CHAPTER 14

MALICIOUS PROSECUTION

Malicious prosecution of criminal proceedings which causes actual damage to the person prosecuted is a tort actionable at the suit of that person. "Malicious prosecution" consists in *instituting unsuccessful criminal proceedings maliciously and without reasonable and probable cause.*

The following are the essential elements of this tort.

(i) There must have been *a prosecution* of the plaintiff by the defendant.

(ii) There must have been *want of reasonable and probable cause* for that prosecution.

(iii) The defendant must have *acted maliciously* (*i.e.* with an improper motive and not to further the ends of justice).

(iv) The prosecution must have terminated *in favour of the plaintiff.*

(v) The plaintiff must have suffered *damage* as the result of the prosecution.

1. THE PROSECUTION

The first thing to be established is that there has been a prosecution of the present plaintiff by the present defendant.

This prosecution must have been a criminal prosecution not a civil action (*a*). And it must be a *prosecution* as opposed to an arrest or imprisonment. To lay hands on someone, or to imprison him or to cause him to be imprisoned by an executive official, may be actionable as a false imprisonment, but it cannot be malicious prosecution. A prosecution consists in setting a *judicial* process in motion (*b*); so that once the independent judicial decision of

(*a*) See Note at end of Chapter.

(*b*) See *Mohamed Amin* v. *Bannerjee*, [1947] A. C. 322: a mere false complaint summarily dismissed is not enough, but if the proceedings result in

another person intervenes (as where a magistrate upon the defendant's information proceeds with a charge) false imprisonment can no longer lie and a possible claim in malicious prosecution takes its place.

Further, not only must there (for a claim in malicious prosecution to succeed) have been a *prosecution* of the plaintiff, but the defendant must also have been the *instigator of it.*

It is usually simple to determine whether the defendant was the instigator, but not always. For instance if B lays against A a false information or falsely and maliciously instructs someone else to prosecute him, B is clearly the instigator, and he may be liable to a subsequent action. Equally if a judge, in the course of a civil case, decides that a party is committing perjury and directs another party to prosecute, the judge, and not the other party will usually be the instigator (*c*); so that the other party could not later be sued. But if in this latter case the second party had deliberately misled the judge and caused his intervention, then the second party *might* be the instigator, and, if the prosecution ended in favour of the accused, despite the intervention of the judge, the accused might have a claim against him (*d*). The question is one of causation; and such issues are often difficult.

It should also be added that—though here again everything depends upon the facts—it is not *necessarily* a defence to an action for malicious prosecution that, in the prosecution upon which the claim is based, the defendant had been bound over to prosecute; even though a man is bound over, his may yet be the moving hand behind the charge (*e*).

2. REASONABLE AND PROBABLE CAUSE

In an action for malicious prosecution the *plaintiff* must establish (*f*) that the defendant *prosecuted him without reasonable and probable cause.*

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damage to the plaintiff there need not have been a formal prosecution in the strict sense.

(*c*) See *Fitzjohn* v. *Mackinder* (1861), 9 C. B. N. S. 505, 521; *per* BLACKBURN, J. (dissenting). And see *Hope* v. *Evered* (1886), 17 Q. B. D. 338.

(*d*) *Dubois* v. *Keats* (1840), 11 Ad. & El. 329, as explained in *Fitzjohn's Case, supra.*

(*e*) As to the position in cases where the *fiat* of the Attorney-General is required for a prosecution, see *Bradshaw* v. *Waterlow & Sons, Ltd.*, [1915] 3 K. B. 527, 535.

(*f*) *Abrath* v. *North Eastern Rail. Co.* (1886), 11 App. Cas. 247, 249. Contrast the *negative* rôle of reasonable and probable cause in false imprisonment.

This is a very difficult issue (*g*) and it has long since been decided that it is a matter for the *judge* to determine, though the jury (*h*) also have a part to play

> "... in order to determine the question of reasonable and probable cause, the *judge* must first find out what were the facts as known to the prosecutor, asking the *jury* to determine any *dispute* on that matter and then the *judge* must ask *himself* whether those facts amounted to reasonable and probable cause" (*i*).

The stock definition of "reasonable and probable cause" is

> "... an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was guilty of the crime imputed" (*k*).

It will be appreciated that this is a very general description, and it has often been stressed that it is inexpedient that the judge's decision on the matter should be fettered by rigid rules (*l*). Indeed the words "guilty of the crime imputed" may be infelicitous since they suggest that the defendant must have been convinced that the crime had actually been committed

> "Whereas in truth he has only to be satisfied that there is a *proper case* to lay before the court, or in the words of Lord MANSFIELD (*m*), that there is a probable cause 'to bring the [accused] to *a fair and impartial trial*' (*n*)."

But it is plain that if the accuser does take care to find out the facts before making his charge, and does *honestly beleive* such information as he receives, he cannot be liable for malicious prosecution provided

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(*g*) For a brilliant discussion of the difficulties, historical and practical, see the judgment of DENNING, L.J., in *Leibo* v. *Buckman, Ltd.*, [1952] 2 All E. R. 1057, 1062–8. He points out that the danger of leaving the question to the "lay gents" (the jury) was recognized as early as *Pain* v. *Rochester & Whitfield* (1602), Cro. Eliz. 871.

(*h*) Juries are still popular in malicious prosecution, for they are likely to favour a person who sues in respect of a charge of which he has been acquitted (see DENNING, L.J.'s judgment, *supra*).

(*i*) *Tempest* v. *Snowden*, [1952] 1 All E. R. 1, 4; [1952] 1 K. B. 130, 138; *per* DENNING, L.J. (italics ours). And see *Panton* v. *Williams* (1841), 2 Q. B. 169; *Herniman* v. *Smith*, [1938] 1 All E. R. 1; [1938] A. C. 305.

(*k*) *Hicks* v. *Faulkner* (1881), 8 Q. B. D. 167, 171; *per* HAWKINS, J. Approved in *Herniman's Case*, *supra*.

(*l*) *Lister* v. *Perryman* (1870), L. R. 4 H. L. 521. And see remarks of Lord DU PARCQ: *Tyne Improvement Commissioners* v. *Armement Anversois S/A (the Brabo)*, [1949] 1 All E. R. 294, 307; [1949] A. C. 326, 353.

(*m*) *Johnstone* v. *Sutton* (1786), 1 Term. Rep. 510, 547.

(*n*) *Glinski* v. *McIver*, [1962] 1 All E. R. 696, 710; [1962] A. C. 726, 758: *per* Lord DENNING.

that his information, in view of the facts objectively considered as a whole, was such that a reasonable man would consider it to form grounds for a *primâ facie* case.

The question of "honest belief" is a complex one. If a man has in fact no honest belief in the validity of the charge he brings he cannot be said to have acted on reasonable and probable cause (*o*); and whether a person has or has not an honest belief is a question of *fact*. Yet it has long been held (probably for the reason that as a matter of public policy prosecutions should not be unduly discouraged) that the issue of reasonable and probable cause is one for the judge, as has been stated, and not one for the jury. Hence there is an admixture of functions; the issue of honest belief *may* (like certain other facts, such as whether statements alleged by the defendant to have been made to him by others were in fact made) be left to the jury. But it is now (*p*) established that it will only be proper for the judge to submit this issue to the jury if there is some evidence upon which the jury could find that the defendant had no such belief. It is particularly important only to leave this question to the jury when such evidence is present, since the jury also have to determine the issue of "malice"; and juries are apt to jump to the conclusion that where there is malice there cannot be honest belief. This of course is not the case, since I may have the worst of motives for preferring a charge and yet honestly believe that the charge is well founded (*q*).

It is safest to leave this matter here (*r*); for, though the issue is for the judge it is again essentially one of fact. Thus, for instance, it has been held that it is not *necessarily* conclusive against the defendant that his information was derived from hearsay (*s*), nor is it *necessarily* conclusive in his favour that he took legal advice before proceeding though usually the fact that he did take such advice is likely to be so (*t*). But it must be repeated that all the

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(*o*) *Glinski's Case* (last note) at pp. 706 and 753 respectively; *per* Lord RADCLIFFE: at pp. 721, 777; *per* Lord DEVLIN.

(*p*) *Glinski's Case*. "I know that question ['honest belief'] has been asked of juries for well over 150 years now, but it has caused a cartload of trouble . . . I hope it will now be cast into the limbo'.: *Dallison* v. *Caffery*, [1964] 2 All E. R. 610, 617; [1965] 1 Q. B. 348; 368: *per* Lord DENNING, M.R.

(*q*) Where the issue of "honest belief" is left to the jury the onus of negativing it lies, like the onus in relation to "reasonable and probable cause", upon the plaintiff: *Dallison's Case* (last note) at pp. 619 and 371 respectively.

(*r*) As to the position where there are reasonable grounds as to *part* only of the charge, see *Leibo's Case*, above, n. (*g*).

(*s*) *Heslop* v. *Chapman* (1853), 23 L. J. Q. B. 49; *Lister* v. *Perryman* (1870), L. R. 4 H. L. 521.

(*t*) *Hewlett* v. *Cruchley* (1813), 5 Taunt. 277 (counsel's opinion). Though the question is really one of the competence and appropriateness of the legal

defendant need have done to bring his accusation within the scope of "reasonable and probable cause" is to have satisfied himself that there was a *case* against the plaintiff: he does *not* have to be convinced that the plaintiff was guilty beyond doubt (*u*). And it must be added that it is the state of the defendant's mind at the time that he brings the charge that is relevant; knowledge of subsequent events, such as that the plaintiff was in fact acquitted, is irrelevant.

ILLUSTRATION III

(a) *No action will lie if the defendant had reasonable and probable cause for prosecuting.*

Malz *v.* Rosen, [1966] 2 All E. R. 10.

Defendant preferred a charge of using behaviour likely to occasion a breach of the peace against plaintiff. This prosecution failed. In a subsequent action by plaintiff against defendant for malicious prosecution. *Held:* The fact that at the police station before the original charge was preferred a police sergeant had told defendant that plaintiff had committed an offence constituted reasonable and probable cause in defendant.

