INTENTIONALLY CAUSING ECONOMIC LOSS BY UNLAWFUL MEANS: A CONSIDERATION OF THE INNOMINATE TORT

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I INTRODUCTION

The common law has historically assumed that there is a need to impose liability in tort where a plaintiff has been harmed by intentionally inflicted economic loss. This has, of course, raised policy questions relating to the distinction which must of necessity be made between legitimate as opposed to illegitimate competitive trade rivalry. The courts have, in essence, drawn this distinction on the basis of the nebulous concept of "unlawful means" being used by the defendant to cause the harm.

The economic torts have developed in an illogical and piecemeal fashion. A number of separate nominate torts have developed involving the use of unlawful means: inducing breach of contract, intimidation and conspiracy by unlawful means. Each of these torts has elements that it shares with no other and there remain, even today, many unclear principles relating to the application of these nominate torts. Against this background it is not surprising that the courts have attempted to formulate propositions of wider application to meet circumstances where economic loss has been caused by intentional acts using "unlawful means".

In these circumstances it is surprising that some writers have cast criticism upon the new tort because of a feared redundancy of certain of the nominate torts.[1] However, it is submitted that it is inappropriate to approach the emergence and development of the innominate tort in this way. This article proceeds upon the assumption that the nominate and innominate torts are not of necessity in conflict. Rather, the innominate tort should be viewed as an expansion upon the nominate torts.

The present inquiry will follow two main avenues. First, an attempt will be made to trace the development and to provide an outline of the elements of the innominate tort.[2] Secondly, certain elements of the tort which require further consideration will be discussed.

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1 Eg Fleming, *The Law of Torts* (7th ed 1987) at 664; Heydon, *Economic Torts* (2nd ed 1978) at 123-125; Dworkin, "Intentionally Causing Economic Loss" (1974) Mon ULR 4 at 30.

2 Text book writers have readily acknowledged the existence of the new tort. For example, Street was prepared to recognise the tort even before the decision in *Rookes* v *Barnard* [1964] AC 1129; see Street, *The Law of Torts* (3rd ed 1963) ch 19. The present text book writers generally support the existence of the tort. See eg *Clerk & Lindsell on Torts* (15th ed 1982) at 747 et seq; Fleming, op cit at 664; *Winfield and Jolowicz on Tort* (12th ed 1984) at 531 et seq; *Salmond and Heuston on the Law of Torts* (19th ed 1987) at 402-404; Trindade and Cane, *The Law of Torts in Australia* (1985) at 194-196.

II THE EMERGENCE OF THE INNOMINATE TORT

1 The English Development

(a) Historical Background

A brief historical review of the innominate tort is a worthwhile exercise because it serves to remind us that perhaps this tort is based upon some falsely imagined past. Like many areas of the common law, the less we know of the historical foundations of the "established" principles, the more likely we are to accept them unquestioningly.

The innominate tort has been developed and shaped over a significant period of time and it is difficult to pinpoint any given case as being the foundation for the tort. One commentator has cogently argued that the decision in *Rookes* v *Barnard* is to be regarded as the starting point.[3] However, the preferable view seems to be that the tort has developed as "an extrapolation from the fact patterns of various historically significant decisions and was not based on any explicit judicial statement of support".[4]

Rookes v *Barnard* was an intimidation case. The decisions of both the Court of Appeal and House of Lords in that case were significant primarily for their confirmation that there existed in English law the tort of intimidation, a matter which in the mid-1960's was not beyond doubt.[5] It was remarkable that the tort had not been invoked since the decisions of *Garret* v *Taylor*[6] and *Tarleton* v *M'Gawley.*[7] Indeed, *Rookes* v *Barnard* relied upon both of these authorities.

At another level *Rookes* v *Barnard* came to be regarded as involving, or perhaps only raising, recognition of the wider principle of the innominate "unlawful means" tort, a matter which at the time was focused upon by the commentators.[8] However, it is submitted that those commentators who advocated the existence of the new tort at that time seized upon this decision with undue enthusiasm.

It can be said, with some degree of confidence, that the first clear judicial statement recognising the existence of the new tort is to be found in *J T Stratford & Sons Ltd* v *Lindley.*[9] The action in this case was founded on the torts of inducing breach of contract and intimidation. The facts of the case, briefly stated, were that the plaintiff was a holding company with a subsidiary, Bowker & King Ltd. Both were controlled by Jack Stratford. The defendants were members and officials of the watermen's union. The defendants had for some time attempted to negotiate certain terms and conditions on behalf of their members who were in the employ of Bowker

3 Mitchell, "Liability in Tort for Causing Economic Loss by the Use of Unlawful Means and Its Application to Australian Industrial Disputes" (1976) 5 Adel LR 428 at 432.
4 Burns, "Tort Injury To Economic Interests: Some Facets of Legal Response" (1980) 58 Can Bar Rev 103 at 142.
5 [1963] 1 QB 623 per Lord Pearson at 688 (CA): *Rookes* v *Barnard* supra n 2, per Lord Reid at 1167, per Lord Evershed at 1184, per Lord Hodson at 1198, per Lord Pearce at 1233 and per Lord Devlin at 1205 (HL).
6 (1620) Cro Jac 567; 79 ER 485.
7 (1974) Peake 270; 170 ER 153.
8 Eg Weir, "Chaos or Cosmos? Rookes, Stratford and the Economic Torts" [1964] CLJ 225 at 226; Hoffmann, *"Rookes* v *Barnard"* (1965) 81 LQR 116 at 140.
9 [1965] AC 269.

