortious immunity was provided for both informational and persuasional picketing by the Trade Disputes Act, 1906 (U.K.) and by the Trade Union and Labour Relations Act, 1974 (U.K.).
22 [1922] 1 Ch. 487.
23 Ibid., Lord Sterndale, M R., at 494; Younger and Warrington, L.JJ., at 498. The case did not, however, involve picketing.
Strong support for *Ward, Lock* is also to be found in Lord Denning's judgment in *Hubbard v. Pitt*. Here the pickets were not involved in an industrial dispute. They were protesting peacefully, with the authority of the local police, outside the premises of a real estate agent, against the activities of developers. An injunction was granted to the estate agent by Forbes, J., who took a wide view of what amounted to a public nuisance, that is, one more restrictive of picketing. In the Court of Appeal, Lord Denning, M.R. rejected the view that picketing was in general unlawful, and indicated that there was no tort of "watching or besetting". The grant of the injunction was, however, upheld by the majority on the authority of the House of Lords decision in *American Cyanamid Co. Ltd. v. Ethicon Ltd.* as to the rules for granting injunctions. No comprehensive discussion, therefore, of the law of nuisance is to be found in the judgments of the majority.

In the light of this background of cases and dicta upholding the correctness of *Ward, Lock*, it seems surprising that counsel for the plaintiffs in the *Thomas* case took as his main submission the point that conduct which was criminal under section 7 was therefore always tortious even for non-violent picketing. It is cited with approval in *Thompson Schwab v. Costaki*, and is accepted as correct on the facts by Orr and Stamp, L.JJ. in *Hubbard v. Pitt* and, more recently, by Fitzhugh, J. in *Mersey Dock and Harbour Co. v. Verrinder*. In *Mersey Dock*, an injunction was granted to prevent peaceful picketing of a docks container terminal aimed at ensuring that only haulage operators who were union men secured work from the shipowners. The case was decided on the basis that peaceful picketing "or watching or besetting" to put pressure on an employer or business at the plaintiff's house or business premises in order to change an existing practice is a private nuisance.

Nevertheless, none of the cases supporting *Lyons v. Wilkins* are authorities for the plaintiffs' submission in *Thomas* that section 7

24 [1976] 1 Q.B. 142
25 The case will be examined in more detail when the discussion turns to obstruction of the highway and public nuisance
26 [1975] A.C. 396
28 [1982] Ind.L.R. 152
creates a new action in tort independently of any reference to other torts. What they demonstrated is that acts of peaceful picketing involving compulsion which are impossible to distinguish from those in *Ward, Lock* are tortious at common law independently of the section. Once this independent tort or torts has been established, in addition, the actions of the defendant will constitute a criminal offence as a "watching or besetting" under the section. The basic distinction between *Ward, Lock* and *Lyons v. Wilkins* (and the cases mentioned above) is that, on almost identical facts, the court was prepared to see a common law nuisance in the latter but not in the former.

Scott, J., therefore, quite properly rejected dicta in the Court of Appeal judgments of Lindley, L.J., Kay, L.J. and A.L. Smith, L.J. in *Lyons v. Wilkins*, that picketing which was an offence under section 7 was for that reason tortious, whereas picketing which came within the exception in section 7 (informational picketing) was not criminal and was not tortious, as involving a *non sequitur*. It was not logical to conclude that, because conduct was criminal under the section, it was therefore also tortious without any consideration of whether the section was intended to create a civil action for its breach. This approach "puts the cart before the horse"29 since, according to *Ward, Lock*, it is necessary to establish that an action in tort exists before any criminal offence is committed.

There is another aspect to the *Lyons v. Wilkins* case that could profitably be dealt with at this point. It is not clear from the judgments whether an injunction was granted to prevent the commission of the alleged criminal offence of "watching or besetting" or of an alleged tort. It is of course possible to grant an injunction to the victim of an offender who breaks the criminal law30 so that the issue of an injunction does not hinge on the distinction between crime and tort. But when what is alleged is tortious conduct, as in *Thomas*, it is incorrect to blur that distinction by arguing that *Lyons v. Wilkins* establishes that the commission of the criminal offence of watching or besetting constitutes a tort, and this was recognised by Scott, J.

29 Supra, 146
2. Assault

The submission that the working miners were put in fear of violence by the massed pickets and could sue for tortious assault was peremptorially rejected. His Lordship accepted that an assault exists when there is "an overt act indicating an immediate intention to commit a battery, coupled with the capacity to carry that intention into effect." That capacity must be present at the time the overt act is committed, and since the mass pickets (with the exception of the official ones) were all held back away from vehicles bringing in the working miners, even the most violent of threats and gestures could not constitute an assault.

