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INTERFERENCE WITH ECONOMIC RELATIONS—
SOME ASPECTS OF THE TURMOIL IN THE INTENTIONAL TORTS

By Lyn L. Stevens*

Over the years, the common law has developed a number of causes of action which use intention to injure economic interests as the basis for imposing liability in tort. The aim of the common law is to protect plaintiffs against intentionally inflicted economic loss by permitting recovery where defendants commit any of the nominate torts of inducing breach of contract, conspiracy by lawful and unlawful means, and intimidation, or the innominate tort of causing loss by unlawful means. For a number of reasons, these torts have developed in an illogical and piecemeal fashion, with the result that, today, many of the principles concerning the intentional torts are still unclear. It is the purpose of this paper to examine and analyse some of the recent developments in these intentional torts. Special consideration will be given to reviewing recent judicial trends in the tort of inducing breach of contract and in the innominate tort of unlawful interference. In this way it may be possible to discern notable developments in relation to the intentional torts generally. An attempt will also be made to ascertain the likely direction of future developments in this area. It is conceivable that these torts are presently in the process of regrouping and may thus present a more united and consistent front as an independent entity in the law of torts.

While the common law has been gradually moving towards affording wider protection to plaintiffs in the area of intentionally inflicted economic loss, the same cannot be said in relation to negligent liability. Where the interference with economic interests has been caused by negligence, the law has not been generous to plaintiffs. An important exception to this hesitancy to protect against negligent interference was introduced in 1963 when the House of Lords, in Hedley Byrne & Co. v. Heller & Partners Ltd., decided that an action in negligence might lie where careless words or advice caused

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pure financial loss. Nevertheless where negligent acts have caused injury to a plaintiff’s economic interests, the courts have consistently refused to impose liability.

There are a number of strong policy arguments behind the limited role of negligence in protecting financial losses. These have been canvassed elsewhere and need not be discussed herein. However, where economic losses are caused by intentional conduct, many of the policy factors relevant to negligence are no longer present and are replaced by other policy considerations which have led the courts to impose liability on defendants under the intentional torts. As stated by Fleming: “Reluctant as we have seen the common law to be in protecting economic interests against negligence, our legal tradition has displayed no similar coyness in furnishing legal sanctions against conduct deliberately aimed at impairing advantageous relations or causing other kinds of financial loss.”

The hallmark of the various causes of action to be examined is the presence of an intention in the defendant to cause economic harm to the plaintiff. The concept of “intention” has been the subject of extensive jurisprudential analysis and it is not proposed to pursue that analysis herein. Nevertheless, it is appropriate that some attempt be made to outline the parameters of the concept for the purposes of this paper. One form of intention, for example, is that state of mind existing in a defendant where the consequences of the invasion of another person’s interests are both foreseen and desired. Thus, to determine whether a wrong has been committed intentionally, one might ask whether the defendant in doing a particular act has foreseen and desired the invasion of the plaintiff’s economic interests as a consequence. However, it should also be noted that intention may encompass more than a desire to bring about a result which causes injury to an-

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3 Liability will be imposed on the defendant when the circumstances reveal a “special relationship” between the parties. The Hedley Byrne principle has been accepted without question as the law in Canada. See Welbridge Holdings Ltd. v. The Metropolitan Corporation of Greater Winnipeg, [1971] S.C.R. 957; Windsor Motors Ltd. v. District of Powell River (1969), 4 D.L.R. (3d) 155 (B.C.S.C.); and see also the dicta favouring the applicability of the principle in J. Nunes Diamonds Ltd. v. Dominion Electric Protection Co. (1972), 26 D.L.R. (3d) 699 (S.C.C.), especially the judgment of Pigeon J., at 723-730; and Sealand of the Pacific Ltd. v. Ocean Cement Ltd. (1973), 33 D.L.R. (3d) 625 (B.C.S.C.).


6 Fleming at 539.

other. It will exist where the wrongdoer believes or ought to have believed that harmful consequences are substantially certain to follow from what he does, although these consequences need not necessarily be the ones he expected. Thus where a lighted squib is thrown into a crowded marketplace, the actor might not desire to injure anyone. Yet, since he must believe and know that somebody is substantially certain to be injured, he will be held to have intended such a result.

If the actor foresees that certain consequences might follow, to the extent that he has knowledge and appreciation of the risk of harm, but the risk falls short of substantial certainty, he cannot be said to have intended any resulting injury. This is the point on the scale where the actor’s conduct is classed as negligent. This scale or “external standard” was described by Holmes as follows:

If the manifest probability of harm is very great, and the harm follows, we say that it is done maliciously or intentionally; if not so great, but still considerable, we say the harm is done negligently; if there is no apparent danger, we call it mischance.

For present purposes, the important point is to distinguish between intention and negligence. However, it is apposite to note that if the circumstances in which the defendant acted reveal a high degree of risk the conduct may be described as reckless or wanton. The terms “wilfulness” or “gross negligence” may also be used to indicate conduct falling between carelessness and intention. This aggravated form of negligence, or “quasi-intent” has been much analysed by commentators, and should be noted as falling in the scale of conduct somewhere between intention and negligence. As will be illustrated later, the courts have regarded reckless or wanton conduct as sufficient to found an action under one of the intentional torts.

It is also important that “intention” be distinguished from “malice.” The term “malice”, which is sometimes used synonymously with intention, has had many different meanings ascribed to it. One such meaning is malice in law, which has been defined as a “wrongful act done intentionally without just cause or excuse”. This type of malice has been identified as a forerunner of the various torts based on wrongful and unjustified intention.

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9 See *Scott v. Shepherd* (1773), 2 Wm. Bl. 892.
11 See Fleming, 120-121.
12 The term is used by S. D. Elliott, *Degrees of Negligence* (1932), 6 So. Cal. L. Rev. 91 at 143.
13 A convenient summary is contained in Prosser, *supra*, note 8 at 187-188.
14 See O. W. Holmes, *supra*, note 10 at 1 (“If the manifest probability of harm is very great, and the harm follows, we say that it was done maliciously or intentionally . . . “).  
15 See *Bromage v. Prosser* (1825), 4 B. & C. 247, per Bayley, J.
Malice of this variety is really broader than mere intention; it is an intention to bring about consequences which are wrongful or tortious in themselves.

Malice in law must not be confused with malice in fact or improper motive. This form of malice is not concerned with the result contemplated (tortious consequences) but with the purpose or object of the conduct (wrongful motive). When a person acts, there may be desired consequences going beyond the primary consequences of the conduct, consequences ulterior to the infliction of harm to the interests of the plaintiff. These consequences are nevertheless intended by the wrongdoer and may be described as the product of an “ulterior intent” or improper motive. This second type of malice constitutes an important element in some of the economic torts. For example, malice might be an important part of the original cause of action, as with injurious falsehood, where it is said to be the gist of the action. Alternatively, malice in the sense of improper motive might be a vital element in the tort of conspiracy by lawful means — an improper motive may make a combination actionable, by negativing the possibility of any justification for the defendant's action. Thus it is clear that the use of the word “malice” does not end the inquiry but rather serves to stimulate further investigation of the defendant's actions.

I EARLY DEVELOPMENTS

Before examining some of the important recent developments in the intentional torts, some references should be made to the significant features of the early growth of these torts. It must be said at the outset that many of the cases and developments outlined below occurred in what might be described as a “labour relations context”. No attempt has been made to analyse this aspect of the cases for to do so would have expanded the analysis significantly and introduced another element into an already complicated and sometimes contradictory area.

The early history of the economic torts appeared to be laying a basis for a broad tort based largely on intention. Evidence of this can be found in the words of Holt, C.J., in 1706, in Keeble v. Hickeringill, where it was flatly and simply stated that: “he who hinders another in his trade or livelihood is liable to an action for so hindering him.” This dictum has since

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17 This is an old term used by Bayley, J., in Bromage v. Prosser, supra, note 15. For a more recent judicial consideration of this point, see Jones Brothers (Hunstanton) Ltd. v. Stevens, [1955] 1 Q.B. 275, per Lord Goddard, C.J. at 280.

18 The term used by Salmond, supra, note 7 at 383.


20 London Ferro Concrete Co. v. Justice (1951), 68 R.P.C. 261, 265 per Birkett, L.J.

21 See J. F. Lever, supra, note 19 at 57; and J. D. Heydon, The Defence of Justification in Cases of Intentionally Caused Economic Loss (1970), 20 U. of T. LJ. 139 at 150 et seq. See also, J.D. Heydon, Economic Torts (London: Sweet and Maxwell, 1973) at 13 et seq.

22 (1706), 11 East 574. See also Carrington v. Taylor (1809), 11 East 571.
been held to have stated the position too widely. In *Allen v. Flood*\(^{23}\) the House of Lords ruled that where there was no question of conspiracy, the doing of an act which is in itself quite lawful will not become unlawful by reason of the intentional interference with the plaintiff's economic interests.\(^{24}\)

While the English courts thus appeared to be moving away from resting liability solely on the defendant's intention, some of the American courts took what seems to be at first blush a decidedly opposite approach. For example, *Keeble v. Hickeringill*\(^{25}\) was used by the Supreme Court of Minnesota in *Tuttle v. Buck*\(^{26}\) as authority for the proposition that recovery should be allowed where the defendant deliberately interfered with the plaintiff's economic expectations. The result has been the development in America of the "prima facie tort doctrine"\(^{27}\) under which considerable emphasis is placed on problems of justification. This doctrine has not however caused liability to arise in America over vast areas where it would not have arisen in England.\(^{28}\) An examination of the cases cited by Prosser\(^{29}\) as illustrative of the *prima facie* tort, reveals that most, if not all, could have been decided on some ground other than the intention on the part of the defendant to cause economic loss. In other words, the English or the Canadian common law would have imposed liability on the defendants, although reliance would have been placed on a conspiracy or the presence of illegal means as a basis for such liability. Nonetheless, the resort to the *prima facie* tort doctrine in America has resulted in a shift of emphasis in the deciding of cases, namely a concentration on the questions of justification, rather than a preoccupation (as in England and Canada) with the complex components of different causes of action.\(^{30}\)

In the twentieth century, the English and Canadian courts have consistently refrained from imposing liability for a wrongful intention without more. The case which finally decided that the *prima facie* tort doctrine was not part of the common law was *Allen v. Flood*.\(^{31}\) The plaintiff shipwright had been lawfully dismissed from his job after his employer had been told by


\(^{24}\) This point is made especially clearly in the judgments of Lord Watson (at 102 *et seq.*) and Lord Herschell (at 132 *et seq.*).