& King. Without consulting the watermen's union, Bowker & King entered into an agreement with another union, the transport and general workers' union. Such recognition of a rival union caused the defendants to place an embargo upon the activities of the plaintiff companies. In consequence, the plaintiff's business was brought to a standstill and injunctive orders were sought.

The House of Lords found for the plaintiffs. The defendant unionists were held to have wrongfully induced breaches of contract between the plaintiffs and their customers and hirers. It is significant for present purposes, however, to note that both Lord Reid and Viscount Radcliffe suggested an alternative basis upon which to found liability. Such alternate ground provides what may be regarded as the first clear reference to liability attaching to the use of "unlawful means" in the innominate tort sense.

Lord Reid expressed his views in the following manner:[10]

> 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 unlawful means are used.

The "unlawful means" referred to in the context of this decision was the inducement to breach contract.

Lord Denning, as has so often been the case, was soon to become a champion of the cause of developing the new tort. On two occasions he seized upon the views of Lord Reid and Viscount Radcliffe in *Stratford* to formulate a proposition of greater clarity. The first occasion was in the decision of the English Court of Appeal in *Daily Mirror Newspapers Ltd* v *Gardner*.[11] The defendants were members of a union representing retail newsagents. The Daily Mirror increased its costs of publication and, in turn, the wholesalers of the newspapers attempted to pass this increased cost on to the retailers. Incensed, the defendants resolved to organise a boycott of the paper by sending a "stop notice" to the wholesaler for a period of one week. The plaintiffs thereupon commenced injunctive proceedings which, significantly, asserted two grounds. First, that the defendants had used "unlawful means" to damage the plaintiffs in their trade, and secondly, on the ground that the defendants were inducing breach of the contracts of supply already existing between the plaintiff and the wholesaler.

Daily Mirror succeeded on both grounds. On the first ground Lord Denning found that "unlawful means" had been used. He formulated the following proposition:[12]

> I have always understood that if one person interferes with the trade or business of another, and does so by unlawful means, then he is acting unlawfully, even though he does not procure or induce any actual breach of contract. Interference by unlawful means is enough.

10 Ibid at 324. See also Viscount Radcliffe at 328 and 330.
11 [1968] 2 QB 762.
12 Ibid at 783.

An almost identical statement of principle was repeated in the second of the Lord Denning decisions, *Torquay Hotel Co Ltd* v *Cousins.*[13] In addition, Lord Denning in *Torquay Hotel* cited the proposition formulated in *Rookes* v *Barnard* as explained by Lord Reid in *Stratford* as authority for his views.[14]

The key features to arise from the Lord Denning formulations have been conveniently summarised by Burns in the following manner:[15]

> (i) He suggested that a tort based on unlawful means is a distinct cause of action. Lord Denning clearly felt that the principles espoused within this tort are unique to itself – that the tort provides an independent cause of action.
> (ii) Lord Denning apparently adopted this somewhat novel tort without reservation stating that it exemplified the law as he has "always understood it". In his eyes then, the principles of law contained in this segment of his judgment do not purport to proffer a novel cause of action, do not constitute an expansion but rather are aimed at achieving consistence with an explication of precedent.
> (iii) Lord Denning expressly pointed out that unlike the tort of inducing a breach of contract, for example, there is no need to prove an actual breach under the new tort. As long as the court is able to find an intent to injure, some damage, and the use of unlawful means, that is enough.

Perhaps the Lord Denning foundations were not so well laid after all. However, a further trilogy of English cases serves to illustrate the determination of the English courts to recognise the need for a cause of action where there had been intentionally inflicted economic loss caused by "unlawful means".

In *Acrow Ltd* v *Rex Chainbelt Inc*[16] Lord Denning was again to the fore. This case involved the manufacture by the plaintiff of a product under licence for SI Handling Systems Inc (SI), an American corporation. An implied term of the agreement was that Rex (another American company having a close association with SI) was to supply Acrow with a component part critical to its manufacture process. There followed a dispute between SI and Acrow and SI attempted unlawfully to revoke the licence. Acrow obtained an injunction restraining SI from interference in this manner. SI then directed Rex to discontinue supply Acrow. Rex complied with this request. The Court of Appeal granted a further injunction requiring Rex to use all reasonable endeavours to supply Acrow.

The case did not involve the tort of intentionally causing economic loss by unlawful means in an indirect manner. The tort in its wide form constituted the primary cause of action. Lord Denning concluded as a matter of law that:[17]

> I take the principle of law to be that which I stated in *Torquay Hotel Co Ltd* v *Cousins,* namely, that if one person, without just cause or excuse, deliberately interferes with the trade or business of another, and does so by unlawful means, that is, by an act which he is not at liberty to commit, then he is acting unlawfully.

13 [1969] 2 Ch 106 at 139.
14 Idem.
15 Burns, supra n 4 at 143-144.
16 [1971] 3 All ER 1175.
17 Ibid at 1181.