3. Public Nuisance

The next major attack on the position of the pickets was launched from the platform of obstruction of the highway. This is a particularly difficult area of the law relating to picketing which was not discussed in sufficient depth by Scott, J., even given the interlocutory nature of the proceedings. Counsel for the plaintiffs relied on two cases, *Broome v. D.P.P.* and *Hubbard v. Pitt*, to support their contention that the actions of the pickets involved obstruction of the highway, for which the working miners could sue in tort.

The English common law relating to picketing, trespass, obstruction of the highway and public nuisance is not at all clear. Much of the difficulty stems from different judicial views as to whether or not trespass to the highway lies at the heart of the public nuisance of the highway. Picketing is particularly susceptible to trespass, because on a restrictive view of that tort, the activities of unauthorized pickets, even those who are stationary, cannot be reconciled with the right of passage and, in addition, there is no need to establish damage

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because trespass is actionable *per se*. These possibilities are somewhat mitigated by the fact that most highways are vested in a highway authority rather than adjacent landowners and the authority is not usually interested in suing pickets or other demonstrators.

A whole range of definitions of highway public nuisance is available from the cases, some emphasising the right of the public to use every part of the highway for passage, others emphasising the importance of permitting reasonable assembly.

The most recent conflict between these two markedly dissimilar approaches in the area of picketing is to be found in *Hubbard v. Pitt*, the facts of which have already been outlined. The group consisted of four to eight people standing in a single line with gaps between them to permit members of the public to pass. Counsel for the defendants' (the pickets') main submission in relation to public nuisance was that unreasonable assembly lies at the core of the tort. But this was rejected by Forbes, J., who thought that it was no defence that a member of the public could easily get around the obstruction. What mattered was that members of the public did not have access to every part of the highway except where the *de minimis* rule was applicable. But that rule did not extend to picketing because the actions were more than "fleeting and inappreciable".

It is clear from the judgment of Forbes, J. that public nuisance on the highway derives its *raison d'être* from trespass, that is, protection of the right of passage on every part of the highway. For him, the word "unreasonable" in the definitions of public nuisance must be interpreted in the light of what is a reasonable use of the highway as a highway for passage and, by refusing to permit assembly within the *de minimis* rule, he widens the scope of public nuisance and renders the word "unreasonable" meaningless.

On the other hand, in the Court of Appeal, Lord Denning, M.R. (the other judges were concerned with the question of the balance of convenience) thought that public nuisance was an unreasonable obstruction of the highway, with reasonableness going to the cir-

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36 For example, *R v Bartholomew* [1908] 1 K B. 554, *Harper v Haden and Sons Ltd* [1933] 1 Ch 298

37 Supra, 152

38 Supra, although Stamp, L.J., at 180 did indicate that he did not "regard the judge's conclusions of law as a satisfactory application of the law to the facts which he found".
cumstances of the assembly. According to him, there must be an actual obstruction (by, for example, crowds collecting or queues forming), threatened violence or actual interference (by, for example, smells or noises). On the facts there was no obstruction of this sort.

Unfortunately, for those involved in either industrial or non-industrial picketing, Forbes, J.'s view probably represents the law. Supporting it is a substantial body of English case law on the statutory equivalent of public nuisance on a highway. Section 137 of the Highways Act, 1980 and similar provisions, such as section 28 of the Town Police Clauses Act, 1847, create the offence of wilful obstruction of the highway. And "[i]t is perfectly clear that anything which substantially prevents the public from having free access over the whole of the highway, which is not purely temporary in nature, is an unlawful obstruction".

In Thomas, counsel for the plaintiffs submitted that in Hubbard v. Pitt, Forbes, J. had concluded that pickets were obstructing the highway without any express reference as to whether special damage was being caused to the plaintiffs by the obstruction. Since, on the facts of Thomas, large numbers of pickets were present at the colliery gates, it followed that they were obstructing some part of the highway even if only the pavements, and it was irrelevant that the working miners were being permitted to enter the colliery. Had this argument been accepted, even the six official pickets would have committed a public nuisance because their situation was identical to that of the pickets in Hubbard v. Pitt, that is, the working miners were prevented from using that part of the highway on which the pickets stood.