(b) *The issue of lack of honest belief in the validity of the charge must not be left to the jury unless there is some evidence to sustain it.*

Glinski *v.* McIver, [1962] 1 All E. R. 696; [1962] A. C. 726.

Defendant police officer had been in charge of a prosecution of the plaintiff for conspiracy. Plaintiff had been acquitted. Plaintiff alleged that upon his arrest defendant had said that he would never have been charged if he had not given evidence for the defence in a previous case involving other people. *Held:* Though the defendant's remark was properly left to the jury on the issue of malice—and the jury's finding of malice could not be disturbed—the statement was not such evidence as to justify the judge in leaving to the jury the question of honest belief. For though the remark bore on the isue of malice it could have no bearing upon the defendant's belief in the validity of the charge at the time when it was made.

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adviser. See *Glinski's Case* at pp. 701 and 745; *per* Viscount SIMONDS and *Abbott* v. *Refuge Assurance Co., Ltd.*, [1961] 3 All E. R. 1074; [1962] 1 Q. B. 432. Though BAYLEY, J., in *Ravenga* v. *Mackintosh* (1824), 2 B. & C. 693, 697 and Lord DENNING in *Glinski's Case* at pp. 710 and 759 seem to state positively that counsel's advice affords the defendant complete protection. And see *Malz* v. *Rosen*, [1966] 2 All E. R. 10, 13; *per* DIPLOCK, L.J.

(*u*) "The distinction between facts to establish actual guilt and those required to establish a *bonâ fide* belief in guilt should never be lost sight of . . .": *Hicks* v. *Faulkner* (1881), 8 Q. B. D. 167, 173; *per* HAWKINS, J. If a prosecutor continues a prosecution *bonâ fide* begun, after he has discovered facts which convince him of the innocence of the accused, this continuing will probably render him liable in malicious prosecution: *Dubois* v. *Keats* (1840), 11 Ad. & El. 329; *Tims* v. *John Lewis & Co., Ltd.*, [1951] 1 All E. R. 814; [1951] 2 K. B. 459, 472.

3. MALICE

Because it is in the public interest that people who commit crimes *should* be prosecuted the law adds a further restriction to the power of those wrongly prosecuted to bring a civil action for malicious prosecution.

This is the requirement of "*malice*" which here means *improper motive*.

> "To maintain an action for malicious prosecution it must be shewn that there was an absence of reasonable and probable cause, *and that there was malice or some indirect* and illegitimate motive in the prosecutor" (*a*).

The proper motive for a person who prosecutes is an honest desire to bring a criminal to justice, so that "malice" may consist in any number of motives other than this: for example, a desire to stop the person prosecuted from bringing civil actions against the prosecutor (*b*), to silence a witness (*c*), or to make an example of the person accused in order to deter others from committing similar crimes (*d*).

But the mere absence of reasonable and probable cause, though it may obviously raise a strong inference of malice, is not in itself conclusive evidence of it; for however stupid or misguided the defendant may have been, if he *honestly* believed he ought to prosecute and no evil motive is established against him he cannot have been malicious (*e*). Further, the fact that the plaintiff was acquitted in the prosecution is not in itself evidence of malice (*f*). Nor in cases of felonious taking of property is it evidence of malice that the defendant was actuated by a desire to recover his property.

The burden of establishing malice lies upon the *plaintiff* (*g*), and the question "malice" or "no malice" is a question of fact and, as such, a jury question (*h*).

(*a*) *Abrath* v. *North Eastern Rail. Co.* (1886), 11 App. Cas. 247, 250–1; *per* Lord BRAMWELL (italics ours).

(*b*) *Leith* v. *Pope* (1779), 2 Wm. Bl. 1327 (impecunious baronet and usurer: £10,000 damages not excessive).

(*c*) *Haddrick* v. *Heslop* (1848), 12 Q. B. 267.

(*d*) *Stevens* v. *Midland Counties Rail. Co., Ltd.* (1854), 10 Exch. 352.

(*e*) *Brown* v. *Hawkes*, [1891] 2 Q. B. 718 (Illustration 112). And see *Hicks* v. *Faulkner* (1881), 8 Q. B. D. 167, 174–5.

(*f*) *Corea* v. *Peiris*, [1909] A. C. 549.

(*g*) *Corea's Case*, (last note).

(*h*) Subject to the judge's power to rule against a finding which the evidence *cannot* warrant. For functions of judge and jury see *Brown* v. *Hawkes*, [1891] 2 Q. B. 718, 726; *per* Lord ESHER, M.R.

It is now well established that an action for malicious prosecution will lie against a corporation (*i*).

ILLUSTRATION 112

In an action for malicious prosecution there must be proof of malice as well as absence of reasonable and probable cause.

Brown *v.* Hawkes, [1891] 2 Q. B. 718.

After an ill-natured dispute about payment for some boots defendant bootmaker had prosecuted plaintiff who was acquitted. It was found that (1) Defendant had not taken care to inform himself about the facts --there was therefore absence of reasonable and probable cause: (2) Defendant honestly believed in the charge he made; (3) Defendant was actuated by malice. On appeal: *Held:* Since the finding of malice, (3), rested solely upon the absence of care, (1), defendant could not be liable, since although this absence of care *might* raise an inference of malice, this was negatived by (2), the finding of honest belief; and absence of reasonable and probable cause could not by *itself* be conclusive evidence of malice.

4. FAILURE OF PROSECUTION

For the action to succeed it is essential that the prosecution should have "terminated in favour of the plaintiff" (*k*).

This is a harsh rule, and it may sometimes work injustice, especially where there is no right of appeal against conviction (*l*); for even criminal courts may sometimes err and sometimes, too, the conviction of the plaintiff need not necessarily vindicate a malicious defendant. But the reason for the rule is long-established and clear; for if the law were otherwise:—

> ". . . almost every case would have to be tried over again upon its merits. . . . This doctrine is as old as the case of *Vanderbergh* v. *Blake* (*m*), where HALE, C.J., says, that if such an action should be allowed . . . the judgment would be blowed off by a side-wind" (*n*).

The decision of a criminal court cannot be reopened in fresh civil proceedings.

But "terminated in the plaintiff's favour" does not mean that there must have been a judicial decision as to his innocence; it is enough if he has been acquitted on a technicality (*o*), or if the

(*i*) *Citizens' Life Assurance Co.* v. *Brown*, [1904] A. C. 423.
(*k*) *Castrique* v. *Behrens* (1861), 3 E. & E. 709, 721; *per* CROMPTON, J.
(*l*) *Basébé* v. *Matthews* (1867), L. R. 2 C. P. 684.
(*m*) (1662), Hard. 194.
(*n*) *Basébé* v. *Matthews* (1867), L. R. 2 C. P. 684, 687; *per* BYLES, J.
(*o*) *Wicks* v. *Fentham* (1791), 4 Term Rep. 247.

charge fails because no evidence is given. Further, where the proceedings in which the defendant made his accusation are such that they are *not capable* of terminating in the plaintiff's favour—as where the plaintiff has no opportunity to controvert the defendant (*p*)—then the plaintiff may bring his action for malicious prosecution without being called upon to establish the impossible, that he was victorious.

5. DAMAGE

It must finally be established that some damage has resulted to the plaintiff as a natural consequence of the prosecution complained of.

This damage may be pecuniary damage, as where he has had to spend money to acquit himself of the charge, or it may be the damage he has received to his person by being put in danger of loss of liberty, or it may be the less concrete damage which arises from the blemish to his fair name which the charge brings upon him (*q*).

But under any of these heads it must be damage which *naturally* (*r*) results from the prosecution. Thus in *Wiffen* v. *Bailey and Romford U.D.C.* (*s*), where the plaintiff had been acquitted of failing to comply with a notice to clean the walls of some rooms in his house, it was held that there was no ground for an action for malicious prosecution, since there is nothing necessarily detrimental to a man's reputation about such a failure (*t*).

On the other hand, though it has long been established that in a civil action (*u*) an award of costs is final and to be taken (even though it notoriously does nothing of the kind (*a*)) as fully determining the

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(*p*) Binding over to be of good behaviour used to be a good example of this; for the accused had no right to be heard: *Steward* v. *Gromett* (1859), 7 C. B. N. S. 191. But since such proceedings are no longer *ex parte* a decision of the magistrates against the plaintiff *will* be a bar to his action for malicious prosecution: *Everett* v. *Ribbands*, [1952] 1 All E. R. 823; [1952] 2 Q. B. 198.

(*q*) *Savile* v. *Roberts* (1698), 1 Ld. Raym. 374, 378; *per* HOLT, C.J.

(*r*) *Wiffen* v. *Bailey and Romford Urban District Council*, [1915] 1 K. B. 600. Though this formulation was criticized in *Berry* v. *British Transport Commission*, [1961] 3 All E. R. 65, 79, 82; [1962] 1 Q. B. 306, 333, 335-336 by DEVLIN and DANCKWERTS, L.JJ.

(*s*) *Supra*.

(*t*) Contrast *Rayson* v. *South London Tramways Co.*, [1893] 2 Q. B. 304 (charge of attempt to avoid payment of fare). And see remarks of DANCKWERTS, L.J. in *Berry' Case* (*supra*) at pp. 82 and 339.

(*u*) *Quartz Hill Gold Mining Co.* v. *Eyre* (1883), 11 Q. B. D. 674.

(*a*) See *Berry's Case* (*supra*) pp. 75 and 328; *per* DEVLIN, L.J. pp. 80 and 336; *per* DANCKWERTS, L.J.

loss incurred by the party by way of expenses in the litigation this rule does not apply to costs awarded in a criminal prosecution. Consequently in an action for malicious prosecution the plaintiff may treat his actual necessary outlay in defending himself at the previous criminal trial as damage sufficient to found his civil claim (*b*), though any compensation awarded to him by the criminal court must of course be taken into account (*c*).

NOTE ON ANALOGOUS TORTS

The tort which has just been discussed is the comparatively common tort of malicious institution of *criminal* proceedings. There are other analogous torts which are not sufficiently important to merit extended discussion here. They include the tort of maliciously and without reasonable and probable cause instituting proceedings to make a man bankrupt (*d*) or to wind up a company (*e*). The party against whom such proceedings are taken may suffer in credit, and this is sufficient damage to ground the action, at all events in the case of a trader or trading company (*f*); although it may be that in the case of a non-trader some other special damage would have to be shown (*g*). The essential elements of these torts are the same as in the institution of malicious criminal proceedings (*h*).