\(^{25}\) (1706), 11 East 574.

\(^{26}\) (1909), 107 Minn. 145; 119 N.W. 946. The brief facts which led to the imposition of liability on the defendant were that economic loss had been inflicted on the plaintiff barber shop operator, when the defendant, acting out of spiteful ends and not genuine competitive interest, set up a rival barber shop.

\(^{27}\) The genesis of this tort may well have been the article of O. W. Holmes, see, *supra*, note 10. For a detailed discussion of the *prima facie* tort, see M. D. Forkosch, *An Analysis of the Prima Facie Tort Cause of Action*, (1957), 42 Cornell L.Q. 465.

\(^{28}\) See J. D. Heydon, *Economic Torts*, *supra*, note 21 at 177.

\(^{29}\) Prosser, *supra*, note 9 at 980.

\(^{30}\) The American Courts have recently been flirting with a new theory of tort liability involving intentionally caused loss through the infringement of contemporary moral standards. See *Morrison v. National Broadcasting Company* (1965), 266 N.Y.S. 2d 406. For a discussion of the decision, see J.D. Heydon, *Economic Torts*, *supra*, note 21 at 94 *et seq*.

the defendant union official that his members would stop work or be called out, unless the plaintiff (a worker from a different craft) was discharged from his job. The House of Lords held that, irrespective of the motive of the defendant, he could not individually be liable in tort. Intention to injure, even with an unjustifiable motive, was not actionable unless there was a combination. The existence of malice in the defendant did not in and of itself create a cause of action in the plaintiff. Interference with trade or employment without interfering with an existing contract, without a conspiracy or the use of unlawful means was held to not be a tort. This statement appears to represent the current Canadian law on this subject.

The principle that there can be no action based on one person's intention to cause another economic loss has not been universally embraced by the judiciary. There are a number of judicial statements which may be cited to show that the Tuttle v. Buck tort is not regarded as such remote a prospect as the judgements in Allen v. Flood would appear to indicate. In Sorrell v. Smith, Viscount Cave, L.C., stated that:

... it does not necessarily follow that the existence of a combination is essential to the commission of the offence. There is some authority for the view that what is unlawful in two is not lawful in one...

Lord Summer, in the same case, was unwilling to concede that the matter had been finally settled, while Lord Loreburn also believed that no exhaustive answer had been given to the question. More recently, Lord Devlin countenanced the possibility of a Tuttle v. Buck type action, describing it as "Quinn v. Leathem without the conspiracy."

One must nevertheless conclude that the tort consisting of a single person intentionally interfering with trade, business or financial expectations finds

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82 There have been a number of surprising applications of this principle. For example, see Chapman v. Honig, [1963] 2 Q.B. 502 (Eng. C.A.) and Hargreaves v. Brotheron, [1959] 1 Q.B. 45 (Eng. C.A.). In each case it was decided that the defendant would not be liable for intentionally causing harm to the plaintiff. In both cases, the means used were not characterized as unlawful — contempt of court in Chapman and perjury in Hargreaves — and the Allen v. Flood rule consequently operated to bar recovery.


84 (1909), 107 Minn. 145; 119 N.W. 946.
87 Id. at 713. Viscount Cave cited dicta in support from Kearney v. Lloyd (1890), 26 L.R. Ir. 268, per Palles, C.B., 280; Giblan v. National Amalgamated Labourers' Union of Great Britain and Ireland, [1903] 2 K.B. 600, per Romer, L.J. at p. 619; and Huntley v. Simmons, [1898] 1 Q.B. 181. Viscount Cave's judgment was concurred in by Lord Atkinson.
88 Id. at 739-741.
91 Id. at 1251.
no unchallenged place in the law. The dictum of Bowen, L.J., in Mogul S. S. Co. v. McGregor, Gow & Co. that "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's property or trade is actionable if done without just cause or excuse," has become a legal reality. Instead, English law has granted remedies for intentionally inflicted economic loss by finding the defendant's conduct to "fit in" to the elements of the various economic torts; the Canadian Courts have largely tended to mirror this approach.

Having examined some early trends, it is now appropriate to consider the recent developments in the economic torts. First, we will discuss those developments connected with the tort of inducing breach of contract, and secondly, reference will be made to the emergence of the innominate tort of causing loss by unlawful means.

II INDUCING BREACH OF CONTRACT

In Quinn v. Leathem Lord MacNaghten stated that "a violation of a legal right committed knowingly is a cause of action, and ... it is a violation of a legal right to interfere with contractual relations recognised by law if there be no sufficient justification for the interference." Although this is a satisfactory starting point for a discussion of the essential ingredients of the cause of action involving inducing breach of contract, it presents an overly simplistic view of the elements of this tort. The courts have in recent times recognised that there are, in fact, six essential elements of this tort. There is general agreement that "inducing breach of contract" entails:

1. intention to cause loss;
2. knowledge of an existing contract;
3. breach of an existing contract;
4. wrongful procurement;
5. actual damage as a necessary consequence; and
6. lack of justification.

42 Lord Dunedin has characterized any suggestions to the contrary as "the leading heresy". See Sorrell v. Smith, [1925] A.C. 700 at 710. Lord Donovan also doubted the existence of such a tort in Stratford & Son v. Lindley, [1965] A.C. 269.

43 (1889), 23 Q.B.D. 598 (Eng. C.A.).

44 Id. at 613.


46, [1901] A.C. 495.

47 Id. at 510.

48 The genesis of this tort was Lumley v. Gye (1853), 2 E. & B. 216, a case involving the inducement of a breach of contract between master and servant. The tort was very quickly expanded to apply to contracts of all kinds. See Stratford & Son Ltd. v. Lindley, [1965] A.C. 269.

It is proposed to deal at length with three of these ingredients, namely, the knowledge and the intention requirements, and the necessity that there be a breach of an existing contract. The recent material on the remaining three requirements has been well analysed in the textbooks and articles.\textsuperscript{50}

A \textbf{The Knowledge Requirement}

(i) How much knowledge is required?

As recently as 1964, in \textit{Stratford \& Son Ltd. v. Lindley},\textsuperscript{51} in the English Court of Appeal, it was postulated that “it must be shown that the defendants knew of the relevant terms of the contracts . . .”.\textsuperscript{52} This view had for some time represented the requisite standard of knowledge required to be proven in an inducing breach of contract action.\textsuperscript{53} However, the House of Lords in the \textit{Stratford} case appeared to relax this “relevant terms” standard. The facts of the case raised the question of whether the defendant union officials had sufficient knowledge of the barge repair contract, the breaches of which they were alleged to have induced. Lord Pearce responded as follows:

It is no answer to a claim based on wrongfully inducing a breach of contract, to assert that the defendants did not know with exactitude all the terms of the contract. The relevant question is whether they had sufficient knowledge of the terms to know that they were inducing a breach of contract.\textsuperscript{54}

Lord Reid\textsuperscript{55} and Viscount Radcliffe\textsuperscript{56} were also prepared to accept substantially less than actual knowledge of precise contractual terms.

The Canadian authorities support the view that something less than actual knowledge of the relevant terms of the contract will suffice to support an action. Among the requirements for liability considered necessary by Gale, J., in \textit{Posluns v. Toronto Stock Exchange}\textsuperscript{57} was the requirement that “the defendant . . . was or can be assumed to have been aware of the existence of [the] contract.”\textsuperscript{58} In considering the issue of knowledge on the part of the defendant Stock Exchange, the judge held that the Exchange was aware that some contract of employment existed between the plaintiff employee and his employer. Furthermore, the Exchange must have intended that the contract was to be ended by whatever means were necessary in the circumstances, including breach. Significantly, the judge added: “that the precise terms of


\textsuperscript{51} [1965] A.C. 269.


\textsuperscript{54} [1965] A.C. 269 at 332.

\textsuperscript{55} Id. at 324.

\textsuperscript{56} Id. at 328.

\textsuperscript{57} (1965), 46 D.L.R. (2d) 210 (Ont. H.C.).

\textsuperscript{58} Id. at 262.
the contract were not known to the governors [of the Exchange] is quite
immaterial."^{69}

Therefore, while the knowledge requirement remains an important
ingredient to the cause of action, the courts seem more willing than before
to allow plaintiffs to succeed upon proof of meagre evidence of knowledge by
the defendant of the contract.\(^{50}\) The question immediately arises as to how
little knowledge a defendant may have and still satisfy the knowledge re-
quirement. What if the defendant is reckless or closes his eyes as to whether
or not there is a contract? Are there circumstances in which the courts will
find that the defendant has constructive knowledge?