Yet, Scott, J. refused to see Hubbard v. Pitt as authority for the "startling proposition" that the plaintiffs can, without special damage, sue in tort for obstructions to the highway. He was prepared to accept that the mass pickets may have obstructed some part of the highway, but it did not follow that the plaintiffs had an action in tort (presumably for public nuisance). The important point was not that there was a technical obstruction to one part of the highway, but that the miners' entry into and egress from the colliery was not being

40 Supra, 148.
physically prevented by the pickets. In other words, special damage is a requirement of the tort and had not been established.

Following Lord Denning's general approach in *Hubbard v. Pitt*, Scott, J. was concerned to ensure that the freedom to assemble was protected from incursions made on it by too strict a view of what amounted to a public nuisance. Although this approach is preferable to that adopted by Forbes, J., Scott, J.'s judgment may be criticised on the ground that no reference was made to the line of statutory highway obstruction cases mentioned above which support Forbes, J.

It should also be noted that the picketing in *Thomas* appears to be in a different category when compared with the relatively harmless picketing undertaken in *Hubbard*. If we leave aside the presence of mass pickets in the former case, the position is identical. But can their presence and conduct be ignored for the purposes of public nuisance as Scott, J. has done? Lord Denning in *Hubbard* emphasised that no crowds had collected or queues formed to amount to an obstruction, no violence was threatened and there were no actual smells or noises. Yet in *Thomas*, crowds had gathered on a regular rather than temporary basis, violence was threatened (though not technically sufficient to amount to an assault) and a great deal of noise was created. Thus, even on Lord Denning's narrower view of the nature of the tort, it appears to be possible to conclude that a public nuisance had been committed. It arose not from the obstruction, because the plaintiffs were not prevented from getting to work, but from the noise and breaches of the peace.

However, given that the degree of annoyance of a plaintiff is greater than that suffered by other members of the public, he still cannot recover damages because he cannot show either actual financial loss or the probability of financial loss. He has succeeded in getting to work on every occasion, even where the public nuisance stems from conduct other than obstruction.

The other main authority cited by counsel for the plaintiffs was *Broome v. D.P.P.* Here it was held that pickets had no right to insist that drivers and pedestrians stop and listen to what they have to say. It was suggested that the same result could be achieved lawfully by

41 Supra, 161.
42 [1974] Ind. Rel L R 26
mass pickets gathering in one place and doing nothing. However, Lord Reid pointed out that if the pickets assemble in reasonably large numbers, it would not be difficult to infer that they have the purpose of preventing free passage\textsuperscript{35} and their presence on the highway would then become unlawful.

Counsel for the plaintiffs’ submission in \textit{Thomas} was that the mass of pickets obstructed part of the highway, even if only the pavement and, presumably, that this was done with purpose of obstructing. Yet it is implicit in \textit{Scott}, J.’s judgment that this was not done with the purpose of obstructing the plaintiffs because the massed pickets were kept back to the side of the road in order to allow vehicles containing the working miners to enter into and egress from the collieries. Had some of the plaintiffs been pedestrians attempting to pass by means of the pavement, the presence there of mass pickets may well have led \textit{Scott}, J. to a different conclusion.

4. Private Nuisance and the New Tort

Having quite properly found that there was no actionable public nuisance, it is submitted that \textit{Scott}, J., then erroneously held that a species of private nuisance had been committed: that unreasonable harassment of the plaintiffs in the exercise of their right to use the highway to go to work constituted an “innominate” tort for which a court would grant relief in the form of an injunction.

In seeking to justify his conclusion, his Lordship drew an analogy with the law of nuisance as a classic example of the principle that unreasonable interference with the rights of others is actionable in tort, although it is not every act of interference with the enjoyment by an individual of his property rights which will be actionable in nuisance. The law must strike a balance between conflicting rights and interests. On the facts, it was necessary to strike a balance between the rights of those going to work and the rights of the pickets.\textsuperscript{44} He referred to the \textit{Ward, Lock} case, where nuisance was not established because “there was no evidence that the comfort of the plaintiffs or the ordinary enjoyment of the Botolph Printing Works was serious-

\textsuperscript{35} Ibid, 29.
\textsuperscript{44} Supra, 149.
ly interfered with by the watching or besetting.” The working miners could not, therefore, complain of picketing *per se* or of harassment *per se* (as in Lyons v. Wilkins). They could only complain of picketing or demonstrations which unreasonably harassed them in their entry into and egress from their place of work. And since this unreasonable harassment had occurred with an average of 50 to 70 men hurling abuse, requiring the presence of the police and the working miners to be conveyed in vehicles, the colliery gate picketing was tortious.