It must also be noted that at one time actions for bringing *malicious civil* proceedings were possible; but probably they cannot now be brought (*i*), and certainly there have been none in recent times. The tort of malicious *arrest* must also be regarded as obsolete. This consisted in wilfully putting the law in motion to effect a civil arrest without cause (*k*); but civil arrest is itself now rarely possible.

On the other hand there is a method of *preventing people from* bringing vexatious civil proceedings; for upon application by the

(*b*) *Berry* v. *British Transport Commission*, [1961] 3 All E. R. 65; [1962] 1 Q. B. 306.

(*c*) And of course if this award amounts to full compensation there will be no damage on which to base the civil claim: see *R.* v. *Whitchurch* (1881), 7 Q. B. D. 534.

(*d*) *Johnson* v. *Emerson* (1871), L. R. 6 Exch. 329.

(*e*) *Quartz Hill Gold Mining Co.* v. *Eyre* (1883), 11 Q. B. D. 674.

(*f*) *Ibid.*

(*g*) See *Wyatt* v. *Palmer*, [1899] 2 Q. B. 106.

(*h*) See *Metropolitan Bank* v. *Pooley* (1885), 10 App. Cas. 210; *Cox* v. *English, Scottish & Australian Bank*, [1905] A. C. 168.

(*i*) See *Quartz Hill Case* (1883), 11 Q. B. D. at pp. 689–91; *per* BOWEN, L. J., and *Wiffen* v. *Bailey and Romford U.D.C.*, [1915] 1 K. B. 600, 606–7.

(*k*) See *Churchill* v. *Siggers* (1854), 3 E. & B. 929.

Attorney-General, the High Court may under powers conferred by the Supreme Court of Judicature (Consolidation) Act, 1925, s. 51 (*l*), if satisfied that a person has persistently instituted vexatious proceedings, order that such person shall not for the future institute proceedings in any court or continue with proceedings already instituted without leave of the High Court or a judge thereof (*m*).

Although it is not directly germane to the present topic it may perhaps be convenient to add here that although an action in tort will lie at the suit of the party aggrieved against a witness who fails to appear upon a subpoena, provided special damage is proved (*n*), it would appear (though this may not be true in all circumstances) that no action will at any rate normally lie against a party who suffers damage by reason of the commission of a contempt of court (*o*). Further, it is a principle of law that

> "no man should be allowed to institute proceedings in any court if the circumstances are such that to do so would be really vexatious . . . it is vexatious if somebody institutes proceedings to obtain relief in respect of a particular subject-matter where exactly the same issue is raised by his opponent in another court (*p*)."

Consequently in *Thames Launches, Ltd.* v. *Trinity House* (*p*), the case from which this citation was taken, the defendants in a civil action were prevented by injunction from bringing criminal proceedings in a magistrates' court upon a matter already raised by the plaintiffs by originating summons in the Chancery Division.

It must now be added that the ancient torts of Maintenance (giving unjustifiable assistance to a litigant) and Champerty (obtaining a reward for giving such assistance) have been abolished (*q*).

(*l*) 18 Halsbury's Statutes (2nd Edn.) 488, as amended by the Supreme Court of Judicature (Amendment) Act, 1959, s. 1 (1) [39 Halsbury's Statutes (2nd Edn.) 1141], replacing the Vexatious Actions Act, 1896. And see *A.-G.* v. *Vernazza*, [1960] 3 All E. R. 97; [1960] A. C. 965.

(*m*) The procedure applies even though the litigant brought the vexatious actions in a representative capacity and not in his own name: *Re Langton*, [1966] 3 All E. R. 576.

(*n*) *Roberts* v. *J. & F. Stone Lighting and Radio, Ltd.* (1945), 172, L. T. 240, and see *Chapman* v. *Honig*, [1963] 2 All E. R. 513, 525; [1963] 2 Q. B. 502, 525; *per* DAVIES, L.J.

(*o*) See *Chapman* v. *Honig* (last note).

(*p*) *Thames Launches, Ltd.* v. *Trinity House of Deptford Strond Corporation*, [1961] 1 All E. R. 26, 33; [1961] Ch. 197, 209: *per* BUCKLEY, J.

(*q*) Criminal Law Act, 1967, s. 14 (1). This conveniently relieves the author of the duty to explain these torts: *but* it seems that this onus is merely shifted to the writers of books on contract since by s. 14 (2) the abolition of these torts is not to affect "any rule of . . . law as to the cases in which a contract is to be treated as contrary to public policy or otherwise 'illegal'". See the Law Commission's *Proposals for the Reform of the Law Relating to Maintenance and Champerty*: H.M.S.O., 1966.

CHAPTER 15

LOSS OF SERVICE, ENTICING, HARBOURING AND SEDUCTION

1. LOSS OF SERVICE AND CONSORTIUM (*a*)

In mediaeval times a servant was in many respects treated by the law as if he were a chattel (a survival of the status of villeinage and serfdom); consequently if he were injured by some third party, *and* the master thereby lost the benefit of his services, an action lay against the third party in respect of the services of which the master had been deprived—just as the master would have had an action in respect of the loss of the use of a horse or of an ox (*b*). The writ upon which this cause of action was founded was appropriately based upon the allegation "*per quod servilium amisit*", and the action came to be known by that name.

Although serfdom has long since disappeared this cause of action remains a part of the law. An employer may therefore claim against a third party who by some wrongful act deprives him of the services of his servant. But it is essential for the plaintiff to establish both that the wrongful act is one which is actionable at the suit of the servant himself (*c*) (as where the defendant through negligent driving injures the servant in a street accident), and that as a result of the wrongful act some service was actually lost (*d*), as where the servant is incapacitated by his injury. Further, it seems now that the word "servant" in this context is to be taken to bear its non-technical meaning of menial or household servant (*e*);

(*a*) The following account of the law derives largely from *Inland Revenue Commissioners* v. *Hambrook*, [1956] 3 All E. R. 338; [1956] 2 Q. B. 641.

(*b*) See DENNING, L.J.'s, judgment in *Hambrook's Case*.

(*c*) Where the servant is *killed* no action lies: *Osborn* v. *Gillett* (1873), L. R. 8 Exch. 88.

(*d*) Thus there will be no action in the case of a trifling assault, which gives the servant himself a cause of action, but does not incapacitate him: *Robert Marys's Case* (1612), 9 Co. Rep. 111 b, 113 d.

(*e*) For the technical meaning of "servant" see Part III, Chapter 1. This rule in fact seems to go back as far as *Taylor* v. *Neri* (1795), 1 Esp. 386: but prior to *A.-G. for New South Wales* v. *Perpetual Trustee Co. (Ltd.)*,

and accordingly this kind of action does not extend to the case of injuries received by an employee who, though technically a "servant", falls outside this restricted category (*f*). Thus it has been held that a police authority has no claim in respect of loss of the services of a policeman (*g*), and no action will lie at the suit of the Crown in respect of loss of the services of a civil servant (*h*).

[1955] 1 All E. R. 846; [1955] A. C. 457, and *Hambrook's Case*, [1956] 3 All E. R. 338; [1956] 2 Q. B. 641, there were some decisions which extended the action to cover cases where the services lost were those of someone who was one of the wider class of "servants" within the *technical* meaning of the word. Many of these decisions must now be treated as bad law: in particular, *A.-G. v. Vallé-Jones*, [1935] All E. R. Rep. 175; [1935] 2 K. B. 209: *Mankin v. Scala Theodrome Co., Ltd.*, [1946] 2 All E. R. 614; [1947] K. B. 257. But apprentices are certainly to be treated as servants for the purposes of the action. See *Hambrook's Case*, [1956] 3 All E. R. 338, 342; [1956] 2 Q. B. at p. 664. In *Railways Commissioner (N.S.W.) v. Scott* (1959), 102 C. L. R. 392, the High Court of Australia reverted to the older view, attaching the technical meaning to the word servant: but DIXON, C.J., MCTIERNAN and FULLAGAR, JJ. dissented. DIXON, C.J., however, demonstrated clearly that the view taken in *Hambrook* is modern, and not based upon the earlier history of the writ.

(*f*) Within the restricted category of "servants" falling within the scope of the action the amount of the master's claim is normally quantified by reference to the servant's wages during the period of incapacity. Where the servant is an employee—"servant" in the ordinary technical sense—he cannot, any more than could the menial servant, claim in respect of loss of wages if in fact these have been paid to him by his employer during his incapacity. But neither can the employer, since *ex hypothesi* he has no cause of action (the servant not being "menial"). The employer thus stands to lose: the present position is that if the wages in this case are paid under a legal obligation, statutory or contractual, the loss simply falls on the employer, for the employee cannot recover from the defendant in respect of a sum in fact made up to him. But it has been held that where the master's payment is an *ex gratia* one, since the servant is morally bound to repay it, he, the servant, may recover it from the defendant on behalf of his master as part of his damages: *Dennis v. London Passenger Transport Board*, [1948] 1 All E. R. 779. Similar reasoning would presumably apply in the case of an *ex gratia* pension paid by the master: see *Payne v. Railway Executive*, [1951] 2 All E. R. 910; [1952] 1 K. B. 26, as explained in the Eleventh Report of the Law Reform Committee (1963) Cmnd. 2017, pp. 5–6. Further it was suggested in *Hambrook's Case*, ([1956] 2 Q. B. pp. 656–657; *per* GODDARD, L.C.J.) that if the employer were to *lend* money to the employee during incapacity this would also be recoverable by the employee against the defendant on the basis of his obligation to repay. A direct attack by the employer against the defendant in respect of money paid under a legal obligation to the employee upon the basis of a quasi-contractual claim for unjust enrichment was repulsed in *Metropolitan Police District Receiver v. Croydon Corporation*, [1957] 1 All E. R. 78; [1957] 2 Q. B. 154, upon the ground that the defendant could not be unjustly enriched in such a case since the employee had no claim against him for the money. (A circular argument?).