The authorities hitherto considered do not expressly say that constructive
knowledge will suffice, although some of the language used by the judges does
suggest this. For example, Lord Reid in the \textit{Stratford} case\(^{61}\) considered that
it was "reasonable to infer" that the defendants had the requisite knowledge
of the contracts. Two decisions have, however, given detailed consideration
to the issue of knowledge of the contract. Both of these support the view
that the courts can use constructive knowledge to satisfy this requirement of
liability.

The first case, \textit{Emerald Construction Co. Ltd. v. Lowthian}\(^{62}\) deals with
reckless defendants. The plaintiff had entered into a "labour only" contract
with certain main contractors for a power station. The defendant union offi-
cials caused this contract to be breached by advising union members not to
work on the construction site. The issue was whether, even though they did
not know of the precise terms of the contracts, they could be found liable in
tort. Lord Denning, M.R., stated that:

> Even if they did not know of the actual terms of the contract, but had the
> means of knowledge — which they deliberately disregarded — that would be
> enough. Like the man who turns a blind eye. So here, if the officers deliberately
> sought to get this contract terminated, heedless of its terms, regardless whether
> it was terminated by breach or not, they would do wrong.\(^{63}\)

In the second case, \textit{James McMahon Ltd. v. James Dunne},\(^{64}\) the court
could not say that the defendants were reckless. It was a question of whether
the defendant union officials could be fixed with sufficient knowledge of tim-
ber contracts between the plaintiff importers and third parties. The de-
fendants were alleged to have procured the breach of these contracts by
operating an embargo against building materials coming into the port of

\(^{69}\) \textit{Id.} at 268. For further support for this view, see \textit{Northern Messenger (Calgary)
were aware of the precise terms of the contracts is immaterial".

\(^{60}\) In a casenote on \textit{Stratford & Son Ltd. v. Lindley} in (1965), 28 Modern Law
Review 205, L.W. Wedderburn speaks in terms of a considerable lowering of the hurdle
65, per Lord Milligan at 72.

\(^{61}\) \textit{Supra}, note 51 at 324.

\(^{62}\) [1966] 1 W.L.R. 691.

\(^{63}\) [1966] 1 W.L.R. 691, at 700 to 701.

\(^{64}\) (1965), 99 I.T.L.R. 45.
Dublin. The plaintiffs contended that it was sufficient if the intervener could be fixed with implied or constructive knowledge of the existence of such a contract. Budd, J., canvassed the *dicta* of the Law Lords in the *Stratford* case and concluded that the observations in that case were "strong support for the proposition that constructive knowledge is sufficient knowledge." He added that:

> In many instances in modern life it must be obvious to the ordinary onlooker that some transaction is taking place on foot of some contract, particularly where matters of payment and delivery are concerned. This applies *a fortiori* where that intervener has special knowledge of the course of dealing, the customs prevailing and the surrounding circumstance.

Budd, J., was satisfied on the evidence presented in the interlocutory proceedings before him that the plaintiffs had made out a sufficient *prima facie* case as to the knowledge of the defendants. They could scarcely have thought that the timber came to the plaintiffs like "manna from heaven".

There is little doubt in my mind that it should on principle be open to a plaintiff to rely on constructive knowledge to satisfy the knowledge requirement necessary for the imposition of tort liability. As the courts are prepared to impose liability where the defendant has acted recklessly or displayed a "quasi-intention", a state of mind which the court may have to infer from the facts, there would seem to be no good reason why the courts should not impose the knowledge requirement upon the defendant by using constructive knowledge.

In view of the fact that the Canadian courts have willingly held that it is not necessary to have knowledge of the precise terms of the contract, they should have little difficulty accepting that constructive knowledge of the contract itself will suffice.

(ii) The time of knowledge.

A second problem has arisen in relation to the knowledge requirement, namely, what is the crucial time at which the defendant must possess knowledge? Is it necessary for the defendant to have knowledge (or for the court to be able to say he had constructive knowledge) at the time when he first made the inconsistent contract, or will it be sufficient that he acquired knowledge of the contract at a later time, either before the contract was finally executed (i.e. in the case of an executory contract) or even after the contract had become executed? The case law on this point is sparse.

In *D.C. Thompson & Co. Ltd. v. Deakin*, Jenkins, L.J., indicated that: "The inconsistent dealing between the third party and the contract breaker may, indeed, be commenced without knowledge by the third party of the

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66 *Supra*, note 64.
67 (1965), 99 I.T.L.R. 45, at 54.
69, [1952] 1 Ch. 646.
contract thus broken; but, if it is continued after the third party has notice of the contract, an actionable interference has been committed by him.”

Support for this broad generalisation can be found in the master and servant cases. For example, in Jones Brothers (Hunstanton) Ltd. v. Stevens, Lord Goddard, C.J., concluded that: “There can be no question . . . that it is actionable to continue to employ the servant of another after notice, though the person so continuing to employ the servant did not procure him to leave his master or know when he engaged him that he was the servant of another.” Unfortunately the dictum is weakened by the fact that the plaintiff employer’s claim was in fact disallowed on the ground that, as the employee would not, if released, have returned to his former employment, it could not be shown that the plaintiff had suffered any damage. At most, therefore, the case provided some judicial support for the obiter remarks of Jenkins, L.J.

In view of the fact that the “Jenkins Principle” cannot be supported by strong authority, it would seem desirable to examine it closely before drawing any final conclusions. Indeed, unless the principle can be justified on some special ground connected with the master-servant relationship (for example, the promotion of stable employment conditions), it would appear to be inequitable to impose liability in tort on a second employer who only learns of the inconsistent employment contract after he has secured a contract with the servant, especially if the court could not find that at the time he negotiated the inconsistent contract he did not even have the constructive knowledge of the earlier contract. Furthermore, in releasing the servant, the second employer may (depending on the terms of his contract with the servant) be forced into committing a breach of contract himself.

The issue under consideration has been the subject of litigation in the case of H.C. Sleigh Ltd. v. Blight. The facts showed that one Bishop had entered into a contract with Blight for the purchase of a service station, in complete ignorance of any trading agreement between Blight and the plaintiff oil company. After the purchase contract had been executed, Bishop became aware of an earlier agreement whereby Blight had undertaken to purchase all petroleum supplies from Sleigh Ltd. and not to sell the business to a purchaser without the consent of the plaintiff. However, Bishop went ahead and took possession of the service station under the purchase contract despite the earlier agreement. Furthermore, he refused to enter into a supply agreement with the oil company.

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70 Id. at 694.
71 Blake v. Lanyon (1795), 6 Term Rep. 221; De Francesco v. Barnum (1890), 45 Ch. D. 430; Fred Wilkins & Brothers Ltd. v. Weaver, [1915] 2 Ch. 322.
72 Id. at 275.
73 Id. at 279.
74 It should be noted that the first employer will always have a contractual cause of action against his former employee, and he may have an action for loss of services, enticement or harbouring against the second employer — see Clerk & Lindsell on Torts, supra, note 49 at 435 et seq.
The plaintiff sought an interlocutory injunction against the purchaser, claiming that he was liable for inducing breach of the Sleigh-Blight agreement. The difficulty faced by the plaintiff was that it could not be shown that at the time Bishop entered into his contract with Blight, he had knowledge of the earlier supply agreement. It was only later that he acquired the vital knowledge of the inconsistent contract. The plaintiff's claim that liability should nevertheless be imposed on the basis that, having later discovered the agreement, Bishop elected to complete the purchase contract, was supported by the *dictum* of Jenkins, L.J., and the master-servant cases.77

In considering this claim, Adam, J., drew a distinction between two different situations involving interference with contracts. First, he referred to the case where the third party having no knowledge of any prior agreement is inescapably bound by his own contract with the contract breaker. Then, he noted the case where the third party again with no knowledge of a prior agreement was able to refuse at his election to complete the second contract without incurring any liability. In the former case he suggested it would be "anomalous" if by performance of binding contractual obligations he incurred liability in tort to a stranger just because he subsequently acquired knowledge of the prior agreement.

However, he added:

> In the latter case where the third party is entitled to repudiate his contract, without liability, there is no doubt more to be said, as it would be from his own election to continue on with the contract, despite the knowledge which he had acquired, that he would have interfered with another's contractual rights.78

The case before Adam, J., was of the second variety. The judge had held that the defendant Bishop had the right to rescind for misrepresentation, and thus was in a position to elect whether to exercise that right or proceed with his contract. Nevertheless, even though the defendant clearly had knowledge of the prior agreement at the time the election was made, it was held that he was not liable for inducing breach of contract. The Court appeared to hold that in neither of the two situations outlined above should liability in tort be imposed. In the first case: "on what rational principle is [the defendant] to be denied his contractual rights to insist on completion of his own contract?"79 And Adam J. added that, even in the second case:

> on principle it should make no difference . . . that his contract may happen to be voidable by him. After all, a voidable contract is valid and enforceable unless and until avoided at the election of a party entitled to avoid it, and why should it be considered an unlawful act on his part if, preferring his own contractual rights, he elects to affirm the contract rather than forego them for the benefit

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77 *Supra*, note 71.


79 The judge concluded that Bishop could have rescinded the contract despite the fact that the contract had been executed. *Sed quaere* whether the right of rescission had been lost by virtue of the operation of the doctrine of merger? For a discussion of this issue, see L.L. Stevens, *The Role of the Doctrine of Merger in Contracts for the Sale of Land — The Canadian Experience* (1973), 8 U.B.C. Law Rev. 35.

of another? In the conflict in such a case between the third party's own contractual rights lawfully acquired, and those of the plaintiff, on what principle are the contractual rights of the plaintiff to be preferred, and the third party's action in asserting his own contractual rights to be deemed as unlawful acts?  