Again a number of criticisms can be made of Scott, J.’s judgment. The most important one stems from his acceptance of mass picketing as constituting “a species of private nuisance”. Private nuisance may be defined as an unreasonable interference with a person’s use or enjoyment of his land or easements. It is crucial to the tort that the plaintiffs’ land or easements are being interfered with, yet the working miners were the plaintiffs, not the N.C.B. as owners of the pits. Moreover, Ward, Lock should not have been relied on because, in that case, as in Lyons v. Wilkins, Hubbard v. Pitt and Mersey Dock and Harbour Co. v. Verrinder, the plaintiffs were all businesses affected by the picketing and having property rights to protect.

Another point worth noting, and which may help to explain Scott, J.’s error, is that it is possible for a private nuisance to arise from activities occurring on public land, whether highway or waste land. But it is still essential that the matter complained of must affect the property rights of plaintiffs.

Confusion is further illustrated by his Lordship’s treatment of the mainly peaceful picketing, usually with smaller numbers, which took place away from the colliery gates. He held that, regardless of the number of people involved and regardless of the peaceful nature of their conduct, picketing at the home or entrance to an estate where a working miner lived, or picketing of a college where a working miner studied, amounted to a common law nuisance *per se*. In his words, “[t]he Ward, Lock case was a case of picketing at business premises, which is a very different matter”.

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45 Supra, Vaughan Williams, L.J., 329.
46 For example, Devlin, J., in Southport Corp v Esso Petroleum Co Ltd., [1953] 3 W L R. 773, 776
47 Supra, 149.
While accepting that he may be correct in assuming that a common law nuisance may be committed by regular picketing by small numbers of men at the homes of workers, it is unlikely that this would also be the case where such picketing occurs at a college attended by a worker because, like the workplace itself, the plaintiff worker does not have a sufficient connection with the property if he is suing in private nuisance. It is only if the facts give rise to a public nuisance that he would be able to sue.

The major difficulty stems from the application of the wider principle that unreasonable interference with the rights of others is actionable in tort. No authority is cited to support it, either as a general principle or in its particular application to unreasonable interference with the right to use the highway for entry into and egress from the workplace. Everything, of course, hinges on the word “unreasonable”. What may be unreasonable to one judge may not be to another. But it is arguable that the existing torts and crimes, such as obstruction of the highway and those contained in section 7 of the Conspiracy and Protection of Property Act, already provide more than adequate protection against the activities of pickets without the need to invent new causes of action in tort.

Scott, J., in support of the principle, refers to an analogous situation. He said:

All citizens have the right to use the public highways. Suppose an individual were persistently to follow another on a public highway, making rude gestures or remarks in order to annoy or vex. If continuance of such conduct were threatened, no one can doubt but that a civil court would, at the suit of the victim, restrain by an injunction the continuance of the conduct. 48

What he did not realise, however, is that this conduct was made a criminal offence by section 7 of the Conspiracy and Protection of Property Act and that the proper course is to consider whether a civil remedy was intended to be given for a breach of the section; a course that he, himself, had earlier thought proper in rejecting counsel for the plaintiffs’ submission that picketing which was an offence under the “watching and besetting” subsection 49 of that Act was therefore tortious.

48 Supra, 149
49 S 7(4) of the 1875 Act.
The acceptance by the courts of Scott, J.’s general principle would mean that they would no longer be constrained by the Ward, Lock interpretation of the “watching or besetting” provision in the 1875 Act. Or, even if they were to follow Ward, Lock, there would be no need to consider whether there was a public or private nuisance because a breach of the new principle would usually be easier to establish than nuisance and once established would activate a breach of the watching or besetting section.

5. Unlawful Interference with the Performance of a Contract\textsuperscript{50}

Yet another of counsel for the plaintiffs’ submissions was that the picketing was tortious as constituting an unlawful interference with the performance of the contracts of employment between them and the N.C.B.

The most recent House of Lords judgments on this aspect are to be found in the case of Merkur Island Shipping Corporation v. Laughton.\textsuperscript{51} Here Lord Diplock, with whom the other members of the House agreed, affirmed Jenkins, L.J.’s statement of the essential ingredients of the tort outlined in D.C. Thomson & Co. Ltd. v. Deakin.\textsuperscript{52} These are: (where breaches of a contract of employment cause a breach of a contract to which the plaintiff is a party) that the defendant knew of the existence of the contract and intended to procure its breach; that the defendant did definitely and unequivocally procure the employees to break their contracts of employment with such intent; that the employees concerned did in fact break their contracts of employment; and that the breach of the plaintiff’s contract ensued as a necessary consequence of the breaches of the employees concerned.