(*g*) *Metropolitan Police District Receiver v. Croydon Corporation*, [1957] 1 All E. R. 78, and *Perpetual Trustee Case*, [1955] 1 All E. R. 846; [1955] A. C. 457.

(*h*) *Hambrook's Case*. But it is hinted in the decision that Crown servants *may* sometimes come within the category of "servants" for this purpose—depending upon the terms of their appointment.

A similar action also lies at the suit of a parent who loses the "services" (*i*) of a child through the wrongful act of another; and also at the suit of a husband in respect of his wife. In the latter instance, however, the husband's claim rests technically not only upon loss of "*servitium*" (including, of course, probable pecuniary loss), but also upon loss or impairment (*k*) of his marital right of "*consortium*"; that is to say, the right to conjugal relations with, and to the companionship of, his wife (*l*). Exactly what this means is a matter of doubt; it has been described as "a name for what the husband enjoys by virtue of a bundle of rights some hardly capable of precise definition" (*m*). In modern times it has in the main been measured, as far as damages go, in terms of special damage arising from material loss, as for medical expenses incurred (*n*) and loss of earnings arising from the need to be with the wife during incapacity resulting from her injuries (*o*). But the vague element of *consortium* remains and general (though small) damages have been awarded under that head (*p*).

The action in respect of loss of services is, however, in all its aspects one which is now felt to be out of keeping with the times; and the courts are not willing to extend its scope. Hence, in *Best* v. *Samuel Fox & Co. Ltd.* (*q*) the House of Lords refused to grant a right of action to a *wife* who lost the "*consortium*" of her *husband* through the defendants' negligence. There is thus in this respect one law for husbands and another for wives.

(*i*) For the meaning of "services" in this special context, see section on Seduction (below) and *Jones* v. *Brown* (1794), 1 Esp. 216: *Hall* v. *Hollander* (1825), 4 B. & C. 660.

(*k*) As for example where the wife is temporarily incapacitated after a motor accident. There is some doubt about the claim in respect of impairment as opposed to total loss. The better view seems to be that such a claim will lie. See *Best* v. *Samuel Fox & Co., Ltd.*, [1952] 2 All E. R. 394, 401; [1952] A. C. 716, 736; *per* Lord REID: *Toohey* v. *Hollier*, [1955] A. L. R. 302; 92 C. L. R. 618; *Lawrence* v. *Biddle*, [1966] 1 All E. R. 575; [1966] 2 Q. B. 504; *Cutts* v. *Chumley*, [1967] 2 All E. R. 89. Contrary views were, however, expressed (*obiter*) in *Best's Case* and see *Spaight and Spaight* v. *Dundon*, [1961] I. R. 201.

(*l*) The husband's right is independent of the wife's; hence, for example, her contributory negligence will not affect the *quantum* of his claim: *Mallett* v. *Dunn*, [1949] 1 All E. R. 973; [1949] 2 K. B. 180.

(*m*) *Best* v. *Samuel Fox & Co., Ltd.*, [1952] 2 All E. R. 394, 401; [1952] A. C. 716, 736: *per* Lord REID.

(*n*) *Kirkham* v. *Boughey*, [1957] 3 All E. R. 153; [1958] 2 Q. B. 338.

(*o*) *McNeill* v. *Johnstone*, [1958] 3 All E. R. 16.

(*p*) *Hare* v. *British Transport Commission*, [1956] 1 All E. R. 578: *Pritchard* v. *Pritchard and Sims*, [1966] 3 All E. R. 601; [1967] P. 195.

(*q*) [1952] 2 All E. R. 394; [1952] A. C. 716.

ILLUSTRATION 113

Where a servant is injured by the tort of another and his master thereby loses the benefit of his services, the master will have a right of action against the person who commits the tort.

Hodsoll *v.* Stallebrass (1840), 11 Ad & El. 301.

Plaintiff's apprentice was bitten by defendant's dog and was rendered unfit for work. *Held:* Plaintiff could recover "*per quod servitium amisit*" from defendant.

2. ENTICING AND HARBOURING

An action also lies at the suit of an employer against anyone who knowingly entices a servant from his employment, or who harbours him knowing that he is in the employer's service (*r*).

As in the case of the action for loss of services, it is essential for the employer to establish that he has suffered damage by the defendant's act (*s*); but this tort differs from the action for loss of services in two respects. First, it is not solely confined to the sphere of domestic relations; and the word "servant" here includes anyone who works for another under a *contract of service* (*t*). Secondly, liability is based upon *knowledge* on the part of the defendant of the existence of the employer-employee relationship: and it is this knowledge that is the gist of the action (*u*), though in the case of harbouring it may be acquired after the harbouring has commenced; as where B takes a man into his service, and later learns that he is in fact still under a contract of service with A (*a*).

Similar causes of action lie at the suit of a parent whose child is enticed away or harboured (*b*), and at the suit of a husband in respect of the enticement of his wife (*c*).

What amounts to "enticement" depends upon the circumstances:

(*r*) *Blake* v. *Lanyon* (1795), 6 Term Rep. 221; *Fred Wilkins & Bros., Ltd.* v. *Weaver*, [1915] 2 Ch. 322.

(*s*) *Jones Bros. (Hunstanton), Ltd.* v. *Stevens*, [1954] 3 All E. R. 677.

(*t*) See *A.-G. for New South Wales* v. *Perpetual Trustee Co., Ltd.*, [1955] 1 All E. R. 846, 854; [1955] A. C. 457, 485–6; citing CROMPTON, J., in *Lumley* v. *Gye* (1853), 2 E. & B. 216, 228. Indeed the rule in *Lumley* v. *Gye* is itself an extension of the enticement action.

(*u*) See *Best* v. *Samuel Fox & Co., Ltd.*, [1952] 2 All E. R. 394, 397; [1952] A. C. 716, 729; *per* Lord GODDARD, C.J.

(*a*) See, *e.g. Jones Bros. (Hunstanton), Ltd.* v. *Stevens*, [1954] 3 All E. R. 677.

(*b*) *Lough* v. *Ward*, [1945] 2 All E. R. 338. This cause of action, like Seduction, rests upon the fiction of "service" by the child.

(*c*) *Winsmore* v. *Greenbank* (1745), Willes 577. In *Gottlieb* v. *Gleiser*, [1957] 3 All E. R. 715, n.; [1958] 1 Q. B. 267, DENNING, L.J., suggests that the action is confined to cases where the defendant is the wife's paramour: but this proposition was *obiter* and in conflict with authority, in particular, *Philp* v. *Squire* (1791), Peake, 82. See *Winchester* v. *Fleming*, [1958] 3 All E. R. 51.

but in *Place* v. *Searle* (*d*), where a husband claimed that the defendant had enticed his wife, it was held that it is not necessary, in order to establish "enticement", to prove that the wife's will has been overborne by the stronger will of the defendant; it is enough that the whole evidence establishes that he has in some way procured her departure or persuaded her to leave (*e*).

This kind of action, unlike the last, also appears to be available to a wife whose *husband* is enticed (*f*) away by another (*g*).

3. SEDUCTION

In its historical origin this tort, like the last two, rests upon the notion that a master has a proprietary interest in the services of his servant (*h*); and even under the modern law an action based upon it is still available to the employer whose servant is seduced (*i*). But such actions are now more usually brought by parents in respect of the seduction of their daughters—the parents' claim being notionally based upon what is in most cases no more than a legal

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In modern times there would apper to be no action in respect of the harbouring of a wife: *Sanderson* v. *Hudson* (1923), Times, January 29th, approved in *Place* v. *Searle*, [1932] All E. R. Rep. 84; [1932] 2 K. B. 497. It is to be noted that harbouring is not mentioned in the Law Reform (Miscellaneous Provisions) Act, 1934, s. 1 (1). The Law Reform Committee, however, appear to think that the action still exists: Eleventh Report, (1963) Cmnd. 2017, p. 10. Enticement and harbouring of a wife may, however, be justified where the defendant is actuated not by malice but by principles of humanity: see *Place* v. *Searle*, [1932] 2 K. B. 497, 517, and *Philp* v. *Squire* (1791), Peake 82; *Berthon* v. *Cartwright* (1796), 2 Esp. 480.

(*d*) [1932] 2 K. B. 497: see in particular p. 517, *per* GREER, L. J.

(*e*) It must be remembered that, apart from the husband's action for loss of *consortium*, enticement and (possibly) harbouring the Matrimonial Causes Act, 1965, s. 41 (45 Halsbury's Statutes (2nd Edn.) 501) preserves the right to claim damages for adultery in a divorce suit. The claim is in respect of the adultery as such and the damages are based upon pecuniary loss—*e.g.* the need to employ a housekeeper) and loss of *consortium*. It is now stressed that, pecuniary loss apart, awards should be moderate. See *Butterworth* v. *Butterworth and Englefield* [1920] P. 126: *Pritchard* v. *Pritchard and Sims*, [1966] 3 All E. R. 601; [1967] 1 P. 195.

(*f*) *Gray* v. *Gee* (1923), 39 T. L. R. 429, approved in *Place* v. *Searle* (n. (*d*), above): *Newton* v. *Hardy*, [1933] All E. R. Rep. 40; 149 L. T. 165. But the wife has no action in respect of harbouring; *Winchester* v. *Fleming*, [1957] 3 All E. R. 711; [1958] 1 Q. B. 259; reversed, [1958] 3 All E. R. 51 n., on other grounds. And in *Gottlieb* v. *Gleiser*, [1957] 3 All E. R. 715, n.; [1958] 1 Q. B. 267; DENNING, L. J., suggests that it will only lie against the wife's lover (see, however, note (*c*). above).

(*g*) An action in respect of the enticement of a husband or a wife does not survive against or for the benefit of the estate of a deceased person: Law Reform (Miscellaneous Provisions) Act, 1934, s. 1 (1) (9. Halsbury's Statutes (2nd Edn.) 792).

(*h*) See *Peters* v. *Jones*, [1914] 2 K. B. 781, 784; *per* AVORY, J.

(*i*) *McKenzie* v. *Hardinge* (1906), 23 T. L. R. 15.

fiction that the parent has, by the seduction, lost the *services* of the daughter to which he is entitled.