In finding for the defendant, the judge refused to accept the proposition of Jenkins, L.J. previously cited. The decision in Sleigh Ltd. v. Blight has recently been criticised on the ground that no adequate case was made out for rejecting the Jenkins principle. What is more, the decision, it has been said, gives "no weight to the fact that the plaintiffs made their contract first". However, it is suggested that neither the view of Jenkins, L.J., nor the view of Adam, J., is entirely correct. Each is an extreme approach, whereas what is required in this difficult situation is a compromise approach based on the issue of whether the second contract maker has any real freedom of choice whether to proceed with his second inconsistent contract. The principle contended for is that liability in tort should be imposed on a defendant if, in the exercise of a free choice whether to proceed or withdraw from an inconsistent contract, he chose to proceed rather than withdraw. This approach necessitates a close examination of the legal effects of the second contract.

This method of resolving cases where knowledge is acquired after the entering into of a second contract can be illustrated with reference to five different factual situations. First, there is the situation where A contracts with B. C without actual or constructive knowledge of the A-B contract, proceeds to execute a contract with B. As a result of this second inconsistent contract B is forced to break off his contract with A, but C, according to the terms of the second contract, has no way of escaping from his obligations to B, without breaking this second contract. If A sues C in tort, claiming that C induced B to break his contract with A, the question is whether A should succeed if C only learns of the prior inconsistent contract after his contract with B has been finalised?

It is suggested that A should not succeed. The result of providing A with a cause of action would force C, an innocent contract maker, into breaching his contract on the sole basis that A had contracted with B first. It would provide A with a second possible cause of action, over and above his normal contractual rights against B. It seems manifestly unjust to allow C to be sued in tort, when, due to his total lack of knowledge, he had no real freedom of choice whether to continue his contract with B. Any failure to perform his obligations would render him liable in contract to B.

A similar result should obtain where C acquires knowledge of the prior inconsistent contract, before the second contract is executed, if, but only if, C has no basis on which to withdraw from his second contract without being held to be in breach of contract. The important point is to examine the second agreement to ascertain whether C had any real choice whether to proceed or not.

81 Id.  
83 Id. at 520.
A third variation would arise if the second contract provided C with a right of rescission. This is precisely the same situation as was before Adam, J., in Sleigh Ltd. v. Blight,84 where C had specifically asked B whether there was any prior inconsistent contract. When it turned out that there was a prior agreement, this very fact furnished C with a right to terminate. He, therefore, had a choice as to whether to proceed with the second contract or not. If he had withdrawn, he would not have been in breach of his agreement with B. Should A have been able to recover against C in tort?

If one applied the freedom of choice test, the answer would be in the affirmative. If a person, with a real choice on the question of whether to proceed or withdraw from contractual relations, decides to proceed and in so doing causes injury to another, liability should follow. Adam, J., considered that the opposite conclusion was justified on the ground that the second "voidable contract was valid and enforceable unless and until avoided",85 but this conclusion would seem to ignore the point that legal rights are being interfered with by the deliberate and conscious act of an albeit formerly innocent contract maker. At the time when the vital election is made, C has ceased to be innocent, in that he has acquired knowledge of the prior contract. The basis for choosing the rights of the first contract maker is that his rights are being destroyed by someone who has a choice of whether to act or not. In the conflict between A and C, it is submitted that the prevention of deliberate incursions upon the rights of others is a valid reason for preferring the claim of A to that of C.

Admittedly, the case for preferring the rights of A is weakened if C fortuitously finds that he has some ground, perhaps on some entirely collateral matter, for terminating his contract with B. Should he still be subjected to tortious liability to A? If one makes freedom of choice (upon the receipt of knowledge) the crucial test, the answer should be in the affirmative. The fact that C has fortuitously acquired some right to terminate the contract cannot detract from the point that if he elects to continue with his agreement with B, he will by his own choice have deliberately inflicted harm on A. Liability in tort should follow.86 A further difficulty could arise if C did not in fact know that he had a right to rescind or terminate his contract with B. It is submitted that, unless C is aware of his rights (or is made aware of them by A), he has no real freedom of choice. In the absence of knowledge of one of the alternatives of his choice, C should not be penalised for deliberately interfering with A's rights.

A further variation to the fact pattern would arise where C executes a second inconsistent contract with B, and the agreement contains a provision enabling C to bring it to an end upon, say, one day's or one week's notice. If during the currency of this contract C acquires knowledge of a prior inconsistent contract between A and B, could he be said to be exercising a freedom of choice if he chose not to implement the notice provision? At first

86 This is, of course, assuming that all the other requirements for the tort of inducing breach of contract can be met.
glance, it appears that an affirmative answer is the correct one. This might explain the decisions in the three master-servant cases mentioned earlier, although it is only speculation in that the reports do not contain any indication as to the presence or absence of a notice provision. However, if the notice provision required a longer period of notice, further difficulties arise.

It is submitted that the courts should do nothing to force the second contract maker into the position where he is in breach of his own contract. Consequently, if a notice provision provided for one year's notice, a court should not hold C liable in tort unless he refused to exercise his notice rights. An order which would have the effect of restoring A's rights in one year's time might be of little solace to A, but at least it would be consistent with the freedom of choice test suggested as a means of mitigating the two extreme views taken in the cases to date.

The approach contended for here places great weight on an analysis of the second contract as a means of ascertaining whether C had any real freedom of choice in relation to his interference with A's contractual interests. Surely this is fairer than the all-or-nothing result produced by the two approaches hitherto outlined by the courts.

B. The Intention Requirement

In order to succeed in an inducing breach of contract action, the plaintiff must show that the defendant intended to cause injury to the plaintiff's pecuniary interests by bringing about a breach of contract. Perhaps the most concise statement of the intention requirement in the Canadian cases was made by McRuer, C.I.H.C. in *Dewar v. Dwan:*

The intention to injure the plaintiffs is an essential element... in order that it may be actionable. Evidence which merely shows that acts were done, whether lawful or unlawful, which resulted in a breach of contract does not give rise to a cause of action for inducing breach of contract. It must be shown that the intended purpose of the acts was to bring about a breach of contract.

The courts have consistently refused to lower this requirement to a point where recovery would be allowed for a negligent interference with contractual rights. There is a long line of case authority dating back to *Cattle v. Stockton Waterworks Co,* illustrating the rule that where negligent conduct causes interference with contractual relations, liability will not be imposed.

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87 Supra, note 71.
88 The result would be that the courts were refraining from protecting the first contract maker unless he suffered a deliberate interference at the hands of C.
90 *Id.,* 133-134. For a further discussion of the intention element, see *Dirasser and James v. Kelly Douglas & Co. Ltd.* (1967), 59 D.L.R. (2d) 452 (B.C.C.A.).
91 (1875), L.R. 10 Q.B. 453.
The most difficult problem with the intention requirement is to ascertain what will be regarded by the courts as sufficient to meet it. As with the knowledge of the contract requirement, the courts have recognized that a reckless defendant may be held liable in tort. If the plaintiff can show that the defendant conducted himself in such a way as to interfere with the plaintiff's contract, regardless as to whether it caused him harm or not, the intention requirement will be held to be satisfied. Recklessness or quasi-intention will be sufficient. Thus the defendant who turns a blind eye, not to the presence of a contract or its turns, but to the question of whether the plaintiff will be injured, may be subjected to liability in tort.

One of the leading cases on intention is the House of Lords decision in British Industrial Plastics Ltd. v. Ferguson. The Law Lords clearly recognized that a defendant who shut his eyes to either the presence of a contract or the question of injury to the plaintiff could be liable in certain circumstances. However, no liability was imposed in that case because it appeared on the facts that the defendants, having suspected that a manufacturing process did not belong to the vendor, sent the matter to their patent agents who reported that the process was patentable. On the strength of this report the defendants foolishly, but honestly, believed that the vendor was at liberty to sell it to them. It was held that even though the defendants had done an act which amounted to a breach of the plaintiff's contract, the fact that they did so in the bona fide belief that no breach was involved, precluded the imposition of liability.

Quite apart from questions of recklessness, it is important to ascertain how the courts deal with the issue of measuring the intention element in borderline cases. We are not concerned here with cases where it is plain on the facts that the defendant intended to cause the plaintiff injury. The difficult cases are those where the facts on the intention issue are equivocal. What test does the court use to determine whether consequences are intentional or not? It would be tempting to state simply that when the courts are having difficulty with the intention issue, that resort could be had to the presumption that a "party must be considered, in point of law, to intend that which is the necessary or natural consequence of that which he does." However,


05 See Jones Brothers (Hunstanton) Ltd. v. Stevens, [1955] 1 Q.B. 275, per Lord Goddard, C.J., at 280.

06 [1940] 1 All. E.R. 479.

07 As Lord Romer stated, the defendants' honesty was vindicated at the expense of their intelligence. "Their stupidity consisted in not realising that the patent agents would concern themselves solely with the question of anticipation by existing patents, and would not concern themselves with any question of want of subject-matter owing to prior user," Id., at 483.

08 R. v. Harvey (1823), 2 B. & C. 257, 264. The presumption is commonly used in the criminal law, but also has application in the law of torts. See Winfield and Jolowicz on Tort, supra, note 1 at 24. For a consideration of the application of the presumption in the torts of assault, battery, etc. see J.J. Atrens, "Intentional Interference with the Person", in A. Linden, ed. Studies in Canadian Tort Law (Toronto: Butterworths, 1968) at 378 et seq.
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there have been a number of statements in the cases and textbooks alike which raise doubts about the validity of this approach. For example, it is stated in Fleming\textsuperscript{99} that a defendant must have acted "with a view to bringing about a [breach of contract, and] counselled action designed to achieve that end". There is a footnote reference which reads: "That it was the 'natural and probable' consequence is not enough."\textsuperscript{100}

There appears to be no reason in principle why the courts should not avail themselves of this presumption to resolve borderline cases, nor do the leading English cases suggest that there is any rule to the contrary. The most notable Canadian decision which can be cited as authority against the use of the presumption is \textit{Dirassar and James v. Kelly Douglas & Co. Ltd.}\textsuperscript{101} The case concerned an alleged inducement of breach of contract by the defendants Kelly Douglas, who, as financial backers of certain developers, had exercised foreclosure rights against the developers and so interfered with the contractual relationship between the developers and the plaintiff architects. A majority of the Court of Appeal held that the defendants were not liable in tort on the grounds that there was no wrongful procurement, neither did the defendant intend to inflict harm on the architects. Norris, J.A., dissented, principally because he took a different view of the facts as they related to (a) the wrongful procurement and (b) the question of intention.