Applying that principle to the facts it was found that the interference caused by Rex's refusal to supply constituted an act in obedience to an unlawful direction. Such conduct was to aid and abet the unlawful act, and accordingly, the omission to act was held to constitute the interference.[18]

Another decision in which the new tort was used as the sole basis for granting an injunction to prevent interference with the trade of the plaintiff is *Brekkes Ltd* v *Cattel*.[19] In that decision Pennycuick V-C had little difficulty in accepting the existence of the tort and, in particular, reliance was placed on the formulation of the tort as enunciated in *Torquay Hotel*.[20]

Finally, the recent House of Lords decision in *Merkur Island Shipping Corp* v *Laughton*[21] warrants mention. The stage I issue in that case was whether the plaintiffs had a cause of action at common law based upon the tort of actionable interference with contractual rights. The primary question here was whether this tort was restricted to procuring a breach of contract between the plaintiff and a third party or extended to actions which interfered with the performance of the contract by a third party. At one level, therefore, the decision may be regarded as limited to issues relating to the nominate tort of inducing breach of contract. However, in the judgment of Lord Diplock there was the further recognition that "the evidence also establishes a *prima facie* case of the common law tort . . . of interfering with the trade or business of another person by doing unlawful acts".[22] The clarity of this statement is, however, clouded to some extent by the immunity issues arising under sub-sections (2) and (3) of section 13 of the Trade Union and Labour Relations Act 1974 (UK) which were mentioned in the context of this statement.

(b) Formulation of the Tort

It is convenient to summarise the discussion thus far by attempting a formulation of the tort which emerges from the English authorities. The following propositions emerge for the application of a general innominate tort of unlawful interference:

(i) If A acts against B with the intention of causing it economic harm, and uses unlawful means, A will be liable to B for the damage caused to B;[23] and

(ii) If A acts against C with the intention of causing harm to B and uses unlawful means against C, A will be liable for the damage resulting to B.[24]

It is evident from these formulations that there are three key elements to the establishment of the tort:

18 Mitchell has questioned this aspect of the decision. How could Rex be acting unlawfully when it did something it had a perfect right to do, namely, to cease a non-contractual business relationship with another company? See Mitchell, supra n 3 at 438.

19 [1972] 1 Ch 105.

20 Ibid at 114.

21 [1983] 2 All ER 189.

22 Ibid at 196-197.

23 Eg *Acrow* supra n 16.

24 Eg *Daily Mirror Newspapers* supra n 11.

(i) An intention by the defendant to harm the plaintiff;
(ii) Subsequent injury or economic loss to the plaintiff; and
(iii) The use of "unlawful means" in the defendant's conduct.[25]

2 *Other Common Law Jurisdictions*

(a) New Zealand

New Zealand has contributed little to the jurisprudence of the innominate tort. It is arguable in the New Zealand context that the tort was recognised as long ago as 1914 by the New Zealand Court of Appeal in *Fairburn Wright & Co* v *Levin & Co.*[26] On this matter the court of three was unanimous. Sim J, delivering the judgment of Edwards J and himself, said that:[27]

> [I]f, for the purpose of advancing his own interests, a trader uses against a rival weapons that are unlawful and thereby causes him injury, the latter has a good cause of action for damages. . . . The plaintiff's right is to carry on their business freely without interferences by the use by rival traders of unlawful means.

This statement of principle was developed no further. The question of the existence of the unlawful means tort was not directly at issue again until the 1980's.[28] On a preliminary question of law in *Van Camp Chocolates Ltd* v *Aulsebrooks Ltd,*[29] it was held by Vautier J that the tort of unlawful interference with business interests did not exist. However, the Court of Appeal thought otherwise.[30] Cooke J accepted that "it is a recognised tort in New Zealand, although its boundaries will receive closer definition as cases emerge".[31] This finding was said to be based upon two of the many cases referred to the Court, namely, *Fairburn Wright* and *Merkur Island.*[32]

(b) Australia

There has been a separate development in Australia which has to some extent distracted attention from the emergence of the innominate tort. In 1966 the full court of the High Court of Australia in *Beaudesert Shire Council* v *Smith*[33] determined that:[34]

25 One commentator has suggested that "the absence of justification for the conduct of the defendant" constitutes a further element to the establishment of the tort. See Stevens, "Interference With Economic Relations – Some Aspects Of The Turmoil In The Intentional Torts" (1974) 12 Osgoode Hall LJ 595 at 620. However, it is arguable whether this is a requirement at all and this issue will be discussed in more detail below. In the ultimate analysis it appears to make no difference whether justification is an element of the tort or a defence to it.
26 (1914) 34 NZLR 1.
27 Ibid at 29-30.
28 Prior to the consideration of the innominate tort in the 1980's, the Court of Appeal had on one occasion commented disapprovingly upon a related Australian tortious development. See *Takaro Properties Ltd* v *Rowling* [1978] 2 NZLR 314 at 339-340.
29 Unreported, High Court, Auckland, A 1440/79, 19 October 1982.
30 *Van Camp Chocolates* v *Aulsebrooks Ltd* [1984] 1 NZLR 354.
31 Ibid at 359.
32 Section 242 of the Labour Relations Act 1987 prohibits any party from bringing an action based upon the nominate torts and the innominate "unlawful means" tort where such action results from a lawful strike or lockout.
33 (1966) 120 CLR 145.
34 Ibid at 155-156.

> Independently of trespass, negligence or nuisance but by an action for damages upon the case, a person who suffers harm or loss as the inevitable consequence of the unlawful, intentional and positive acts of another, is entitled to recover damages from that other.

This statement has been subjected to considerable criticism by the commentators,[35] has never been applied and has received considerable judicial disapproval.[36] The High Court of Australia itself recently went so far as to say that "when [the question whether *Beaudesert* should be followed] does arise for decision, it will be desirable that a Court of seven justices should consider it".[37] The almost unanimous prediction is that the *Beaudesert* formulation will not be followed, and indeed, Heydon is of the opinion that it is likely to become absorbed as part of the general innominate tort formulation under review.[38]

There are, of course, features common to both the *Beaudesert* formulation and the innominate tort such as the causation of loss to the plaintiff and the use of unlawful means by the defendant. However, there is a fundamental distinction. The innominate tort requires that the defendant must intend by his acts to inflict economic harm upon a specific person, the plaintiff. The *Beaudesert* test is wider requiring only that the plaintiff need show that the defendant intended to do the act, not necessarily aimed at any given individual, which caused economic harm to the plaintiff.