The essentials of liability are that:—(i) The plaintiff must be either the master or the parent of the girl seduced (*k*). (ii) She must, both at the time of the seduction and (*l*) at the time of her pregnancy, confinement, or other illness following upon the seduction be in the "service" of the plaintiff. (iii) The plaintiff must, as a result of the seduction (*m*), have been deprived of this service.

(i) *Master or Parent.* Where it is a master who brings the action "master" appears to mean "employer" in the wide sense, and the action does not appear to be limited to the seduction of menial servants (*n*). Where the action is brought by a parent, the "parent" will in most cases be the girl's father (who is in theory *primâ facie* the person entitled to her services at home). But if at the time of the seduction and of the confinement the girl, not being in the service of an extraneous employer, is in fact (the father for example being dead) in the care of some other person, that person will be treated as the "parent". And therefore, as well as the mother, "parent" *may* include someone such as an adopter, a brother, or an aunt with whom the girl makes her home and who stands "*in loco parentis*" to her (*o*).

(ii) *The "Service".* Where the plaintiff is an employer this word bears its ordinary meaning. But where the plaintiff is a "parent" it is used in a special, and to a large extent fictional, sense. For there is no need to establish that the girl is actually *employed* by the parent. It suffices to prove either that she in fact performed services for the parent, however slight—it is enough even that she makes tea or milks the cows (*p*)—or that, being under twenty-one years of age, she was capable (*q*) of performing such services; even though it be not established that she actually did so. The former

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(*k*) If the *seducer* is not the father of the child born he cannot be liable: *Eager* v. *Grimwood* (1847), 1 Exch. 61.

(*l*) See *Hedges* v. *Tagg* (1872), L. R. 7 Exch. 283; *Hamilton* v. *Long*, [1905] 2 I. R. 552; *Peters* v. *Jones*, *supra*.

(*m*) In this sense, "seduction" does not necessarily imply consent on the part of the girl; in a case of rape, the master or parent may thus be entitled to sue: *Mattouk* v. *Massad*, [1943] 2 All E. R. 517; [1943] A. C. 588.

(*n*) *Fores* v. *Wilson* (1791), Peake, 77.

(*o*) See note to *Fores* v. *Wilson* (1791), Peake, 77; *Murray* v. *Fitzgerald*, [1906] 2 I. R. 254; *Peters* v. *Jones*, [1914] 2 K. B. 781; *Beetham* v. *James*, [1937] 1 All E. R. 580; [1937] 1 K. B. 527.

(*p*) *Bennett* v. *Allcott* (1787), 2 Term Rep. 166.

(*q*) To ground an action upon loss of service it is always essential that a child should be *capable* of performing the services: *Hall* v. *Hollander* (1825), 4 B. & C. 660.

is sometimes called "*de facto*", and the latter "constructive" service.

(iii) *Loss of Service.* Whether this be a reality or, in the case of a parent, little more than a legal fiction, it must always be established. Thus for example if at the time of the seduction the girl is away from home, acting as housekeeper for some other person, no action will lie at the suit of her parent (*r*); though his rights will not be lost if, while remaining a member of his household, she merely goes away on a temporary visit (*s*).

Inasmuch as the action is based upon loss of service, the plaintiff is entitled to be compensated (*t*) for such damage as he actually sustains by reason of this loss; and reasonable expenses which he has incurred as a result of the confinement, pregnancy, or other illness may also be recovered. But where the plaintiff is a *parent*

> "although in point of form the action only purports to give a recompense for loss of service, we cannot shut our eyes to the fact that it is an action brought by a parent for an injury to a child, and the jury may take into consideration all that he can feel from the nature of the loss" (*u*).

Hence, in this case the damages may also include compensation for such items as the loss of the daughter's society, the dishonour to the parent, or the anxiety and distress to which he has been put.

Further, since the cause of action lies in the *parent*, and not in the daughter, his rights may be lost by his own misconduct. For instance in *Reddie* v. *Scoolt* (*a*) the father's claim failed where he had allowed the seducer, *whom he knew to be married*, to pay his addresses to his daughter. And conversely where the seducer acts in a particularly disgraceful manner—as where he effects the seduction under the pretence of desiring matrimony (*b*)—the damages against him may be aggravated; though the seducer for his part (*c*) may prove in mitigation that the girl was of a loose disposition (*d*).

(*r*) *Dean* v. *Peel* (1804), 5 East, 45. Though although no man serve two masters, it seems that a woman can; for it has sometimes been held that the fact that a girl works for some part of her time in the service of some other person does not necessarily mean that she ceases to be a member of her father's household for the purposes of this action: *Rist* v. *Faux* (1863), 4 B. & S. 409; *Ogden* v. *Lancashire* (1866), 15 W. R. 158.

(*s*) *Griffiths* v. *Tertgen* (1854), 15 C. B. 344.

(*t*) *Mackenzie* v. *Hardinge* (1906), 23 T. L. R. 15.

(*u*) *Bedford* v. *McKowl* (1800), 3 Esp. 119, 120; *per* Lord ELDON.

(*a*) (1794), Peake 240.

(*b*) See *Tullidge* v. *Wade* (1769), 3 Wils. 18, 19; *per* WILMOT, L.C.J.

(*c*) *Verry* v. *Watkins* (1836), 7 C. & P. 308.

(*d*) Actions for seduction do not survive death: Law Reform (Miscellaneous Provisions) Act, 1934, s. 1 (1) (9 Halsbury's Statutes (2nd Edn.) 792).

ILLUSTRATION 114

An action for seduction is based upon loss of service by the plaintiff.

Hedges *v.* Tagg (1872), L. R. 7 Exch. 283.

The girl seduced was employed away from home, as a governess. The seduction occurred while she was at home on a three days' holiday to attend the Oxford races. At the time of her confinement she was in other service. *Held:* An action by the mother failed. Although it might have been different if the girl had been on a holiday recognized as such in her contract of service, instead of casual leave, she was in the service of other people both at the time of seduction and at the time of confinement. "In order to entitle a plaintiff to maintain the action there must be in some shape or other the relation of master and servant existing between the plaintiff and the persons seduced" (*e*).

Contrast *Terry* v. *Hutchinson* (1868), L. R. 3 Q. B. 599; where the girl seduced was *nineteen* years of age, and the seduction took place in a train while she was returning home after *having left* employment. "The girl is under twenty-one, and is therefore *primâ facie* under the dominion of her natural guardian; and as soon as a girl under age ceases to be under the control of a real master, and intends to return to her father's house, he has a right to her services" (*f*).

SUGGESTED REFORM

The Eleventh Report of the Law Reform Committee (*g*) advises radical reform in this branch of the law. The Committee consider that the *master's action for loss of services* "is out of accord with modern ideas and its results are capricious" (*h*). They recommend that the law in respect of the employer's rights in relation to loss of services be reformed so as to accord with the principle

> "that a person who has incurred expense in order to mitigate the loss or injury suffered by another should, to the extent to which he is out of pocket, have the same right to reimbursement as the injured person himself would have had, had he not received the assistance in question" (*i*).

They would therefore abolish the ancient action for loss of services (with all its illogical limitations) (*k*) and would substitute for it a claim by the employer (*l*) direct against the wrongdoer for any

(*e*) (1872), L. R. 7 Exch. at p. 285; *per* KELLY, C.B.
(*f*) (1868), L. R. 3 Q. B. at pp. 602–3; *per* BLACKBURN, J.
(*g*) (1963), Cmnd. 2017.
(*h*) Report, para. 5.
(*i*) Report, para. 6.
(*k*) In particular its restriction to menial servants.
(*l*) They realize that, whether the claim would rest with the employer or with the servant, great practical difficulties would arise (Report, paras. 12–16, reinforced by Minority Report, para. 5).

payments made to the employee during his incapacity; where these payments are made under some legal obligation (statutory or contractual) recovery should be in full, but where they are discretionary recovery should be limited to the amount paid up to time of judgment. The claim should apply to payments made by way of pension (*m*) as to other payments. But where the employee's claim is reduced by reason of contributory negligence this would also reduce the amount of the employer's claim (*n*). Finally,

> "the benefits of the changes in the law . . . recommended . . . should not . . . be confined to cases in which the relationship of employer and employee exists as a matter of strict law, but should apply to any body or authority, including the Crown, responsible for the remuneration of the injured person (*o*)."

The Committee also consider that the action for loss of *consortium* (*p*) is "now an anachronism and that it ought to be abolished (*q*)": they would replace it by a claim by either spouse in respect of expenses reasonably incurred as the result of the injury to the other—such as medical and nursing expenses, visits to hospital and the cost of extra domestic help. They also recommend that a father or mother should be permitted to recover similar expenses in the case of injuries to a child, irrespective of the rendering of services" (*r*). Moreover, whether the claim be in respect of an injured spouse or of an injured child reasonable loss of earnings incurred as the result of the injury should be recoverable.

They recommend (*s*) the abolition of the action for *seduction* and its replacement by an action at the suit of the parent (*t*) for loss, similar to that already mentioned.

(*m*) But only if, under the existing law, they would be taken into account assessing the employee's damages against the wrongdoer (Report, para. 9).
(*n*) Report, para. 10. This seems to be one of the main weaknesses of the commendation. See Minority Report, paras. 4 and 5. The majority also cognize that the employer's claim would be reduced in other ways: the tax bility of the employee would be deducted (*British Transport Commission* v. *urley*, [1955] 3 All E. R. 796; [1956] A. C. 185), and, in accordance with the inciple of the Law Reform (Personal Injuries) Act, 1948, s. 2, where the ployer had paid remuneration to the employee without taking national surance benefits into account, since the employee's damages would be duced to the extent of one half of those benefits the employer's claim would similarly reduced.
(*o*) Report, para. 12.
(*p*) And loss of services of a child.
(*q*) Report, para. 19.
(*r*) Report, para. 20.
(*s*) Report, para. 21.
(*t*) Whether they would prohibit the award of aggravated damages in this ion is not clear: there seems no good reason why they should be abolished. reover, no mention is made of possible claims by an employer, which though

They would abolish the actions for *enticement and harbouring* (*u*); replacing enticement of a spouse by the remedies available in divorce proceedings and enticement of a child by existing remedies available in wardship proceedings. The actions for harbouring they would abolish altogether.