For present purposes, the important point is to ascertain what the court decided on the applicability of the presumption when considering the intention issue. This was a case where it was extremely difficult to tell whether the defendants possessed the necessary intention or not. Was the court entitled to use the presumption to help resolve this point? The judgments of the majority judges suggest a negative answer: MacLean, J.A. considered and rejected the plaintiffs' argument that: "it was sufficient for the plaintiffs' purposes if the alleged resulting damage was the natural and probable consequence of the act."\textsuperscript{102} He referred for support to the \textit{dictum} of Upjohn J. in the \textit{Thompson} case that the "fact that the natural and probable consequences of that act is that [the company] may be compelled to break their contracts with the plaintiffs is not sufficient to constitute the tort alleged."\textsuperscript{103} Branca, J.A. also considered this point and appeared to reject the applicability of the presumption, although his conclusion was simply that there was no evidence of intention to interfere with the plaintiffs' contract.\textsuperscript{104}

The minority judge, Norris, J.A., took a different view on the question of proof of intention. He was clearly of the opinion that in appropriate cir-

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\textsuperscript{99} Fleming at 608.

\textsuperscript{100} See note 14. A number of cases are cited in support of this proposition. These will be considered shortly.


\textsuperscript{102} (1967), 59 D.L.R. (2d) 452, 488.

\textsuperscript{103} , [1952] 1 Ch. 646 at 663.

\textsuperscript{104} (1966), 59 D.L.R. (2d) 452 at 506.
cumstances it was open to the court to use the presumption. The learned judge drew support for this conclusion from several sources, including the decision in *Bowen v. Hall,* where Brett, L.J. stated that: "Whenever a man does an act which in law and in fact is a wrongful act, and such an act as may as a natural and probable consequence of it produce injury to another, and which in the particular case does produce such an injury, an action on the case will lie." Not only did Norris, J.A., accept that the intention element could be proved in this way, but he also held that the presumption stood unrefuted on the evidence in the instant case.

Was Norris, J.A., correct as to the use of the presumption? It is submitted that court should be free to employ the presumption where the facts are unclear. It is stated by Street that:

If the defendant does an act the substantially certain consequence of which is to bring about a breach of a contract of which he is aware, then he will be presumed to have intended it, and be held liable unless the presumption is rebutted.

The purpose of using the presumption is to help the court, faced with a need to fulfil the intention requirement, to surmount an impasse where the evidence is equivocal. What is more, the presumption is rebuttable, and it is open to the defendant to adduce evidence which indicates that there was no intention to injure. *Dirassar case* has been the source of considerable confusion. In the writer's view, the case should not be interpreted as denying the courts the opportunity of using the presumption as a means of assisting them to reach a conclusion in difficult cases. The result of the case may well have been correct, but the majority reached that result by somewhat unsatisfactory means.

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105 Id. at 473.
106 For example, the judgment of Blackburn, J., in *R. v. Hicklin* (1868), L.R. 3 Q.B. 360 at 365, where it was said that: "I take the rule of law to be, as stated by Lord Ellenborough in *Rex. v. Dixon* (1814), 3 M.&S. 11, in the shortest and clearest manner: 'It is a universal principle that when a man is charged with doing an act [that is a wrongful act, without any legal justification] of which the probable consequence may be highly injurious, the intention is an inference of law resulting from the doing of the act." Also, *South Wales Miner's Federation v. Glamorgan Coal Co. Ltd.,* [1905] A.C. 239 (H.L.) Per Lord James, at 250.
107 (1881), 6 Q.B.C. 33.
109 Id. 339. See also, *Salmond on Torts,* supra, note 50, at 496 ("It is enough to show that the defendant did an act which must damage the plaintiff: it need not be proved that he intended to do so.").
110 *Exchange Telegraph Co. Ltd. v. Gregory & Co.,* [1896] 1 Q.B. 147; *White v. Riley,* [1921] 1 Ch. 1; *National Phonograph Co. Ltd. v. Edison-Bell Phonograph Co. Ltd.,* [1908] 1 Ch. 335, per Lord Alverstone, C.J., at 357.
111 In the same way as it is open to the defendant where the court is considering reckless conduct, to lead evidence to prove the contrary. *See British Industrial Plastics Ltd. v. Ferguson,* [1940] 1 All E.R. 479; and *Emerald Construction Co. Ltd. v. Louthian,* [1966] 1 W.L.R. 691.
112 Supra, note 101.
C. **Breach of an Existing Contract**

It has generally been considered that one of the prerequisites to liability for inducing breach of contract is a breach of a "valid and enforceable contract by the defendant". Recently this requirement has been the subject of much judicial scrutiny, and two separate parts of the requirement must be examined in the light of a number of decisions. First, reference will be made to the decisions dealing with the need for a valid and enforceable contract and secondly, the rule requiring a breach of contract will be considered.

(i) Valid and enforceable contracts.

It is clear that no tort is committed where the contract which has allegedly been breached as a result of the defendant's conduct is void. Various illustrations of void contracts being a bar to recovery in tort can be cited, including contracts void on the ground of a mistake of identity of one of the contracting parties, or void as being a gaming or wagering contract, or void on account of the incapacity of one of the parties, or void as being an unreasonable restraint of trade. In relation to the restraint of trade cases, the severance doctrine may be applied to save certain reasonable contracts or parts thereof, and consequently, liability in tort may follow if the defendant has procured a breach of the valid portion of the contract.

The question of voidable contracts is more difficult. If one of the parties has already taken steps to avoid the obligations under the contract, no liability in tort should flow in respect of any act after the time of avoidance. But if the contract is valid and subsisting (although voidable) when the interference takes place, it appears that liability in tort may be imposed. Presumably a similar result should follow where the contract is voidable on some other ground, for example, certain types of mistake. If the party holding the right to avoid has chosen not to exercise his right, and a third party has induced

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113 Posluns v. Toronto Stock Exchange (1965), 46 D.L.R. (2d) 210 (Ont. H.C.); and Northern Messenger (Calgary) Ltd. v. Frost (1966), 57 D.L.R. (2d) 456 (Alta. S.C.); see also McKernan v. Fraser (1931), 46 C.L.R. 343 (High Ct. of Aust.).

114 Said v. Butt, [1920] 3 K.B. 497, where the sale of a theatre ticket was found not to constitute a contract on account of a material mistake concerning the identity of the purchaser. For a discussion of mistakes which render a contract void, see G. Treitel, *The Law of Contract* (3d ed. London: Stevens, 1970) at 238 et seq.

115 Joe Lee Ltd. v. Lord Dalmeny, [1927] 1 Ch. 300.

116 De Francesco v. Barnum (1890), 45 Ch. D. 430.


118 Id. Where the doctrine of severance was applied to save certain delivery contracts, liability in tort was imposed in respect of breaches of these contracts procured by the defendants.

119 Kesnne v. Boycott (1795), 2 H.Bl. 511. There, a contract of service between the plaintiff and his infant's option, and, in holding the defendant liable in tort, the court indicated that it was not open to the defendant to take advantage of the infant's right of avoidance.

120 Or has not yet had the opportunity to exercise that right (e.g. on account of unawareness of the mistake giving rise to the right).
a breach of the contract, it seems that in principle liability should be imposed.\textsuperscript{121}

The situation where the contract is voidable on the basis that it is an unconscionable transaction\textsuperscript{122} is more complex. If the unconscionable contract is subsisting when a third party intervenes, considerable differences may arise in the disposition of the tort action depending on who was induced to breach the contract, and in what circumstances. If the perpetrator of the unconscionable bargain was induced to break the contract, it would be unlikely that any action would be commenced by the sufferer of the unconscionability. For one thing, it is doubtful that any damage would have been caused — indeed the sufferer might have gained from the contract breaker's action. If the innocent party was induced to breach the contract, the question of whether the plaintiff could succeed in a tort action would be determined by the circumstances surrounding the inducement. If the innocent party had been advised by friends, or a solicitor to take advantage of his legal rights to rescind the unconscionable bargain, no liability should be imposed.\textsuperscript{123} But if the defendant was an independent third party, in a position to profit from bringing the earlier contract to an end, the courts might well hesitate before rejecting the plaintiff's claim.\textsuperscript{124}

Further difficulties arise where there has been an induced breach of a contract unenforceable by action. An example of this is where the requirements of the Statute of Frauds have not been met. Should a defendant be liable in tort for inducing a breach of an unenforceable contract? There is Canadian authority indicating a negative answer to this question. In Brown v. Spamberger\textsuperscript{125} a defendant purchaser of real estate had advised the vendor that his commission contract with the real estate agent was unenforceable as there was no written agreement. As a result, the vendor agreed to sell the property at a substantially reduced price, thus benefitting the defendant. The agent sued the purchaser for inducing breach of contract, but it was held by a majority of the Ontario Court of Appeal that the defendant was not liable in tort.

It is interesting to note that only one judge decided the case on the ground that the defendant had induced a breach of an unenforceable agreement.