Notwithstanding the attention which *Beaudesert* has understandably attracted, the emergent innominate tort has not gone unnoticed in Australia. There are dicta supporting the existence of the tort. First, there is the decision of the Supreme Court of New South Wales in *Sid Ross Agency Pty Ltd* v *Actors and Announcers Equity Association of Australia.*[39] The issue arose in a somewhat unsatisfactory context. The facts of the case gave rise to a potential test case situation. The plaintiff was a theatrical agency which sued an industrial union for damages for loss of business profits by reason of the fact that the union had published a list of approved theatrical agencies from which the plaintiff alleged that its name had been wrongfully omitted. Else-Mitchell J opined that:[40]

> There can, I think, be no doubt in the light of the authorities . . . that a right of action is available to a person who suffers damage as a result of interference by another with his trade or business by unlawful means and that this may be so even though the interference does not entail the procurement of inducement of an actual breach of contract.

35 Eg Dworkin & Harari, "The Beaudesert Decision – Raising The Ghost Of An Action Upon The Case" (1967) 40 ALJ 296 and 347; Dworkin, supra n 1; Heydon, "The Future Of Economic Torts" (1975) 12 U West Aus LR 1 at 16-17. Cf Sadler, "Whither Beaudesert Shire Council v Smith?" (1984) 58 ALJ 38.

36 Eg *Grand Central Car Park Pty Ltd* v *Tivoli Freeholders* [1969] VR 62; *Takaro Properties Ltd* v *Rowling* supra n 28 at 339; *Freeman* v *Shoalhaven Shire Council* [1980] 2 NSWLR 826; *Lonrho Ltd* v *Shell Petroleum Co Ltd (No 2)* [1982] AC 173; *Dunlop* v *Woollahra Municipal Council* [1982] AC 158; *Freedman* v *Petty* [1981] VR 1001; *Hospitals Contribution Fund of Australia* v *Hunt* (1983) 44 ALR 365.

37 *Elston* v *Dore* (1982) 43 ALR 577 at 585.

38 Heydon, op cit at 134.

39 [1970] 2 NSWR 47.

40 Ibid at 52.

However, Else-Mitchell J was required to determine, not whether there was such a cause of action, but whether the pleadings sufficiently alleged such a cause of action. It was held that the relevant count had been adequately framed.

A further decision of the Supreme Court of New South Wales, *Copyright Agency Ltd* v *Haines,*[41] has in more recent times recognised the potential action. It is interesting to note that, in attempting to establish an action in tort, the plaintiff had pleaded the innominate tort based upon the English authorities and the *Beaudesert* formulation as alternate causes of action. McLelland J conceded that "there may be some generalised but as yet imprecisely defined principle of tortious liability (outside the scope of the traditional torts) which in some circumstances will provide relief against unlawful interference with economic activity".[42] Indeed, McLelland J thought that the High Court of Australia had already recognised as much in *Kitano* v *The Commonwealth.*[43] However, the suggestion was also made that such developments in English law should not be applied in Australia, at least by a court of first instance, in the light of the decision of the High Court in *Beaudesert.*[44]

Accordingly, the Australian position is unsettled at this time. The *Beaudesert* formulation requires reconsideration but is unlikely to be followed. There are indications that the English development of the innominate tort will be followed in Australia, but there has been the suggestion that courts of first instance should be reluctant to make findings based solely on the innominate tort having regard to precedent considerations. But it is submitted that courts of first instance will not in reality find such precedent considerations a problem. First, if there is a finding that the defendant acted intentionally towards the plaintiff — the innominate tort test — it is difficult to see that there would not be a similar finding under the wider *Beaudesert* test which requires that the defendant must have intended to do the act. Secondly, the court may justify a finding under the innominate tort head as a separate and distinct cause of action from the *Beaudesert* formulation.

(c) Canada

Judicial support has also been given to the "unlawful means" tort in Canada. The tort was arguably first recognised by the Supreme Court of Canada in *International Brotherhood of Teamsters etc Local 21* v *Therein*[45] where Locke J stated:[46]

> [Even] 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.

41 [1982] 1 NSWR 182.
42 Ibid at 194.
43 (1974) 129 CLR 151 at 173-174.
44 Supra n 42.
45 (1960) 22 DLR (2d) 1.
46 Ibid at 13.

Clearer principles were enunciated in two subsequent decisions of the Manitoba Court of Appeal. First, in *Gersham* v *Manitoba Vegetable Producers' Marketing Board,*[47] a case primarily involving intimidation, O'Sullivan JA recognised and also made findings in respect of the "unlawful means" tort as a separate and distinct cause of action. As authority for the existence of the tort O'Sullivan JA cited with approval the following passage from Clerk and Lindsell:[48]

> There also exists a tort of uncertain ambit which consists in one person using unlawful means with the object and effect of causing damage to another. In such cases, the plaintiff is availed of a cause of action which is different from those so far discussed.

In addition O'Sullivan JA placed express reliance on the views expressed by Lord Reid and Viscount Radcliffe in the *Stratford* decision for the existence of the tort.[49]

The Manitoba Court of Appeal, in the later case of *Mintuck* v *Valley River Bank No 63A*[50] again reached the same conclusion. The Court cited with approval the above extract from Clerk and Lindsell[51] and was prepared to determine liability, inter alia, on the basis of the tort of unlawful interference with economic interests as a separate and distinct cause of action.