A minority (*a*) of the Committee, however, disagreed with the majority on the matter of the proposed employer's right of recovery against the wrongdoer. They agreed that the old action for loss of services should be abolished, but thought that the employer's rights are really adequately protected under the existing law, since if he contracts with the employee to reimburse him in respect of money paid by him to the employee if the employee shall recover that sum from the wrongdoer, he is free to do so; and the employee is entitled to recover that amount in damages.

It is thought that the Minority Report is to be preferred; for, in particular, they argue that the effect of implementing the Majority Report would be to make employers chary of advancing money to employees during incapacity since the result would be to draw them into complex (*b*) and uncertain litigation. It is notable that most, if not all, attempts to circumvent the existing law have been made, not by the captains of industry rapacious for their loss of profit, but by public authorities anxious for the interests of the taxpayer. Dislike of the present state of affairs in respect of the employer's claim is probably more based upon dislike of the "archaism" introduced—perhaps unnecessarily—by the modern limitation of the action *per quod servitium* to menial servants in *Hambrook's Case* than upon expedience. One simple answer adopted in Australia (*c*) is to abandon this limitation. This is not, of course, to argue in favour of the archaism surrounding the other actions, such as seduction.

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necessarily rare in modern conditions might sometimes still be reasonable where expense is in fact incurred.

(*u*) Report, para. 23.

(*a*) DIPLOCK, L.J., ASHWORTH, J., R. J. F. Burrows, Esq.: The Minority Report seems more convincing that the Majority and is more in accord with the evidence submitted by the British Employers' Confederation and the Law Society.

(*b*) Minority Report, para. 5.

(*c*) See *Railways Commissioner* (*N.S.W.*) v. *Scott* (1959), 102 C. L. R. 392. This could still be done by the House of Lords; and it is a pity that there is no machinery for obtaining a ruling other than by the chance of litigation.

CHAPTER 16

INTERFERENCE WITH CONTRACTUAL RELATIONS

The common law does not espouse the principle that the infliction of economic loss in the course of business or industrial affairs is *necessarily* a tort; even though it be inflicted out of malice, *i.e.* spite or ill-will.

Thus for example it is not a tort in *itself* to induce a person to refrain from entering into commercial relations with another; nor is it *in itself* a tort to induce a person who has a contract with another to bring it to a lawful end. Accordingly the law will not as a *general rule* prevent B from inducing X to leave the service of A, after giving A *sufficient notice*—and this is so whatever B's motives may be, and however much A may suffer by losing the services of X. This rule may be illustrated by the leading case of *Allen* v. *Flood* (*a*) where

> Plaintiff was a shipwright who was engaged by shipowners upon repairing a ship. His contract was such that they could dispense with his services at will. Defendant was a trade union delegate. Due to past grievances, members of this union, who were ironworkers also employed upon the repairs, told defendant that they would cease work unless plaintiff was discharged. Defendant passed this information on to the shipowners who, in view of the threatened strike, discharged plaintiff. The House of Lords held that whatever the motives of defendant's act, plaintiff had no cause of action against him.

As a general rule, therefore, those who suffer loss as the result of commercial or industrial strife have no cause of redress.

Nevertheless there are limits to the *kinds* of rivalry that the law of torts will countenance, and there are certain torts which (though not all exclusively designed for the purpose) (*b*) are principally used to prevent the infliction of economic loss in certain specific ways; and these include the tort which is about to be discussed (interference with contractual relations), intimidation, conspiracy, malicious falsehood, passing-off and fraud which will be examined in the following Chapters.

(*a*) [1898] A. C. 1.

(*b*) In the case of fraud see for example *Langridge* v. *Levy* (1837), 2 M. & W. 519; affirmed *sub nom. Levy* v. *Langridge* (1838), 4 M. & W. 337, where the loss was physical as opposed to economic.

It was explained in the last Chapter that the common law always accorded a master certain rights of action against those who infringed his interest in the services of his servants, but until *Lumley* v. *Gye* (*c*) it had not been found expedient to afford similar protection to rights which were founded upon *contract*, rather than upon the "status" relationship of master and servant.

Lumley v. *Gye*, however, marked a turning point by which contractual rights came to be protected. The facts of the case were that Johanna Wagner, an operatic singer, having contracted to perform for the plaintiff, was persuaded by the defendant to break her contract; and this was held to constitute a cause of action.

Thus, though it was based upon ancient foundations, a new tort came into being; and the essential elements of this tort have recently been summarized by MORRIS, L.J., in the following words:—

> "The tort is committed if a person without justification knowingly and intentionally interferes with a contract between two other persons" (*d*).

It need only be added that proof of damage to the plaintiff is essential to success in the action (*e*).

Though it is not necessary to establish "malice" (*e*) in the sense of spite or ill-will, knowledge of the existence of the contract and an intention to interfere with the plaintiff's rights under it are essential to liability; but this does not necessarily mean that the defendant must be aware of the contract's exact terms

> "For it is unlawful for a third person to procure a breach of contract knowingly, or recklessly, indifferent whether it is a breach or not (*f*)."

On the other hand, even where knowledge and intention are present, interference with contractual relations may sometimes be justified by the circumstances. What will amount to "justification" cannot be exactly defined (*g*); but it has been suggested (*h*) that where the alleged interferer owes a special duty to the party in

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(*c*) (1853), 2 E. & B. 216.

(*d*) *D. C. Thomson & Co., Ltd.* v. *Deakin*, [1952] 2 All E. R. 361, 384; [1952] Ch. 646, 702. To similar effect *Quinn* v. *Leathem*, [1901] A. C. 495, 510; *per* Lord MACNAGHTEN.

(*e*) As at one time seemed to be the case. See *Lumley* v. *Gye* itself; but *contra Quinn* v. *Leathem*, [1901] A. C. at p. 510.

(*f*) *Emerald Construction Co., Ltd.* v. *Lowthcan*, [1966] 1 All E. R. 1013, 1017; *per* Lord DENNING, M.R. and see *Daily Mirror Newspapers* v. *Gardner*, [1968] 2 All E. R. 163, 168.

(*g*) See *Glamorgan Coal Co., Ltd.* v. *South Wales Miners' Federation*, [1903] 2 K. B. 545, 573; *per* ROMER, L.J., and s.c., [1905] A. C. 239.

(*h*) S.c., [1903] 2 K. B. at p. 569; *per* VAUGHAN WILLIAMS, L.J.

breach (as where he is his solicitor or a close relation) he may in proper cases be justified in persuading him to effect the breach. And in *Brimelow* v. *Casson* (*i*) RUSSELL, J., held that members of an actors' protection society were justified in inducing a theatre proprietor to break his contract to permit the plaintiff's company to perform at his theatre where it appeared that he was paying his chorus girls such a low wage that they were forced to supplement their earnings by resort to immorality; "if justification does not exist here", said the learned judge, "I can hardly conceive the case in which it would be present".

The element of "interference" is the most difficult element in this tort; because it may embrace "infinite varieties of facts" (*k*). But it is clear that it may take any one of the following forms:—

(i) *Direct inducement of C by B to break or terminate his (C's contract with A.*—This was the original form which the tort took in *Lumley* v. *Gye* (*l*) itself. The main difficulty in this kind of case is to determine what will amount to an "inducement"; mere advice is not enough, there must be something at least amounting to persuasion (*m*), and of course this may often take the form of tempting the contract-breaker by an offer of higher remuneration than he is receiving under his contract. But of course Z will be liable if he has reason to know that the effect of the demand will be to cause interference with the contract (*o*).

(ii) *Rendering performance of the contract physically impossible.*—This might happen for instance where the intervener physically detains the contracting party, making him unable to perform the contract by reason of the detention (*p*); or where he removes from one party to the contract tools which are essential to the performance of it (*q*). Thus in *J. T. Stratford & Son, Ltd.* v. *Lindley* (*r*) it was held that where a trade union instructed its members to refuse to handle barges of the appellants' which were hired out to customers

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(*i*) [1924] 1 Ch. 302.

(*k*) *Thomson's Case*, [1952] Ch. 646, 702; *per* MORRIS, L.J.

(*l*) See also *Bowen* v. *Hall* (1881), 6 Q. B. D. 333; *Temperton* v. *Russell*, [1893] 1 Q. B. 715; *Quinn* v. *Leathem*, [1901] A. C. 495; *National Phonograph Co., Ltd.* v. *Edison Bell, etc., Co., Ltd.*, [1908] 1 Ch. 335; *Jasperson* v. *Dominion Tobacco Co.*, [1923] A. C. 709.

(*m*) *D. C. Thomson & Co., Ltd.* v. *Deakin*, [1952] 1 Ch. 646, 686; *per* Sir Raymond EVERSHED, M.R. But advice may sometimes be so strong as to amount to persuasion: see *Camden Nominees, Ltd.* v. *Slack*, [1940] 2 All E. R. 1; [1940] Ch. 352.

(*o*) See *Daily Mirror Newspapers, Ltd.* v. *Gardner*, [1968] 2 All E. R. 163, 168; *per* Lord DENNING, M.R.

(*p*) *Ibid.*, at p. 678; Sir Raymond EVERSHED, M.R.

(*q*) *Ibid.*, at p. 702; *per* MORRIS, L.J.

(*r*) [1964] 3 All E. R. 102; [1965] A. C. 269.

with the result that the barges, remaining with the customers could not be returned to the appellants for further hiring this was an inducement to breach of contract within the rule of *Lumley* v. *Gye*.