\textsuperscript{121} Whether it was the plaintiff or the other party to the contract who held the right to avoid the contract should be irrelevant, so long as the contract has not yet been avoided.

\textsuperscript{122} Morrison v. Coast Finance Ltd. (1966), 55 D.L.R. (2d) 710 (B.C.C.A.); noted in (1966), 44 Can. Bar Rev. 142 (B. Crawford).

\textsuperscript{123} Knupp v. Bell (1966), 58 D.L.R. (2d) 466 (Sask. Q.B.). From the point of view of tort liability, such defendants might well be able to plead justification in the event that all other requirements of the tort had been met. Although it is doubtful whether there has been any breach of contract.

\textsuperscript{124} Compare Brown v. Spamberger and Bunting (1960), 21 D.L.R. (2d) 630 (Ont. C.A.).

\textsuperscript{125} Id.

\textsuperscript{126} By virtue of then section 39 of The Real Estate and Business Brokers Act, R.S.O. 1950, c. 332.
ment.\textsuperscript{127} The other majority judge, McGillivray, J.A., decided that there was evidence on which the court would find that the defendant induced or procured a breach of contract.\textsuperscript{128} There was a very strong dissent by LeBel, J.A. In his view, the mere fact that the commission agreement was not in writing (and hence unenforceable by action) did not make it any less of a valid and legal contract, imposing a legal obligation or duty on the vendor to pay the commission. He indicated that the result of the defendant's argument would be that one could interfere with another’s known contractual rights so long as there is nothing in writing to evidence the contract. He added: "That strikes me as a rather novel and startling proposition. I am not aware of any authority which supports it. It also amounts to the assertion that a stranger to a contract is entitled to rely on section 39 [of the Real Estate and Business Brokers Act] as a defence to an action that does not lie in contract. In my opinion neither of these propositions is sound in law."\textsuperscript{129}

Direct support for the view of the minority judge is to be found in Winfield and Jolowicz on Tort.\textsuperscript{130} The authors claim that it should be actionable to procure a breach of a valid but unenforceable contract, and add that the action is not "an indirect method of enforcing the contract against the other contracting party but is against a third party and in tort."\textsuperscript{131} The plaintiff is being provided with redress by the law for an independent wrong perpetrated by the defendant.\textsuperscript{132}

There appears to be no sound reason in principle why an unenforceable contract should not provide the foundation for an action for procuring breach. Like the voidable contract, it is in certain circumstances a valid legal undertaking remaining on foot to allow the voluntary performance by the party entitled either to avoid or to resist its enforcement. Any interference amounting to breach by a third person in either of these situations should be actionable in tort. This conclusion has not been willingly accepted by the Canadian courts. Yet, it has not been questioned by the American courts, as illustrated in the following passage from Prosser:

The law of course does not object to the voluntary performance of agreements merely because it will not enforce them, and it indulges in the assumption that even unenforceable promises will be carried out if no third person interferes. Accordingly, it usually is held that contracts which are voidable by reason of the statute of frauds, formal defects, lack of consideration, lack of mutuality, or even uncertainty of terms, or harsh and unconscionable provisions, or conditions precedent to the existence of the obligation, can still afford a basis for a tort action when the defendant interferes with their performance.\textsuperscript{133}

\textsuperscript{128}Id. at 641.
\textsuperscript{129}Id. at 635-636.
\textsuperscript{130}Supra, note 1 at 455.
\textsuperscript{131}Id.
\textsuperscript{132}For further indirect support for this view, see Austin v. Olsen (1868), L.R. 3 Q.B. 308, especially the judgment of Mellor, J., at p. 211. (No defense to the criminal offence of persuading a seaman to break an engagement to plead that the engagement did not comply with all the necessary statutory formalities).
\textsuperscript{133}Prosser on Torts, supra, note 8 at 955-956.
The Canadian courts would do well to consider this approach before applying the majority decision in Brown v. Spamberger\(^{134}\) to other situations involving voidable or unenforceable contracts.

In connection with the "valid and enforceable contract" requirement, the courts have held that the fact that the party induced to break the contract had an option to terminate the contract in certain events will provide no solace to the defendant who procured the breach.\(^{135}\) Such a defendant will have no defence simply by showing that a termination option was reserved in the original contract. He must show that the induced party terminated his contractual obligations lawfully (e.g. by the exercise of a notice provision). But if the defendant produces the conditions required to bring an available option into play, with the intention of bringing the contract to an end, he will have committed an actionable wrong.\(^{136}\) In these circumstances the contract cannot be said to have been lawfully terminated and will be treated as having been breached in the same way as if the breach had been caused by a more direct method.

It will always be important to scrutinise the original contract to ensure that a binding contract has been formed. The situation might arise where there was no contract due to the presence of a condition precedent.\(^{137}\) A court might however characterize the condition as a condition subsequent,\(^{138}\) in which case a binding contract would exist.

Another reason for scrutinising the original contract is to ascertain the effect of any exception clause. If such a clause is so wide as to prevent the creation of contractual obligations, there will be no contract to provide the foundation of liability in tort. As is indicated by one writer\(^{139}\) "the exception would affect primary rights and duties by preventing their accrual". If no obligations accrue, the plaintiff will be in exactly the same position as if the contract were void: there would be no basis for liability.

It might well be that the particular exception clause will not be interpreted as having such a devastating effect on the agreement. The clause, rather than precluding the formation of a contract, might simply operate to render particular types of breaches not actionable in certain circumstances, leaving unaffected the substratum of the contract.\(^{140}\) However, the important point is that the original contract must be carefully analysed to determine the exact nature of the obligations undertaken and the scope of any exceptions thereto.

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\(^{134}\) (1960), 21 D.L.R. (2d) 630 (Ont. C.A.).


\(^{137}\) See Treitel, supra, note 114 at 55.

\(^{138}\) See the recent Supreme Court of Canada decision in Fabbi v. Jones (1972), 28 D.L.R. (3d) 224.

\(^{139}\) B. Coote, Exception Clauses (London: Sweet and Maxwell, 1964) at 148.

\(^{140}\) See Torquay Hotel Co. Ltd. v. Cousins, [1969] 2 Ch. 106 (Eng. C.A.). And for a discussion of this point, see Clerk & Lindsell, supra, note 49 at 383-384.
(ii) Breach or interference — the emergence of a new tort.

As noted earlier, one of the prerequisites for liability in the tort of inducing breach of contract is that the defendant must procure or induce a *breach* of the contract.\(^{141}\) It may be that one of the parties to the original contract retains a right to determine the contract, for example, upon giving appropriate notice. The defendant will commit no wrong if he induces the party holding that right to exercise it, for no breach will have been induced. However, it is not open for the defendant to argue that he has merely caused a suspension of the contractual obligations. Any material alteration to the contract caused by the defendant will be tantamount to breach and it will not avail the defendant to attempt to characterize this as a temporary suspension.\(^{142}\)

Difficulties have arisen where it has not been possible to characterise the consequences as a "breach" of contract. Can liability be imposed where there has merely been a "prevention" or "hindering" of the performance of the contract? Recent *dicta* in the English courts indicate a negative answer.\(^{143}\) However, there is some support for the contrary view. For example, Lord Denning, M.R., believes that the question has not finally been determined.\(^{144}\) He has opined that "some would . . . hold that it is unlawful for a third person deliberately and directly to interfere with the execution of a contract, even though he does not cause any breach."\(^{145}\)

The first direct support for a tort of interference short of breach came from the Master of the Rolls in *Torquay Hotel Co. Ltd. v. Cousins*.\(^{146}\) In his view the decision in that case could have been reached on the basis of tort liability imposed on a person preventing or hindering the plaintiff in the performance of his contract. He claimed that: "The time has come when the principle should be further extended to cover deliberate and direct interference with the execution of a contract without that causing any breach . . . the common law would be seriously deficient if it did not condemn such interference."\(^{147}\)

Lord Denning then proceeded to outline the three elements of this tort. First, the plaintiff must show that there has been an interference in the


\(^{143}\) See *J.T. Stratford & Son Ltd. v. Lindley*, [1965] A.C. 269. Especially the *dictum* of Lord Donovan at 340 ("the argument that there is a tort consisting of some undefinable interference with business contracts, I find as novel and surprising as I think the members of this House who decided *Crofter Hand Woven Harris Tweed Ltd. v. Veitch*, [1942] A.C. 435 would have done"). This view was confirmed by Fenton Atkinson, J., in *F. Bowles & Sons Ltd. v. Lindley*, [1965] 1 L.L. Rep. 207, especially at 212. See also *Brekkes Ltd. v. Cattel*, [1972] 1 Ch. 105, per Pennycuick, V.-C., at 114.

\(^{144}\) *Emerald Construction Co. Ltd. v. Lowthian*, [1966] 1 W.L.R. 691.

\(^{145}\) Id. at 701.

\(^{146}\) Id. at 701.

\(^{147}\) Id. at 138. For a recent English decision adopting this *dictum*, see *Esso Petroleum Co. Ltd. v. Kingswood Motors Ltd.*, [1973] 3 All E.R. 1057.
execution of a contract. Such interference is not confined to cases of breach, but extends to cases “where a third party prevents or hinders one party from performing his contract, even though it be not a breach". Secondly, the interference must be deliberate or intentional: this requirement could be satisfied either by intentional or reckless conduct. Finally, the interference must be direct. Indirect interference such as “cornering the market” or calling a strike on proper notice will not result in liability.