III Elements Of The Tort Requiring Further Consideration

Although some may consider that the innominate tort is based upon questionable foundations, there has emerged a growing body of authority to support its existence. Perhaps we have all by now convinced ourselves that the tort is "established". Clearly, the tort, which is based on intention and "unlawful means", has obvious advantages. Where it is accepted as a matter of competition law policy that liability should attach in such circumstances, the tests imposed by the tort should result in relief being more readily obtainable. For example, contrast the nominate tort of inducing breach of contract. Under the new tort there would be no need to prove knowledge of the existence of the contract and the actual breach of the contract.[52] Likewise, in the intimidation situation the intention to harm becomes the primary requirement and it would seem that the establishment of an actual threat is not required under the new tort. The tort may therefore be viewed as having achieved its basic objective, namely to extend beyond the existing heads of liability recognised by the nominate torts.

However, the judicial process relating to the action is far from complete. The remaining parts of this article will be devoted to three key issues,

47 [1976] 4 WWR 406.
48 *Clerk & Lindsell on Torts* (14th ed) para 808, quoted at 413.
49 Idem.
50 (1977) 75 DLR (3d) 589.
51 Ibid at 601.
52 The four elements to the tort of actionable interference with contractual rights are discussed by Lord Diplock in the *Merkur Island* decision, supra n 21 at 195-196.

involving interpretive and conceptual matters, which require further judicial refinement.

1 The Width of the Proposition

It has been said that:[53]

> It is the mark of a more developed society to have a broad principle, conceptually clear, which has been rationalised from the earlier law. A broad principle will encompass a wider range of grievances, and fewer wrongs will go unremedied simply because they do not fit within narrower tort categories. The courts have a greater discretion to deal openly with policy issues.

However, there has correspondingly been a reluctance on the part of the judiciary to formulate and apply tortious propositions of wide application in circumstances, such as the present, where the relevant subject matter is already governed by various statutory controls in the industrial relations and business competition law spheres; the potential continued application of the established economic torts; and other recognised legal sanctions. Should the "unlawful means" tort continue to exist, cast in the broad terms which presently appear to be applicable? In essence, this calls into question whether a narrower formulation of the intentional aspect of the tort is desirable and whether recklessness should suffice for the establishment of the action.

(a) Intention

Should the intentional aspect of the innominate tort require that the defendant by his conduct have a single or dominant intention to harm the plaintiff? There is an argument by analogy in this regard with the tort of civil conspiracy that the intention to harm must at least be the dominant purpose of the defendant.[54] It could further be argued that the absence of a requirement of a dominant intention to harm could result in permitting an incidental victim to recover.[55] These issues were raised directly in the *Van Camp* case and the New Zealand Court of Appeal dealt with the matter in the following terms:[56]

> In principle, as we see it, an intent to harm a plaintiff's economic interests should not transmute the defendant's conduct into a tort actionable by the plaintiff unless that intent is a cause of his conduct. If the defendant would have used the unlawful means in question without that intent and if that intent alone would not have led him to act as he did, the mere existence of the purely collateral and extraneous malicious motive should not make all the difference. The essence of the tort is deliberate interference with the plaintiff's interests by unlawful means. If the reasons which actuate the defendant to use unlawful means are wholly independent of a wish to interfere with the plaintiff's business, such interference being no more than an incidental consequence foreseen by and gratifying to the defendant, we think that to impose liability would be to stretch the tort too far. Moreover it would entail minute and refined

53 Dworkin, supra n 1 at 30.
54 See *McKernan* v *Fraser* (1931) 46 CLR 343 at 389-405.
55 See Heydon, op cit at 66.
56 Supra n 30 at 360.

exploration of the defendant's precise state of mind – an inquiry of a kind which the law should not call for when a more practicable rule can be adopted.

The *Van Camp* decision is the only case to date which has attempted to directly explore the intentional character of the innominate tort. Unfortunately, the above passage is not free from ambiguity although it seems that a wide test of intention relating to causation of harm is preferred. Some form of "deliberate interference" to use unlawful means is obviously required. However, if the defendant can show that the use of the unlawful means was independent of a wish to interfere with the plaintiff's business, then such conduct is not actionable. But surely such distinction between that which is "deliberate" and that which is "wholly independent" involves a detailed inquiry into the defendant's precise state of mind – an inquiry of a kind which the court expressly thought should not be called for. And one is left to wonder, what is the "more practicable rule"?

This issue requires further judicial analysis. It is submitted, however, that a wide formulation of the intentional limb of the innominate tort is to be preferred. The only nominate tort to have formulated the narrower dominant intention test has been the tort of civil conspiracy to injure, which has not involved the requirement that unlawful means be employed by the defendant. Rather, conspiracy to injure has been primarily concerned with the determination of issues relating to legitimate objects in respect of the defendant's conduct.[57] Therefore, on the basis of the nominate torts from which the innominate tort has emerged, it seems that a wide formulation of the intentional limb of the tort is appropriate.