(iii) *With knowledge of the contract, doing anything which is inconsistent with its due performance* (*s*).—This may occur for example where the interferer contracts with the party in breach to do something which is inconsistent with the contract which he has made with the plaintiff; here, it will be noted, there need be no element of inducement or persuasion, and indeed the contract-breaker may be a willing party to the breach (*a*). But it is to be noted that it is inconsistency with the performance of the contract, and not necessarily the breach of it, that is involved; thus in *Torquay Hotel Co., Ltd.* v. *Cousins* (*b*) the defendant union officials in the course of an inter-union dispute, threatened to forbid their tanker drivers, in breach of their contracts with their employers (the Esso Petroleum Company), to deliver oil to the plaintiff company's hotel. This, had the threat been carried out, would have produced a situation in which in self-protection the Esso Company would have been forced to invoke an exception in their contract with the plaintiff company which excused them from delivery or delay in delivery in case of "threat or apprehension of labour stoppages". STAMP, J., held that the threat was a sufficient "Interference directed to bringing about a violation of legal right (*c*)" to justify him in granting an interim injunction restraining the defendants from carrying out their threat. For had the drivers refused to deliver to the plaintiffs Esso would have been forced to a course of action which, though not a breach of their contract with the plaintiff company, would nevertheless have been inconsistent with its *due performance* (*d*).

(iv) *By inducing some third party to do some unlawful act which will*

(*s*) *Ibid.*, at p. 694; *per* JENKINS, L.J.

(*a*) *British Industrial Plastics, Ltd.* v. *Ferguson*, [1940] 1 All E. R. 479; *British Motor Trade Association* v. *Salvadori*, [1949] 1 All E. R. 208; [1949] Ch. 556.

(*b*) [1968] 3 All E. R. 43; contrast *Sefton (Earl)* v. *Tophams, Ltd., and Capital and Counties Property Co., Ltd.*, [1965] 3 All E. R. 1; [1965] Ch. 1140; reversed *sub nom. Tophams, Ltd.* v. *Earl of Sefton*, [1966] 1 All E. R. 1039; [1967] 1 A. C. 50.

(*c*) *Jasperson* v. *Dominion Tobacco Co.*, [1923] A. C. 709, 712. And see *Quinn* v. *Leathem*, [1900–1903] All E. R. Rep. 1, 9; [1901] A. C. 459, 510; *per* Lord MACNAGHTEN: *National Phonographic Co., Ltd.* v. *Edison-Bell Consolidated Phonographic Co., Ltd.*, [1904–1907] All E. R. Rep. 116, 124; [1908] 1 Ch. 335, 368–369: *per* KENNEDY, L.J.

(*d*) See *Emerald Construction Co., Ltd.* v. *Lowthian*, [1966] 1 All E. R. 1013, 1017. "Some would . . . hold that it is unlawful for a third party deliberately and directly to interfere with the *execution* of a contract (Lord DENNING, M.R.—italics ours).

necessarily cause interference with the contract.—And this is so whether the pressure brought to bear upon the party to the contract is direct or not. Thus in *D. C. Thomson & Co., Ltd.* v. *Deakin* (*e*) influence was exerted directly upon the employees of one of the parties to the contract, but in *Daily Mirror Newspapers, Ltd.* v. *Gardner* (*f*) the pressure, though less direct, was nevertheless held to be unlawful. The facts of that case were that the plaintiffs were newspaper proprietors and the defendants officials of a retailers' trade union. The defendants, in the interests, as they thought, of their members, requested the latter to stop taking supplies of the plaintiffs' newspaper from their wholesalers for the period of a week. This request was in fact a contravention of the Restrictive Trade Practices Act, 1956. Had the retailers acted as requested the effect would have been that the wholesalers would have had to have broken a continuing contract with the plaintiffs for supplies of the paper. The Court of Appeal granted an injunction to restrain the defendants' proceedings; though clearly there was no suggestion of *direct* pressure by them upon the wholesalers.

This general description of the element of "interference" probably represents a conservative statement of the law as it seems to be at the present time. Moreover, it may be that this tort may develop in the direction of proscribing any acts which, whether they induce a breach or not, are aimed, through bringing pressure to bear upon others, at attacking the plaintiff's business interests (*g*): this, however, does not seem to represent the present law (*h*), though it is becoming clear that threats of this kind will at least support the grant of an interim injunction to maintain the *status quo* pending the trial of an action (*i*).

(*e*) [1952] 2 All E. R. 361; [1952] Ch. 646 (Illustration 116).

(*f*) [1968] 3 All E. R. 163. And see *Torquay Hotel Co., Ltd.* v. *Cousins*, [1968] 3 All E. R. 43.

(*g*) See *J. T. Stratford & Son, Ltd.* v. *Lindley*, [1964] 3 All E. R. 102, 110; [1965] A. C. 269, 330; *per* Viscount RADCLIFFE and *Gardner's Case* (above, n. (*f*)) at p. 168: where Lord DENNING, M.R. makes an approving—though obscure—reference to Viscount RADCLIFFE's dictum. The *dictum* goes perilously near to Sir Frederick POLLOCK's postulate that "all damage wilfully done to one's neighbour is actionable unless it can be justified or excised" (*Law of Torts*, 8th Edn., 325–326). A statement which had seemed to have been repudiated as long ago as *Sorrell* v. *Smith*, [1925] All E. R. Rep. 1, 9; [1925] A. C. 700, 719 by Lord DUNEDIN and by the House of Lords in *Rookes* v. *Barnard*, [1964] 1 All E. R. 367; [1964] A. C. 1129: but see Lord DEVLIN at pp. 405 and 1217. One supposes that the question remains open.

(*h*) See *Stratford's Case* (last note) at pp. 117 and 340; *per* Lord DONOVAN and *F. Bowles & Sons, Ltd.* v. *Lindley*, [1965] 1 Lloyd's Rep. 207, 212; *per* FENTON ATKINSON, J.

(*i*) See *Stratford's Case* (above, n. (*f*)), at pp. 116 and 339; *per* Lord UPJOHN: *Torquay Hotel Co., Ltd.* v. *Cousins*, [1968] 3 All E. R. 43, 60.

It is important to note that whatever form this tort may take (whether or no it be in any one of the above guises) it is also essential to liability that the broken contract in respect of which the plaintiff claims must itself be a valid contract. Thus in *De Francesco* v. *Barnum* (*k*) the plaintiff was held to have no cause of action against an impresario who induced an infant actor to break her contract of apprenticeship with the plaintiff since the contract was itself invalid, being unreasonable and oppressive.

Finally, there is a statutory exception to the rule that it is an actionable wrong to interfere with contractual rights: for it is provided by the Trade Disputes Act, 1906, s. 3, that:—

> "An act done by a person in *contemplation or furtherance of a trade dispute* shall not be actionable on the ground *only* that it induces some other person to break a contract of *employment* (*l*).

and this provision is now reinforced by the Trades Disputes Act, 1965, s. 1 (*m*), which enacts that

> "an act done . . . by a person in contemplation or furtherance of a trade dispute . . . shall not be actionable in tort on the ground *only* that it consists in his *threatening* . . . (b) that he will induce another to break a contract of employment to which that other is a party (*n*)."

It follows that interference with a *contract of employment* is not actionable if it is done in "contemplation or furtherance of a trade dispute" (*o*). It must be appreciated, however, that the contract must be one of "employment": for example it was held in *Emerald Construction Co., Ltd.* v. *Lowthian* (*p*) that a contract between a construction company and subcontractor (though only on the basis of "labour only", *i.e.* supplying labour and not materials) was not within the protection of the Act; which affects contracts between employer and workman.

(*k*) (1890), 45 Ch. D. 430. And see *Camden Exhibition and Display, Ltd.* v. *Lynott*, [1965] 3 All E. R. 28; [1966] 1 Q. B. 555.

(*l*) As to the granting of injunctions against trade unions see above, p. 52.

(*m*) 45 Halsbury's Statutes (2nd Edn.) 1755.

(*n*) (Italics ours.) For comment on this section see below, p. 352. The effect of it is to override *Rookes* v. *Barnard* (Illustration 117) which ruled that intimidation fell outside s. 3 of the 1906 Act.

(*o*) As to the meaning of "trade dispute" see Trade Disputes Act, 1906, s. 5 (3) (25 Halsbury's Statutes (2nd Edn.) 1269), and *Conway* v. *Wade*, [1909] A. C. 506: *Larkin* v. *Long*, [1915] A. C. 814: *Hodges* v. *Webb*, [1920] 2 Ch. 70: *Huntley* v. *Thornton*, [1957] 1 All E. R. 234: *Beetham* v. *Trinidad Cement, Ltd.*, [1960] 1 All E. R. 274; [1960] A. C. 132: *Bird* v. *O'Neal*, [1960] 3 All E. R. 254; [1960] A. C. 907: *J. T. Stratford & Son, Ltd.* v. *Lindley*, [1964] 3 All E. R. 102; [1965] A. C. 269; *Camden Case* (above, n. (*k*)); *Torquay Hotel Co., Ltd.* v. *Cousins*, [1968] 3 All E. R. 43.

(*p*) [1966] 1 All E. R. 1013. And see *Re C. W. and A. L. Hughes, Ltd.*, [1966] 2 All E. R. 702.

ILLUSTRATION 115

It is an actionable wrong intentionally, and with knowledge of the existence of the contract, to cause damage by interfering with contractual relations unless the interference be lawfully justified.

G. W. K., Ltd. *v.* Dunlop Rubber Co. Ltd. (1926), 42 T. L. R. 376.

Plaintiffs, who were manufacturers of motor cars, entered into an agreement with the A. Co. that all their cars were to be fitted with "Bal-lon-ette" tyres manufactured by the A. Co., whenever they were sent to exhibitions. Defendants knew of this agreement. On the first day of one of these exhibitions defendants removed these tyres from two of plaintiffs' cars, and substituted tyres of their own manufacture. *Held:* Defendants were liable, for their action was an unjustified violation of the contractual relations subsisting between plaintiffs and the A. Co.

ILLUSTRATION 116

This tort may be committed where the defendant, knowing of the existence of the contract, induces a third party to do some unlawful act which will have the necessary consequence of causing one of the parties to break it.

D. C. Thomson & Co. Ltd. *v.* Deakin, [1952] Ch. 646.

Appellants were a firm of printers. Respondents were officials of a trade union. It was alleged that, in order to bring pressure to bear upon appellants to stop their policy of employing non-union labour, respondents had induced employees of a firm who supplied appellants with printing materials, in breach of contract with that firm, to refuse (*inter alia*) to deliver these materials to appellants; thus causing the firm to break its contract with appellants to supply the materials. *Held:* Had these facts been established (which in the circumstances they were not) appellants would have had a cause of action against respondents (*r*).