The problem immediately arises of ascertaining the scope of what is essentially a new tort. Before considering this question, reference should be made to a Canadian decision which appeared to apply the principle enunciated by Lord Denning — the first time the principle has been used as the essential ground for imposing liability in tort. In Einhorn v. Westmount Investments Ltd. the three defendants controlled two companies, including Westmount which had entered into a contract with Einhorn. It was alleged that the defendants, by transferring to the second company all the valuable assets of Westmount, made it impossible for Westmount to fulfil its contractual obligations to the plaintiff. The defendants failed in their application to strike out the action, as the court held that the facts revealed that there had been an interference with the contract. Disberry, J., held that he was not precluded from finding in favour of the plaintiff by the rule that a servant acting bona fide within the scope of his authority was exempt from liability. The fact that no breach of contract was procured was no bar to the action. Liability could be imposed on the basis of the principles outlined by Lord Denning in the Torquay Hotel case. The fact that the siphoning off of the assets had merely hindered and delayed the performance of Westmount’s contract with Einhorn was also no reason for holding against the plaintiff.

It is important to emphasize that no decision on the merits of the case was rendered at this point. The decision was merely as to whether to allow the defendant’s motion to strike the statement of claim for failing to disclose a cause of action. While judges are notoriously reluctant to grant such requests and while there would thus be some doubt as to the precedential value of this decision, the judgment is noteworthy if for no other reason than Disberry J.’s apparent acceptance of the “interference doctrine.”

There can be no doubt that a fair result was reached on the facts of the case, but the question remains as to the scope of the new tort. One commentator has argued against even a limited application of the tort: “might it not be better, after all, to return for now to the English common law?”

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148 Id. There is also support for this “new tort” in the judgment of Winn, L.J., (at 147) but it is made clear that this is not part of the ratio decident of the case. In Brekkes v. Cattel, [1972] 1 Ch. 105, Pennycuick, V.-C., seems to have considered that the new tort was clearly established by the Court of Appeal decision in the Torquay Hotel case, but, as pointed out by D.M. Kloss, Note in (1971), 34 Modern Law Review 590 at 691, this was certainly not the ratio of the case.

149 1969], 2 Ch. 106 at 138.


161 Any rule to this effect was “swept aside almost peremptorily”. See the criticisms of K. W. Wedderburn, Note (1970), 33 Modern Law Review 309-310.

152 Id. at 313.
The main reasons for that writer taking a cautious stand are, first, doubts as to the limits of the tort, and second, doubts as to the ability of the English and Canadian courts to handle questions of privilege, justification and just cause which must necessarily accompany a developing tort of this nature.

In relation to the first objection, the question is whether the tort will go as far as imposing liability on a defendant who has merely persuaded a party to a contract to exercise a right to terminate which may be available to him. Most commentators would restrict the tort to interferences which induce frustration or impossibility of performance. However, the eventual scope of the tort may not be of major significance, provided that the Canadian and English courts realise that any extension of liability must also be accompanied by a development in the grounds of justification available to the defendants. The American courts have had little difficulty reaching the position that “any conduct which is intended to and which in fact makes performance more onerous is, unless privileged, a tort against the promisor”. The Canadian courts could well follow the lead of the American courts on this point.

The second doubt relates to the underdevelopment of the common law concept of justification. One reason for the narrowness of the concept in English law is that the *prima facie* tort doctrine has never been embraced as a principle of the common law. Another is that, in those torts where justification is an integral part, it has been possible to dispose of many of the cases without detailed consideration of this element of the tort. But this is not to say that the common law judges do not have the capacity to apply and develop concepts of privilege, justification, or just cause, should the occasion and necessity arise. Indeed, it would seem that the common law has spun a number of individual threads in relation to the justification of the economic torts, and there seems to be no good reason why it should not, given the opportunity, develop a broader and more flexible doctrine of justification. Presumably, one way of spurring the development of such a doctrine would be for the common law to continue to develop the tort of interference with contractual relations short of breach: defendants and the judges would do the rest.

III CAUSING LOSS BY UNLAWFUL MEANS

If interference short of breach is not sufficient to render the defendant liable in tort, such interference will certainly found liability where unlawful

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153 Id. at 310, (“Just when and how far can a party take deliberate commercial action for his own ends which he knows will make it more difficult, or perhaps impossible, for a rival trader to pay off a debt to a creditor . . .?”).
154 Id. at 312. The American courts by comparison have had much wider experience in handling this “armoury of conceptual weapons”.
155 Wedderburn, *supra*, note 151, at p. 310; *Clerk & Lindsell, supra*, note 50 at 386; and *Winfield & Jolowicz, supra*, note 1 at 455.
157 Either the case has been dismissed on account of an absence of one of the other requirements, or liability has been imposed and it has been plain that the defendant’s conduct is beyond justification.
or illegal means are employed by the defendant. Several nominate torts have in the past been used to allow plaintiffs to recover where economic loss is caused by unlawful means, for example, the torts of intimidation, conspiracy to injure by using unlawful means, and indirect procurement of breach of contract. More recently, there appears to be developing an innominate tort of causing loss by unlawful means, where the threads of the separate nominate torts have been drawn together to form one tort.

The emergence of this new tort was noted by two members of the House of Lords in *J.T. Stratford & Son Ltd. v. Lindley.* Lord Reid and Viscount Radcliffe both indicated that an alternative ground for imposing liability on the respondent union officials was that they had, by unlawful means, interfered with the business of the plaintiffs. As Lord Reid stated: “In addition to interfering with existing contracts, the respondents’ action made it practically impossible for the appellants to do any new business with barge hirers. It was not disputed that such interference with business is tortious if any unlawful means are employed.”

It appears that there are four essential ingredients to this tort of causing loss by unlawful means, or unlawful interference with trade:

(a) an intention to injure the plaintiff; (b) resultant economic loss or interference with business relations; (c) unlawful means; (d) an absence of justification for the conduct of the defendant.

Undoubtedly, the key to the tort is “unlawful means”. Since *Allen v. Flood* it has not been possible at common law to impose liability in tort for an intention to injure existing in a single person. Therefore, to prevent the new tort falling into the category of “the leading heresy”, it has been necessary to build it around the concept of unlawful or illegal means. No liability in tort can be imposed if the means used by a single defendant are characterised as lawful.

Lord Denning has again been instrumental in developing this second new tort based on intentional infliction of economic loss. He indicated that:

If one person deliberately interferes with the trade or business of another, and

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107 Id. at 324. For the *dictum* of Viscount Radcliffe, see Id. at 328.
108 This terminology is used by Pennycuick, V.-C. in *Brekkes Ltd. v. Cattel* [1972] 1 Ch. 105, 114.
109 The question whether illegal means can ever be justified is a contentious one. For a discussion of the issue see J.D. Heydon, *Economic Torts, supra,* note 21 at 178. And for judicial comment on the topic, see *Morgan v. Fry,* [1968] 1 Q.B. 521 at 547-548 per Widgery, J. at first instance, and, [1968] 2 Q.B. 710 at 729 per Lord Denning, M.R.
110 For example, where loss is caused to a member of a trading or professional association, by expelling the member from the association pursuant to the rules of the association: *Lee v. Showman's Guild of Great Britain,* [1952] 2 Q.B. 329; *Faramus v. Film Artistes' Association,* [1964] A.C. 925; and *Posluns v. Toronto Stock Exchange* (1965), 46 D.L.R. (2d) 210. If the expulsion is carried out in breach of the association's rules, then the member may have a cause of action (presumably, the member could sue in contract): *Bonsor v. Musician's Union,* [1965] A.C. 104; and *Edwards v. S.O.G.A.T.,* [1971] Ch. 354.
1102 See *Torquay Hotel Co. Ltd. v. Cousins,* [1969] 2 Ch. 106.
does so by unlawful means, that is, by an act which he is not at liberty to commit, then he is acting unlawfully, even though he does not procure or induce any actual breach of contract. If the means are unlawful, that is enough.\textsuperscript{166}

The English Court of Appeal has used the tort as an alternative ground for granting an injunction to prevent union officials operating a boycott against newspaper publishers.\textsuperscript{167} It was held that the boycott instruction constituted a restrictive agreement registrable under the English Restrictive Trade Practices Act 1956\textsuperscript{168} and that it could not be justified by being brought within one of the "gateway provisions" under the Act.\textsuperscript{169} Consequently, the instruction was not only in contravention of the Act, but also constituted unlawful means for the purposes of the tort of intentionally interfering with the publisher's trade.

In \textit{Brekkes Ltd. v. Cattle},\textsuperscript{170} the new tort was used as the sole basis for granting an injunction to prevent interference with the trade of the plaintiff transport firm. The unlawful means relied on by Pennycuick, V.-C. consisted of a resolution by the defendant trade association which was held to be within the Restrictive Trade Practices Act and not capable of being justified under the gateway provisions.

More recently, the tort has been relied on by the English Court of Appeal as the principal ground for imposing liability in tort. In \textit{Acrow (Automation) Ltd. v. Rex Chainbelt Inc.},\textsuperscript{171} the plaintiff, Acrow, manufactured a product under license from an American company, S. I. Handling Systems Inc. As part of the license agreement Rex supplied to Acrow special chain essential to the manufacturing process. Rex and S.I. were very closely associated and Rex accepted directions from S.I. A dispute arose between Acrow and S.I. in relation to the license agreement and Acrow obtained an injunction against S.I. restraining them from interfering with the manufacture and sale of the licensed products. S.I. then told Rex that the decision of the English Court had no bearing on them and that they were to refuse to deliver chain to Acrow. Rex complied with the direction. Acrow sought, and at first instance was refused, an injunction against Rex requiring them to use all reasonable endeavors to supply them with chain.