(b) Recklessness

An issue allied to the test of intention is whether the establishment of recklessness, being a disregard for the consequences of the action in question,[58] should suffice in establishing the intentional act limb of the innominate tort formulation. By way of analogy, there is authority in the trade union cases that the tort of inducing breach of contract may be based upon the establishment of recklessness.[59] However, other nominate torts such as intimidation have emphasised that intention to harm is a fundamental requirement.[60]

It is submitted that the formulation of the innominate tort is directed to the requirement that intention be established. From the historical development of the innominate tort it is clear that the intentional harm inflicted by the defendant must be aimed at a specific person, the plain-

57 See *Crofter Hand Woven Harris Tweed Co Ltd* v *Veitch* [1942] AC 435 at 441-442.

58 The term recklessness is used in an objective sense in this context so as not to be bracketed with intention. See Clerk & Lindsell, op cit at 49 and *Pannett* v *McGuinness & Co Ltd* [1972] 2 QB 599 at 606. An objective test has also been applied to the concept of recklessness in the company law context: see *Thompson* v *Innes* (1985) 2 NZCLC 96-064 at 99,472 and *Re Petherick Exclusive Fashions (in liq)* (1987) 3 NZCLC 96-136 at 99, 959. In contrast, the criminal law in New Zealand appears to have adopted a subjective test in relation to recklessness. See *R* v *Harney* (Unrep CA 87/87, 7 September 1987) and Orchard, "Recklessness in New Zealand" [1987] NZLJ 378.

59 Eg *Emerald Construction Co Ltd* v *Lowthian* [1966] 1 WLR 691 at 704.

60 Eg *Rookes* v *Barnard* supra n 2 at 1183.

tiff. To relax that requirement by permitting recklessness to be substituted for intention would change the character of the tort as it has been formulated.

2 "Unlawful Means"

Central to the nominate torts of intimidation, conspiracy by unlawful means and indirect procurement of breach of contract has been the requirement that "unlawful means" must be established.[61] The innominate tort has likewise for policy reasons pertaining to the legitimacy of competitive conduct required that the successful plaintiff must satisfy this test of "unlawful means" to establish liability. This requirement imposes a significant limitation on the potential application of the tort. Furthermore, the authorities relating to the above nominate torts do not provide clear guidelines as to what constitutes "unlawful means".

There have been isolated instances where certain acts have been considered to amount to "unlawful means". For example, an act in contempt of court[62] or wrongful acts committed in the course of administration of the affairs of a company which might have been lawful if proper procedures had been used may be sufficient.[63] It has also been regarded as obvious that acts of a criminal nature come within the "unlawful means" test.[64] This assumption may, however, require modification as will become apparent where the criminal character of the act derives from the breach of a statute.

The major heads for determining whether conduct is unlawful for the purpose of the innominate tort, however, are in equity, tort, contract and statute. Of these categories of unlawful means, the most controversial extension has been the inclusion of a mere breach of contract.[65] The remaining categories require some consideration in terms of what conduct constitutes unlawful means.

While conceding that it is not clear whether breaches of equitable obligations are generally "unlawful", Clerk & Lindsell point to recent extensions of the law relating to breach of confidence and economic duress and suggest that both might be accepted as unlawful means.[66] However, it is doubtful that this view is correct. Equity has traditionally taken a wider

61 The recent decision of the House of Lords in *Lonhro* arguably casts some doubt on the relevance of the concept of unlawful act in connection with civil conspiracy. The House of Lords on one interpretation decided that, even if unlawful means were involved, it is not enough for the plaintiff to show that he had thereby suffered damage: see *Lonhro* supra n 36 at 188-189. In so doing, their Lordships arguably reverted to the traditional legitimate objects test enunciated in earlier decisions relating to conspiracy to injure, thus rendering redundant the unlawful means test in relation to civil conspiracy. However, two subsequent decisions, one a decision of the Supreme Court of Canada and the other a decision of the High Court of New Zealand, have concluded that *Lonhro's* case does not affect the law of civil conspiracy in this way. See *Canada Cement Lafarge* v *British Columbia Lightweight Aggregate Ltd* (1983) 145 DLR (4d) 385 and *SSC & B Lintas New Zealand Ltd* v *Murphy* (1986) 3 NZCLC 96-077.

62 *Acrow* supra n 16.

63 Eg *Volkswagen Canada Ltd* v *Spicer* (1979) 91 DLR (3d) 43.

64 *Rookes* v *Barnard* supra n 2 per Lord Reid at 1167 and per Lord Devlin at 1206.

65 See Clerk & Lindsell, op cit at 721-722.

66 Clerk & Lindsell, op cit at 752.

view of possible liabilities than has the common law. Furthermore, it may be regarded by the courts to be more appropriate to determine the equitable remedy applicable in, for example, an action for breach of confidence, rather than to attempt to follow the circuitous route of the tort of unlawful interference in such circumstances.[67]

Tortious conduct has also been regarded as constituting "unlawful means". For example, fraud causing damage to the plaintiff, whether such fraud be perpetrated either by the defendant on a third party or by a third party on another, has been held an actionable interference.[68] There have likewise been many instances where indirect inducement of breach of contract[69] and threat of breach of contract[70] have been held to constitute unlawful means and it seems appropriate that this should continue to be the case under the innominate tort.

Finally, breach of statute may provide "unlawful means" conduct for the establishment of the innominate tort. In *Daily Mirror Newspapers*[71] it was held that an arrangement which contravened the Restrictive Trade Practices Act 1956 (UK) was "unlawful means" for the purposes of tort. That statute, in fact, did not render the arrangements in question criminal or illegal but caused such arrangements to be registrable trade practices. Without following such procedures the arrangements were presumptively void under the statute and were deemed to be contrary to the public interest.