According to Lord Diplock, Jenkins, L.J. did not intend to confine the tort to inducing a breach of contract. This was simply one example of the wider tort of interference with contractual relations and any doubt as to whether it extended to cases where there is no


\textsuperscript{51} [1983] Ind.Rel.L.R 218, 221 222.

\textsuperscript{52} [1952] 1 Ch. 646.
actual breach, merely preventing or hindering the performance, was
settled by the Court of Appeal in *Torquay Hotel Co. Ltd. v. Cousins.*
In other words, Jenkins, L.J. did not intend to restrict the tort to the
"procuring of such non-performance of primary obligations under
a contract as would necessarily give rise to secondary obligations to
make monetary compensation by way of damages. All prevention of
due performance of a primary obligation under a contract was in­tended to be included even though no secondary obligation to make
monetary compensation thereupon came into existence, because the
secondary obligation was excluded by some force majeure clause."

In the *Merkur Island Shipping* case, all the elements of the tort were
established, affirming the Court of Appeal decision. Interference with
a charter party was held to exist when union officials (the defendants)
persuaded their union members (tug crews and lock keepers) to break
their contracts of employment by "blacking" a ship and preventing
it from leaving the port of Liverpool, thereby causing non­
performance by the plaintiff shipowners of a primary obligation under
their charter contract with another shipping company.

On the other hand, in *Thomas,* despite the fact that the other
elements may well have existed, Scott, J., was correct in rejecting the
plaintiffs’ allegations of unlawful interference because the plaintiffs
had succeeded in getting to work and were being paid and there was
no other evidence which would justify a finding that there was a failure
to perform a primary obligation in the contracts of employment of
the working miners by the N.C.B..

6. Intimidation

In relation to this tort, counsel for the plaintiff made two submis­sions. First, he alleged that the criminal offence of intimidation under
section 7(1) of the *Conspiracy and Protection of Property Act, 1875* had been
committed and that its breach gave rise to a cause of action in tort.
That section makes it an offence for any person who, with a view to
compel any other person to abstain from doing or to do any act which

53 [1969] 2 Ch. 106
54 The Law Lords went on to hold that the cause of action which existed at common law and
which was removed by s. 13 of the *Trade Union and Labour Relations Act, 1974* had been effec­tively restored by section 17 of the *Employment Act, 1980.*
such other person has a legal right to do or abstain from doing, "wrongfully and without legal authority", uses violence to or intimidates such other person or his wife or children or injures his property.

Essentially, this argument was the same as that advanced earlier as regards the "watching or besetting" sub-section and was rejected by Scott, J., for the same reason. No new causes of action in tort were created by section 7 following the Ward, Lock interpretation rather than that in Lyons v. Wilkins. It will be recalled that these different interpretations hinged on the words "wrongfully and without legal authority" in the section, the latter case holding that the words were meaningless (comparable to "wrongfully and maliciously" in a murder charge) and that the effect of the section was to make criminal and possibly tortious acts which were previously innocent; the former that the section applied only to conduct which was already tortious even if not already criminal.

Although the Ward, Lock approach was taken by Scott, J., both in relation to sub-section 7(1) and (4), there is less reason for it as regards the former sub-section. The word "wrongfully" is clearly meaningless in conjunction with "uses violence". Moreover, given that on a strict view of statutory interpretation it is essential to make sense of every part of the section, it is difficult to escape the conclusion that the Lyons v. Wilkins approach is the only one which makes sense of both sub-section 7(1) and (4). 56

Having held that no tortious liability for intimidation arose from a mere breach of section 7(1), Scott, J. then, surprisingly, found that mass picketing at the entrances to the collieries nevertheless constituted tortious intimidation, agreeing with the second more general submission made by counsel for the plaintiff. 57 Again, no authorities were cited by Scott, J. Rookes v Barnard 58 is clearly not relevant here since, unlike in Rookes, no pressure was being brought to bear by the defendants on third parties causing loss to the plaintiffs. On the contrary, the facts disclose that pressure was aimed directly at the plaintiffs by the defendants, that is, there was "two party" intimidation.

56 Chitty, L.J., in Lyons v Wilkins, [1899] 1 Ch 255, 271
57 Supra, 149
58 [1964] A.C 1129
At this point it is necessary to consider briefly the scope of the tort of intimidation. Most text book writers accept that the tort is not limited to situations where there are three parties. For example, Salmond and Fleming have stated a broader principle covering both “two” and “three party” cases. According to Salmond, “the wrong of intimidation includes all those cases in which the harm is inflicted by the use of unlawful threats whereby the lawful liberty of others to do as they please is interfered with.”