The plaintiffs appealed, basing their claim principally on the tort of unlawful interference with business. The Court of Appeal unanimously allowed the appeal. The unlawful means were found in the defendants refusing to deliver chain, an omission which meant that they were aiding and abetting S.I. in their contempt of a High Court injunction.\textsuperscript{172} The fact that Rex knew

\textsuperscript{166} \textit{Id.} at 139.
\textsuperscript{168} Being a restriction within the Act, the instruction was \textit{prima facie} unlawful and "deemed to be justified under section 21(1) (d) of the Act."
\textsuperscript{169} Per Lord Denning, M.R., [1968] 2 Q.B. 762 at 782-783, and per Russell, L.J. at 785-787. The "gateway provisions" under the Restrictive Trade Practices Act, 1956, S. 21 (i) (a) to (h) outline the circumstances in which a restrictive agreement (defined in section 6 of the Act) may be justified before the Restrictive Practices Act.
\textsuperscript{170} \textit{Id.}, [1972] 1 Ch. 105.
\textsuperscript{171} \textit{Id.}, [1971] 3 All. E.R. 1175.
\textsuperscript{172} \textit{Id.} at 1181, per Lord Denning, M.R.
of the injunction and yet still refused to deliver chain meant that they had deliberately interfered with Acrow's business. Rex had done so by unlawful means because it was done in obedience to an unlawful direction of S.I. As Lord Denning put it: "if a person complies with a direction by another, which he knows or has reason to know, is unlawful, then he is acting unlawfully himself." 173

An interesting feature of this decision is that the court recognised that an interference for the purposes of this tort could be caused by an omission, or a refusal to act. Furthermore, the Acrow decision seems to suggest that a contempt of court itself, as well as the aiding and abetting of such contempt, should constitute unlawful means for the purposes of the tort. 174 This is a significant development in that the English Court of Appeal had previously held, in Chapman v. Honig 175 that a criminal contempt of court did not constitute unlawful means for the purposes of founding liability in tort. 176 The decision in the Acrow case has raised some doubt as to the validity of the earlier decision. Unless the courts intend to draw distinctions between the various types of contempt of court (a course upon which it is submitted it would be unwise to embark), it would appear that the minority view in Chapman is the preferable one. Unfortunately, the earlier case was neither cited, nor referred to by the court in Acrow.

In the various Commonwealth jurisdictions, support has been building in favour of an intentional tort based on unlawful means. The Australian High Court appears to have accepted the existence of a tort of this variety. 177 The New Zealand courts have also used the tort of unlawful interference with another's business as a basis for imposing liability. 178 Similarly, the Canadian courts have had little difficulty in accepting the tort as a valuable means of regulating intentional conduct resulting in economic loss. As early as 1960, the Supreme Court affirmed that: "[E]ven though the dominating motive in a certain course of action may be the furtherance of your own business or your own interest, you are not entitled to interfere with another man's method of gaining his living by illegal means". 179

It now appears that the law, rather than utilising three separate economic torts involving unlawful means, is moving towards a unified tort based on intention and unlawful means. It is interesting to note that many of the older cases involving the nominate torts can be explained on the basis of the

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173 Id. See also the judgment of Megaw, L.J. at 1182.
174 This point is noted by K.W. Wedderburn, Note (1972), 35 M.L.R. 184.
175 , [1963] 2 Q.B. 502. The Court rejected a claim in tort by a tenant who had been given notice by his landlord to punish him for having given evidence on subpoena against the landlord.
179 See International Brotherhood of Teamsters, etc., Local 213 v. Therien (1960), 22 D.L.R. (2d) 1 per Lock, J. at 13. (The "illegal means" which gave rise to the tort liability in the case involved the infringement of statutes controlling the conduct of trade union disputes, i.e. section 21 of the Labour Relations Act, S.B.C. 1954, c. 17.
new tort. However, this does not mean that there will be a total disappearance of cases involving the torts of conspiracy, intimidation and inducing breach of contract. It is probably true that there will be more resort by plaintiffs to the new tort in future, in view of the fact that it removes the need to prove some of the detailed requirements of the nominate torts.

Unlike the tort of inducing breach of contract, for example, there is no need to prove a breach of contract under the new tort. Also, the tort removes the necessity of proving a combination or conspiracy, as was required under the tort of conspiracy to injure by unlawful means. It has already been judicially noted that the emergence of this new principle of tort liability has lead to a decline in the usefulness of the tort of conspiracy. So long as the defendant has used unlawful means the court now need only find an intention to injure, damage and an absence of justification.

With respect to the question of what constitutes unlawful means for the purposes of this tort, one cannot help but be struck by the patchwork approach which the courts have displayed in dealing with this concept. Although there are a number of torts which depend on proof of unlawful means, there has been a marked lack of consistency in the decisions of the court. Indeed, the judges have drawn what one writer describes as a "curiously ragged line" in relation to this concept. It has been suggested that:

[I]t 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 four rubrics. The reason for the requirement is clearly the same in all four cases, namely, the maintenance of the right to take lawful action by way of trade competition and the like in present society. Unhappily, no such clear principle emerges from the authorities.

It is not proposed here to give a detailed analysis of what constitutes or should constitute unlawful means: this has been done elsewhere. It will simply be noted that not all wrongs amount to unlawful means for the purposes of the unlawful interference tort. Also, since the emergence of the tort of causing loss by unlawful means no consistent pattern has as yet appeared from the judicial pronouncements on the subject. Yet, this is a developing area of the law and as more cases come before the courts the opportunities for

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180 For example, Tarleton v. McGawley (1793), 1 Peake 270, (firing a cannon at traders about to do business with a rival ship); Garrett v. Taylor (1620), Cr. Jac. 567, (threats of violence against customers of a rival merchant); and Keeble v. Hickeringill (1705), 11 East 574n (frightening schoolboys with guns to deter them from going to the plaintiff’s school).

181 If an unlawful interference does in fact cause a breach of an existing contract, there will be an overlap between the torts of unlawful interference and inducing breach of contract (by indirect procurement) and the plaintiff will have a choice of causes of action.

182 Pete's Towing Services Ltd. v. Northern Industrial Union of Workers, [1970] N.Z.L.R. 52 (N.Z.S.C.). Speight, J. remarked that: “it is now immaterial that there was a combination if the means themselves are tortious.” (at 55).

183 J. D. Heydon, Justification in Intentional Economic Loss, supra, note 21, at 177.

184 Clerk & Lindsell on Torts, supra, note 49 at 409-410.

185 J. D. Heydon, Justification in Intentional Economic Loss, supra, note 21 at 172-177; Clerk & Lindsell, supra, note 49 at 409 et seq.
the logical and consistent development of the concept will be increased. It is hoped that the judges will recognise the importance of this new tort and direct their attention to straightening the "curiously ragged" line which at present runs through the case law.

IV CONCLUSIONS

From amidst the recent judicial activity involving the torts of intentionally causing economic loss, the tort of causing loss by unlawful means (or unlawful interference) appears likely to develop as an important method of imposing liability on defendants who, with intent, and without justification, inflict economic injury on their rivals. It is submitted that one can predict with some confidence that this tort is here to stay, and could well continue on from where the various nominate torts leave off. More and more, judges seem inclined to apply the new tort rather than become bogged down with a consideration of the intricate and complex requirements of the nominate torts.

The new tort is a manifestation of a judicial policy, recognised since the late nineteenth century, that defendants should not be allowed deliberately to injure another's financial or business interests by the use of unlawful means. This cannot be regarded as legitimate competition, a concept likewise jealously guarded by the common law. The attitude of the common law was illustrated in the development of the various nominate torts. Now, when a more unified principle is emerging, the rationale behind the nominate torts applies with equal force to that new principle.

It has been demonstrated that the recent developments in the intentional torts have not been solely concerned with the tort of unlawful interference. The form of the tort of inducing breach of contract which does not require unlawful means (i.e. direct procurement) has also been the subject of judicial activity, as was exemplified in the Einhorn case. It is clear that this development stands on less firm a footing than the tort of unlawful interference. This is because the Einhorn tort comes very close to reversing an important common law rule, sanctified in 1898 in Allen v. Flood, that no liability in tort will be imposed for a mere intention to cause economic loss. Such a drastic break with traditional thinking will inevitably take more time to become accepted law than a development which is more a refinement of old principles than a totally new approach.

Clearly, the nominate tort of inducing breach of contract by direct procurement may continue to be an important part of the law. If all the requirements of this tort can be met, plaintiffs will continue to base their claims on this older cause of action. Indeed, they may be forced to rely on the nominate tort if the developments involving the tort of interference short of breach are not willingly accepted by the Canadian courts.

This paper has also dealt with other aspects of the intentional torts which have been canvassed in the recent case law. The question of proof of the intention element in the tort of inducing breach of contract has been examined in some detail. The developments in this area are significant not only in relation to that one tort, but affect all the torts where intentional economic loss is inflicted on the plaintiff. For, while the law retains the rule
against liability where negligent acts cause economic loss, it is vital for a plaintiff to know what he must do to bring himself within the ambit of the intentional torts.

The various torts which have been considered form part of the body of common law rules which regulate economic behaviour. It has been the task of the judges to chart an appropriate course between too much competition and too little. The result has been the intentional torts. Yet, as has been illustrated, many aspects of this body of law are in a state of turmoil at the present time. One response to this situation has been to suggest that Parliament should develop appropriate rules to regulate this area of the law. However, it has not yet been demonstrated that Parliament could achieve more satisfactory results than does the present law.186

The turmoil is in the process of working itself out. As more consideration is given to such questions as the dividing line between intention and negligence, the concept of unlawful means, and the notion of justification of intentional conduct, the intentional torts will become a more satisfactory body of law, and more capable of meeting the objects they were developed to serve.

186 See J. D. Heydon, Economic Torts, supra, note 21 at 91.