There has been a conflicting approach taken by the courts in determining whether acts which are illegal because they contravene penal statutes amount to "unlawful means". A "private right" approach was first formulated in *Ex p Island Records Ltd.*[72] There were some thirty plaintiffs in that case, being musical performers and their contracted recording companies. They complained of damage caused by the activities of "bootleggers" who recorded live performances and then made copies of the recording for distribution. Section 1 of the Dramatic and Musical Performers' Protection Act 1958 (UK) provides only for penalties in criminal proceedings for such activities and does not provide that civil proceedings may be brought for breach of such statutory provision. However, the majority of the English Court of Appeal was prepared to find that there was jurisdiction in equity to grant an injunction ex parte on the basis of the protection of private rights. This concept was not new at the time as it had been addressed by the House of Lords in *Gouriet* v *Union of Post Office Workers.*[73] Lord Denning in *Island Records* summarised the result of *Gouriet's* case as follows:[74]

> When a statute creates a criminal office – prescribing a penalty for the breach of it but not giving any civil remedy – the general rule is that no private individual can

67 This view was expressed by Cooke J in *Van Camp* supra n 30 at 360.
68 See *National Phonograph Co* v *Edison-Bell Co* [1908] 1 Ch 335 at 360 and 369; *Bradford etc Building Soc* v *Borders* [1941] 2 All ER 205 at 220.
69 *Acrow* supra n 16 at 1180; *Merkur Island* supra n 21 at 195-196.
70 Eg *Rookes* v *Barnard* supra n 2 at 1168-1169, 1188, 1201, 1207 and 1235.
71 Supra n 11.
72 [1978] 1 Ch 122.
73 [1978] AC 435.
74 Supra n 72 at 135.

> bring an action to enforce the criminal law, either by way of an injunction or by damages. It must be left to the Attorney-General to bring an action, either of his own motion or at the instance of a member of the public who "relates" the facts to him.

Lord Denning, with whom Waller LJ agreed, although arguably on the narrower ground of harm to a property interest,[75] continued:[76]

> But there is an exception to this rule in any case where the criminal act is not only an offence against the public at large, but also causes or threatens to cause special damage to a private individual. If a private individual can show that he has a private right which is being interfered with by the criminal act — thus causing or threatening to cause him special damage over and above the generality of the public — then he can come to the court as a private individual and ask that his private right be protected.

Shaw LJ dissented from this view holding that the statute in question could not be construed as conferring a civil remedy by a penal provision because the Act did not define a duty to the plaintiffs.[77]

The "private right" approach adopted in *Island Records* has, however, been rejected in subsequent cases. In *Lonrho Ltd* v *Shell Petroleum Co Ltd (No 2)*[78] the House of Lords expressly rejected the "private right" formulation.[79] Rather, the question whether legislation which makes the doing or omitting to do a particular act a criminal offence renders the person guilty of such offence liable also in a civil action for damages at the suit of any person who suffers loss or damage was said to be a question of construction.[80] Reviewing the traditional authorities on this matter Lord Diplock first stated the presumption that where an Act creates an obligation, and enforces the performance of it in a specified manner, that performance cannot be enforced in any other manner. There were stated to be two exceptions to the situation where the only manner of enforcing performance under the Act is by way of prosecution for the criminal offence. First, where as a matter of true construction of the Act it is apparent that the obligation or prohibition was imposed for the benefit or protection of a particular class of individuals, and secondly, where the statute creates a public right and a member of the public suffers a "particularly direct and substantial damage other and different from that which was common to all the rest of the public".[81]

The question was reconsidered by the English Court of Appeal one year later in RCA Corporation v *Pollard*.[82] It was remarkable that the factual background here, as in *Island Records*, was the making and distribution of bootleg records. Again, section 1 of the Dramatic and Musical Performers' Protection Act 1958 (UK) was at issue. Putting to one side the

75 Ibid at 144-145.
76 Ibid at 135.
77 Ibid at 139 and 141.
78 Supra n 36.
79 Ibid at 187.
80 Ibid at 183-186.
81 Ibid at 185.
82 [1982] 3 WLR 1007.

findings made as to the true construction of the Act,[83] there are dicta in *RCA* that *Lonrho* has overruled *Island Records* in respect of the wide "private right" principle formulated by Lord Denning.[84] Whilst Lawton LJ expressly stated that it was unnecessary for him to consider whether *Lonrho* had overruled *Island Records,* he had earlier noted that what Lord Diplock said about *Island Records* on this point was not obiter and was a matter requiring determination in that case by the House of Lords.[85] Clearer statements are to be found on this point in the judgment of Oliver and Slade LJJ.[86]

It should finally be noted that in the context of the breach of statutory provisions it appears that if a statute provides specific remedies which may be pursued by individuals for breaches of such statute, it is not possible to commence a distinct and separate innominate tort action asserting that the unlawful act was provided by the breach of the relevant statutory provision.[87]

A great deal of uncertainty therefore surrounds what will be regarded as the use of "unlawful means". It is submitted that this requirement will place significant limitations on the potential application of the innominate tort as the courts have been prepared to find the existence of the relevant "unlawful means" in only limited circumstances.

3 *Justification*

It has been suggested that the wider tort formulation gives rise to a greater need for a defence of justification.[88] But the existence and application of such defence in respect of "unlawful means" conduct is uncertain.