Since Rookes was decided by the Law Lords, there is now no doubt that “three party” intimidation, whether by threats of breaches of contract or threats of violent conduct, is a tort, and the same conclusion has been reached in many subsequent cases. The same certainty does not, however, attach to “two party” intimidation, although it would appear that, on balance, the authorities support it. It is arguable that in the two party situation where what is threatened is a breach of contract, the employer should not be able to sue, for example, if a number of employees threatened to break their contracts with the employer by going on strike unless he improves conditions or raises wages, and he gives way to the threat. This is because he already has adequate remedies in contract and/or because he has no valid interest suitable for protection by the law of tort. On the other hand, these considerations are irrelevant where, in a “two party” situation, the plaintiff is subjected to intimidation not in the sense of a threat of a breach of contract, but in the more mundane sense of being coerced by threats of personal violence, as in Thomas, or destruction of, or serious damage to, property.

It would seem, therefore, that Scott, J’s finding that the plaintiffs could prima facie sue the defendants for the type of intimidation that

60 Salmond on Torts, 1st ed (1901), 439
63 See L.H Hoffman (1965), 81 L.Q.Rev. 116, 127-28
64 Or indeed, in “three party” intimidation.
occurred in *Thomas* was well founded, provided that the other requirements of the tort were fulfilled. In two party cases involving threats of violence, the requirements are as follows. In the first place, there must exist the making of a threat to do something unlawful or illegal as between the plaintiff and the defendant. On the facts there were threats of personal violence. Although no assault could be committed because there was no capacity to carry the intention to commit a battery into effect, it is arguable that there is a threat to commit a battery which is sufficient for the purposes of the tort of intimidation without the need to establish a capacity to carry out the intention. Alternatively, if Scott, J., was not in error in finding that the conduct of the pickets amounted to a species of private nuisance or analogous innominate tort, the existence of these facts on one day could be construed as a threat that they would be continued in the future.

Another possibility is intimidation as a criminal offence. Having found that a tort had been committed independently of tortious intimidation, Scott, J. could then have held that there was a breach of section 7(1) of the *Conspiracy and Protection of Property Act* and, consequently, the threat of an illegal act for tortious intimidation. However, intimidation under section 7 requires that the person alleged to be intimidated is put in fear by the exhibition of force or violence or the threat of force or violence. The test is whether the words and surrounding circumstances are such as to induce a serious apprehension of violence in the mind of a man of ordinary courage; the acts covered are those that would justify a magistrate in binding over the perpetrators to keep the peace.66

It was submitted for the defendants, though not expressly in relation to section 7, that the working miners were tough, self-reliant, down-to-earth characters not likely to be upset by a little rough language or the odd threatening gesture, and that all those wishing to get to work were successful with the assistance of the police. This argument did not make much of an impression on Scott, J., who thought it had little relation to reality. Given the background of high community tension, the need for police to be present and the fact that the working miners were forced to use vehicles to get to work and back,
the conduct of the pickets was clearly intimidatory to an ordinary person. Thus, the threat of a breach of the offence in section 7(1) would, it is submitted, have provided the necessary illegality for the tort of intimidation.

The second requirement of the tort is that there must be a demand that the plaintiff do something or not do something likely to do damage to him, which is conditional on the threat being withdrawn. It is arguable that the only evidence was of mere abuse ("you scabby bastards", "you're dead", "kill the scabs", "you'll get your heads kicked in", "your life has ended now", "we'll have you", "Judas") without any demand that the men stop work. According to Lord Denning, M.R., in *Stratford and Son v. Lindley*76 "...it [the threat] must be capable of being expressed in the form: 'I will hit you unless you do what I ask', or 'if you do what I forbid you to do'. A bare threat without a demand does not in my mind amount to the tort of intimidation."

On the other hand, if this point had been considered in *Thomas*, Scott, J. may well have taken the view that the person who merely threatens violence should be equally liable.77 Alternatively, an implied demand to "stop work" could be drawn from the surrounding circumstances.

Thirdly, the threat must be successful, that is, the plaintiff must be coerced into doing or not doing what is demanded, and this must be the objective of the threat. If an implied demand to cease working exists, it is still impossible to accept, on the facts of *Thomas*, that the third requirement has been satisfied. All the plaintiffs who desired to work were getting to their place of work regardless of the picketing.

It should be mentioned that, although the House of Lords in *Rookes* affirmed that the threat must be successful, this has been criticised as an unnecessary restriction on the scope of the tort. Much depends on what is seen as the fundamental purpose of the tort.78 If the emphasis is placed on the threat to do an unlawful or illegal act then the existence of a demand and the success of the threat become irrelevant. If this is the gist of the tort, then in "two party" situations involving threats of violence or destruction of property, the tort performs much the same

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67 Supra, 284
69 Ibid., 265
function as assault. It is submitted, however, that intimidation is concerned with threats which have either directly or indirectly coerced the plaintiff into the action or inaction demanded.

Fourthly, the act or refusal constituting the demand must be caused by the threat. If this is not so, then there is a break in the chain of causation. Moreover, it seems that the act or refusal must stem from the illegality inherent in the threat, rather than from the mere threat itself, so that if the act or refusal would have been the same whether the threat was lawful or unlawful, the threat would not be a motive force in respect of its illegality. 70

On the facts of *Thomas*, there is no doubt that the demanded act or refusal was not caused by the threat because, even if there was a “stop work” demand, there was no stoppage of work. Consideration of whether the stoppage was in response to the illegality of the threat is therefore irrelevant.

Finally, damage to the plaintiff as a consequence of the act or refusal demanded must be established. Again, in the absence of any cessation of work by the plaintiffs, this requirement is not satisfied. Before leaving intimidation it is worth noting that Scott, J. would have been prepared to hold that a large number of sullen men lining the entrance to a colliery, offering no violence, saying nothing, but simply standing and glowering would have given rise to a cause of action in that tort. 71 It is not easy to accept his reasoning.

If the pickets in such a situation are merely lining the entrance, that is, along one or both sides, not stretched across it, with the workers entering and leaving freely by vehicles, the threat, if there is one, has not been successful, nor is there any demand. It is also just as difficult in *Thomas* to construe an implied demand. More importantly, as regards the threat of an unlawful or illegal act, it is not possible to rely on a breach of sub-section 7(1) of the *Conspiracy and Protection of Property Act* because, if the pickets are not unruly, there is no conduct justifying a magistrate in binding over the pickets to keep the peace. As for threats of tortious acts, no assault is committed for the same reason as in *Thomas* and in addition, because there are no violent gestures or threats other than the presence of the

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71 Supra, 145
pickets themselves, there is no threat of battery. If the conduct amounts to the threat of a public nuisance because there is both an intention to obstruct (deduced from the fact that they have gathered *en masse*) and a technical obstruction of the highway, although permitting entry and egress, it is still difficult to see how tortious intimidation has been committed because the refusal demanded (stop work!) must be caused by the illegality or unlawfulness inherent in the threat. It is arguable that, if there is an implied demand and if we assume that the demand was effective, the stoppage of work was not a response to the threat of a public nuisance because the mere presence of the pickets would have had the effect of making them stop work whether or not that presence amounted to a public nuisance.

The requirements of this tort have been considered in some detail because *Thomas* appears to be the only reported instance of two party intimidation in England.

**Application in Thomas of Later English Legislation on Picketing**

Section 7 of the *Conspiracy and Protection Act, 1875* containing the offences of intimidation, watching or besetting and so on, still applies to individuals whether or not they are acting in combination, and whether or not they are involved in a trade dispute. But the proviso permitting picketing merely for the purpose of communicating information was repealed by the *Trade Disputes Act, 1906*. In view of the uncertainty surrounding the common law after *Lyons v. Wilkins* and *Ward, Lock*, section 2 made lawful both attending at or near a house or place where a person resides, works, carries on a business or happens to be merely for the purpose of peacefully obtaining or communicating information and merely for the purpose of peacefully persuading any person to work or abstain from working. The provision only operated where there was a trade dispute, although it protected both individuals and persons acting in combination.

Section 2 of the *Trade Disputes Act, 1906* was replaced by section 15 of the *Trade Union and Labour Relations Act, 1974* which provided the

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72 For example, *Hubbard v. Pitt*, supra.
same protection for those engaged in industrial disputes, with the exception of acts done near the place of residence, business, and so on. However, the potentially wide immunity contained in the proviso was restricted, first by judicial interpretation which made effective picketing impossible, and secondly, by further legislation in the form of section 16 of the Employment Acts, 1980, which basically re-enacted the 1974 proviso but removed the protection for secondary picketing which was anyway ineffective. Peaceful picketing is lawful for an employee who is not an official of a trade union only at his own place of work, unless he is employed at a place the location of which is such as to make picketing there impracticable, in which case he may picket at the place from which his work is administered.