In the historical context, Heydon[89] has referred to the dogma that illegal means cannot be justified. The old authorities stated that there is no such defence in these circumstances.[90] It has been suggested that, in essence, there are five reasons explaining this position.[91] First, the view was probably widely shared that illegal means were evil. Secondly, with reference to the nominate tort of inducing breach of contract by illegal means the view was expressed that the plaintiff was required to prove malice, proof of which itself was regarded as being wrong. A third reason related to the supposed analogy between justifying intentionally caused economic loss and pleading privilege to a defamation action. On this line of argument it followed that,

83 It was noted that Shaw and Waller LJJ in *Island Records* had in fact both found that the Act did not create a duty of permission or omission for the benefit of a class of persons which included recording companies. *Island Records* was held to be binding on this point: per Lawton LJ ibid at 1016 and per Slade LJ at 1024.
84 Ibid. See also *Copyright Agency Ltd* v *Haines* supra n 41 at 193-194.
85 Idem.
86 Ibid at 1018, 1021 and 1025. See also the decision of the English Court of Appeal in *Rickless & Ors* v *United Artists Corporation & Ors* [1987] 2 WLR 945 at 955-956.
87 See *Broadlex Pty Ltd* v *Computer Co Pty Ltd* (1983) 50 ALR 92 at 95; *Aristotite* v *Gladstone Shopping Centre Pty Ltd* (1983) 5 ATPR 40-370 at 44, 413.
88 Heydon, op cit at 125.
89 Heydon, "The Defence of Justification in Cases of Intentionally Caused Economic Loss" (1970) 20 U of Tor LJ 139 at 178 et seq.
90 Ibid at 178 footnote 271.
91 Ibid at 178-179.

just as spite destroys a plea of privilege, so too illegal means destroys a plea of justification. Fourthly, there was an apparent harm surrounding illegality that it ought not to be capable of justification. Finally, vagueness of the defence was thought to be a factor contributing to its non-recognition.

But as Heydon has cogently argued and concluded, there is no adequate basis for the rule that illegal means can never be justified.[92] More importantly, there is today judicial support for the existence of such defence, although the form and scope of the justification defence in this situation is far from clear. As Slade J put it "[the] plea of justification nowadays is a flexible one and should not be regarded as confined to narrow strait-jackets".[93]

A brief outline of the authorities leading to the modern judicial view in respect of justification is worthwhile. In *Rookes* v *Barnard* Lord Devlin left open the possibility of justifying intimidation.[94] In the first instance, Widgery J said in *Morgan* v *Fry* that a threat to induce breaches of contract would be justified only if actual inducement could be justified as between the defendant and the innocent party to the contract.[95] The appeal in *Morgan* v *Fry*[96] provides the first of two statements made by Lord Denning in respect of the defence. Lord Denning appeared to accept that justification might be possible if the organisers of the breakaway union which the defendant unionists were attempting to have removed by the employer "were really troublemakers who fomented discord in the docks, without lawful cause or excuse".[97]

The second of the Lord Denning judgments on this point is *Cory Lighterage Ltd* v *TGWU*.[98] In this case an employee S had caused a dispute to arise through purposely allowing his union membership to lapse and his dues to remain in arrears. A compulsory union membership policy applied in the relevant industry. Lord Denning referred to the issue of justification in the following terms:[99]

> If S's conduct was justifiable — as, for instance, if he conscientiously objected to joining the union, or was dissatisfied with it — then he should, of course, recover compensation for and damage done to him. But if his conduct was not justifiable as, for instance, if he did it out of malice and with intent to injure — then he should not recover compensation. In such case, the union and its members may plead that their own conduct — in refusing to work with him — may be justified or excused.

In summary, the modern judicial trend is to recognise the defence and significantly Heydon concludes in favour of this trend on the basis of the "seriousness and social inutility of what has to be justified".[100] However,

92 Ibid at 178-180.
93 *Greig et al* v *Insole et al* [1978] 3 All ER 449 at 493.
94 Supra n 2 at 1206.
95 [1967] 1 QB 521 at 547.
96 [1968] 2 QB 710.
97 Ibid at 729.
98 [1973] 1 WLR 792.
99 Ibid at 815.
100 Supra n 89 at 182.

the defence must be regarded as potentially of only limited application. Each case will turn on its particular circumstances and no general inclusionary rule is likely to emerge.[101]

IV Summary And Conclusion

The following conclusions and submissions emerge:

1 The English development of the innominate tort has since *Stratford* followed a consistent path. It is generally accepted today that the innominate tort provides an important additional weapon to the aggrieved plaintiff who has suffered intentionally inflicted economic loss which has been caused by the use of unlawful means. Certain foundations of the tort are, however, questionable. The Lord Denning formulations contained in the *Daily Mirror Newspapers* and *Torquay Hotel* decisions may be challenged. For example, Lord Denning in stating what had always been his view failed to recognise that the proposition he was enunciating was, in fact, novel at that time. Lord Denning did not, therefore, explore the protean nature of the tort and formulate the elements of it in an appropriate expansionary manner.

2 In comparatively recent times New Zealand and Canadian courts have indicated their approval and acceptance of the new tort.

3 The Australian position is less clear, having regard to the present confusion surrounding the *Beaudesert* formulation. For the reasons already advanced, it is submitted that it is presently open to the Australian courts to recognise the existence of the innominate tort regardless of the ultimate fate of *Beaudesert.*

4 Assuming the existence of the innominate tort, there remain a number of uncertain issues relating to its scope and application. It is submitted that:

(a) A wide formulation of the intentional limb of the tort is desirable and the establishment of recklessness should not suffice in making out the tort; and

(b) Clearer statements of principle are required relating to what constitutes "unlawful means".

5 It has yet to be conclusively determined whether the defence of justification is available in relation to the innominate tort and, if so, a proper formulation of the elements of the defence is still awaited. Such formulation seems unlikely, however, having regard to the application of justification as a defence in respect of the other nominate torts.

101 See *Pete's Towing Services Ltd* v *NIUW* [1970] NZLR 32 at 49.