Although there has been criticism by some commentators of the restrictive judicial interpretation of the “peacefully obtaining or communicating information or peacefully persuading any person to abstain from working” requirement, Scott, J. was quite correct on the facts in refusing to apply sub-section 16(1). The shouted threats from the mass of pickets were undoubtedly not “peaceful” since the conduct clearly amounted to a breach of the peace. The general argument advanced for the defendants was that the court should avoid impeding the right to picket in support of an officially recognised strike, but this was given little weight by Scott, J. He thought that unless the case could be brought within sub-section 16(1), the right to picket is no more than the general “right” which everyone has to do what he or she wants to do, if it can be done without infringing the rights of others. Yet, he did think that the six official pickets might be able to bring themselves within the section.

As regards secondary picketing, that is, picketing at industrial premises other than collieries in the South Wales area, we have already seen that Scott, J. rejected the notion that there could be any liability in the South Wales union for acting ultra vires, or in the N.U.M. and N.C.C. for inducing or encouraging ultra vires secondary picketing. Obviously, if the picketing were not necessarily ultra vires the South Wales union, there could be no liability in the N.U.M. and N.C.C. for encouraging it. But there were two other reasons justifying the conclu-

73 For example, Kavanagh v Hiscock, (1974) Q.B. 600
74 Supra, 150.
sion reached by Scott, J. First, the N.U.M.'s and the N.C.C.'s encouragement was in pursuit of a trade dispute and the immunity granted by section 13 of the *Trade Union and Labour Relations Act, 1974* in these circumstances had not been withdrawn by section 17 of the *Employment Act, 1980*. Section 17 removed protection against liability for inducing breaches of commercial contracts where the inducement is brought about by secondary action, but the section did not apply to encouraging the South Wales union to engage in *ultra vires* picketing. And secondly, the section 13 immunity was not removed by sub-section 16(2) of the 1980 Act because that section is concerned with acts done in the course of picketing and the N.U.M. and N.C.C. were being sued for inducing breaches of the South Wales union's rules, not for participating in the picketing.

**Postscript**

Since the completion of this article, Scott, J.'s new tort of harassment was argued as a ground for liability (the others were public and private nuisance, intimidation and interference with contractual relations) in *News Group Newspapers Ltd. & Ors. v. Society of Graphical and Allied Trades '82 & Ors. (No.2)*. Here the six corporate plaintiffs were publishers, printers and distributors of newspapers, and were in dispute with the defendant union about the introduction of new technology and overmanning. In order to break the hold of the unions in the Fleet Street area of London, the publishers moved from Bouverie Street ("The Sun" and "News of the World") and Gray's Inn Road ("The Times" and "Sunday Times") to a new plant at Wapping. Mass picketing, including demonstrations, marches and some acts of violence, occurred at all three premises, but mainly at Wapping, in order to prevent employees from working and to disrupt the conduct of the plaintiffs' businesses. The seventh plaintiff was employed by "The Times" as a deputy manager at Wapping. She succeeded in getting to work each day with other employees in a bus provided by her employer with grilles over the windows to protect the occupants from being injured by missiles thrown by pickets.

Injunctions were granted by Stuart Smith, J., to prevent the unlawful picketing at the three premises since it constituted in-
terference with contractual relations, intimidation, public and private nuisance. But after referring to Scott, J.’s statement of the law in *Thomas*, he agreed with criticisms of the defendants that “Scott, J., should not have invented a new tort and that it is not sufficient to found liability that there has been an unreasonable interference with the rights of others, even though when the balance is struck between conflicting rights and interests the scale comes down in favour of the plaintiffs, unless those rights are recognised by the law and fall within some accepted head of tort,” especially where it does not appear that damage is a necessary ingredient of the tort. “If, of course, damage peculiar to the plaintiff is established, then the tort is that of nuisance.”

Since Stuart Smith, J., had already found that nuisance was established and intimidation threatened, he thought it unnecessary to express a final view on the question of harassment. In any case, the action would only lie at the suit of the seventh plaintiff in respect of her journeys to and from Wapping.

These comments are eminently sensible, although a complete rejection of Scott, J.’s new tort would have been more satisfactory. It is hoped that such a repudiation will occur in a future case decided more authoritatively by the Court of Appeal or House of Lords.

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76 Ibid., 206
77 Ibid.