(*r*) The statement of facts is much simplified and the report of the case must be read in full.

CHAPTER 17

INTIMIDATION

It is now firmly settled that intimidation is a tort. This tort consists in inflicting loss upon another person intentionally by means of violence or by the use of threats to do some unlawful act, provided that the threats be such that "no man of ordinary firmness or strength of mind, can reasonably be expected to resist" (*a*) them. The essence of the matter is coercion, forcing someone to do or to refrain from doing something which is damaging. And this coercion may take one of two forms. It may either consist of forcing A by the means described to do something to his own detriment, as for instance by forcing him to shut up shop (*b*) by seriously threatening him if he fails to do so, or it may take the form of threatening to do an unlawful act to another person with the object (successfully achieved) of injuring A by forcing that person to act or refrain from acting in a way detrimental or beneficial to A. This second form is well illustrated by *Tarleton* v. *M'Gawley* (*c*) where the defendant, a trader on the coast of Africa, wishing to prevent the plaintiff from trading with the natives, fired guns at the natives' canoes and prevented them from coming to the plaintiff's ship for trade.

Until very recently this tort was regarded as a tort of doubtful pedigree: it was suggested either that it rested upon ancient decisions best explained upon some other grounds (such as nuisance (*d*)) or that violence was an essential ingredient of it or, at the most, that the threats concerned must be threats to commit a crime or a tort. But in *Rookes* v. *Barnard* (*e*) the House of Lords have now ruled beyond doubt that the tort not only exists but also includes cases in which the threatened "unlawful act" is a breach of contract and not a tort.

(*a*) *Allen* v. *Flood*, [1898] A. C. 1, 16; *per* HAWKINS, J., and see *Ashley* v. *Harrison* (1793), Peake 256.

(*b*) Of course if no unlawful means are used no action lies. Fair competition is recognized as early as the *Gloucester Grammar School Case* (1410), Y. B. Hil. Hen. 4, fo. 47, pl. 21, where it was held no wrong for one schoolmaster to allure pupils from another school by setting up a rival establishment.

(*c*) (1794), Peake 270. And see *Garret* v. *Taylor* (1620), 2 Roll. Rep. 162.

(*d*) *Keeble* v. *Hickeringill* (1706), 11 East, 574 n. can certainly be so explained.

(*e*) [1964] 1 All E. R. 367.

ILLUSTRATION 117

Intimidation may consist in threatening to break a contract.

Rookes *v.* Barnard, [1964] 1 All E. R. 367; [1964] A. C. 1129.

Plaintiff was employed as a draughtsman by B.O.A.C. Defendants were trade union officials (*f*). All members of the union had contracted with B.O.A.C. not to strike in the event of a dispute. Plaintiff resigned from the union and because defendants wished to retain 100 per cent membership they obtained the passing of a resolution by the local branch that B.O.A.C. should be informed that unless plaintiff were dismissed from his employment labour would be withdrawn. In due course B.O.A.C. acceded to this threat and lawfully terminated A's contract. In respect of this loss of employment A sued the defendants. *Held:* The threat to break the contract with B.O.A.C. not to strike constituted intimidation and since plaintiff suffered loss thereby he was entitled to succeed (*g*).

It is to be noted that in *Rookes* v. *Barnard* the members of the union had contracted not to strike; and it may be that this was vital to the decision (*k*). The question therefore arises as to the effect of a threat to strike where no such undertaking has been given. Suppose, for instance, that the men's contract be on a weekly basis and that they threaten to cease work after giving a full week's notice. Is such a threat unlawful intimidation (*l*)? It would appear that it is not (*m*); since no unlawful interruption of the contract is contemplated. There is nothing wrong in threatening to do what one has a right to do (*n*). There is indeed some suggestion that in such a case the threat would still not be unlawful if a full week's notice were omitted and only, say, three days given, for this omission might be regarded as a mere "technical illegality" (*o*).

(*f*) It should be added that three officials were involved and that two of them were parties to the contract with B.O.A.C.; one of them was not. This has some bearing on the matter because, as Lord DEVLIN (at pp. 400 and 1210) points out the third official could not himself have been held responsible for intimidation by threatening to break a contract to which he was not a party, but could only be liable for conspiring with the others in respect of their breaches.

(*g*) The case also bears on interference with contract and conspiracy. See above, p. 348 and below, p. 356.

(*k*) See *Morgan* v. *Fry*, [1968] 3 W. L. R. 506, 511–513; *per* Lord DENNING, M.R.

(*l*) It is to be noted, as Lord DENNING, M.R., suggested in *J. T. Stratford & Son, Ltd.* v. *Lindley*, [1964] 2 All E. R. 209, 216–217, that what the strikers usually want is not a cessation of work but, through the threat to strike, its continuance upon more favourable conditions.

(*m*) *Morgan's Case* (above, n. (*k*)), *per* Lord DENNING, M.R., and DAVIES, L.J. (RUSSELL, L.J., however, had doubts).

(*n*) *Allen* v. *Flood*, [1898] A. C. 1; *White* v. *Riley*, [1921] 1 Ch. I.

(*o*) See *Rookes* v. *Barnard*, [1964] 1 All E. R. 367, 406; [1964] A. C. 1129, 1218: *per* Lord DEVLIN. And *Morgan's Case* (above, n. (*k*), 515, 520).

In *Morgan* v. *Fry* (*p*), it must be added, Lord DENNING, M.R., suggested that *justification* may be a defence to an intimidation action, as for example where a strike is threatened in protection of union interests.

A further question arose in *Rookes* v. *Barnard* as to whether the defendants were protected by the provision of the Trade Disputes Act, 1906, s. 3 (*q*) that

> "An act done in contemplation or furtherance of a trade dispute shall not be actionable upon the ground . . . that it is an interference with the trade, business or employment of some other person, or with the right of some other person to dispose of his capital or labour as he wills."

For reasons which need not now (*r*) detain us the House of Lords decided that this provision gave the defendants no protection under the section, which was not intended to embrace intimidation. Not surprisingly trade union opinion at least disliked this part of the decision and this resulted in another (*s*) provision of the Trade Disputes Act, 1965, s. 1 (*t*):—

> "An act done . . . by a person in contemplation or furtherance of a trade dispute . . . shall not be actionable in tort on the *ground only* that it consists in his *threatening*—(a) that a contract of employment (whether one to which he is a party or not) will be broken . . ."

It is thought that the effect of this section both in respect of inducing breach of contract and in respect of intimidation is solely to reverse the immediate impact of *Rookes* v. *Barnard*. That is to say it provides immunity only in respect of threats to *induce breaches of contract* and threats to *break contracts*. It does not, therefore, give immunity in respect of intimidation in any other form. It deals only with cases where there is in being a "trade dispute" (*u*), it deals only with contracts of employment (*a*) and it would not affect a case in which there is intimidation in any other form than the forms stipulated, *e.g.* threats accompanied by violence: the words "*on the ground only*" are significant.

(*p*) Above, n. (*k*), at p. 517.
(*q*) 25 Halsbury's Statutes (2nd Edn.) 1268.
(*r*) See the last edition of this book, pp. 326–327. But see the views of Lord DENNING, M.R.: *Morgan* v. *Fry*, [1968] 3 W. L. R. 506, 516.
(*s*) 45 Halsbury's Statutes (2nd Edn.) 1755.
(*t*) As to the bearing of the section on interference with contract see above, p. 348.
(*u*) See above, p. 348, n. (*o*).
(*a*) See above, p. 348.

CHAPTER 18

CONSPIRACY

It has already been remarked that it is not *necessarily* a tort to cause loss to another person; and this proposition is particularly important in relation to the field of business or industrial competition, for in this sphere of activity loss to others is often the essence of success. Moreover, it has also been remarked that as a *general rule* the purpose or object which a person has in mind when he inflicts loss or damage upon another is legally irrelevant in the law of torts (*a*). The tort of conspiracy forms one of the exceptions to this general rule; for here the defendants' purpose in inflicting the loss may be decisive of the issue.

Conspiracy is both a crime and a tort; and a criminal conspiracy "consists . . . in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means" (*b*). Thus if two or more combine to commit a larceny, each may be indicted both for the larceny which he has committed and for the conspiracy which arises from the joint agreement. But in relation to conspiracy the word "unlawful" bears an exceptionally wide meaning; and an indictment for conspiracy may also be sustained in cases where, had each accused acted alone and not in combination, no crime would have been committed (*c*). In such cases the element of combination makes that "unlawful" and indictable which would otherwise have been guiltless in the eyes of the criminal law.

The same applies in the case of the *tort* of conspiracy. An action based upon conspiracy will, at least in theory, clearly arise where two or more persons cause loss or damage to another by combining to commit some unlawful act such as a tort (*d*)—say for example the tort of interference with contract (*e*) or the tort of intimidation (*f*);

(*a*) *Allen* v. *Flood*, [1898] A. C. 1.

(*b*) *Mulcahy* v. *R.* (1868), L. R. 3 H. L. 306, 317; *per* WILLES, J.

(*c*) See *e.g. R.* v. *Newland*, [1953] 2 All E. R. 1067; [1954] 1 Q. B. 158: *Shaw* v. *Director of Public Prosecutions*, [1961] 2 All E. R. 446; [1962] A. C. at p. 237.

(*d*) But "I am not saying that a conspiracy to commit a *breach of contract* amounts to the tort of conspiracy"; *Rookes* v. *Barnard*, [1964] 1 All E. R. 367, 400; [1964] A. C. 1210: *per* Lord DEVLIN (italics ours).

(*e*) See *Quinn* v. *Leathem*, [1901] A. C. 495, in so far as it concerned inducing breach of contract. But see *Ward* v. *Lewis*, [1955] 1 All E.R. 55.

(*f*) *Rookes* v. *Barnard*, [1964] 1 All E. R. 367; [1964] A. C. 1129.

though in such a case the plaintiff may often prefer in practice to sue the tortfeasors, either jointly or severally, in respect of the tort which each has committed.

But as in the case of the crime, so in the case of the tort, difficulty has arisen in cases where, without doing anything independently unlawful, or using any independently unlawful means, *two or more persons combine* (*g*) *to damage, and do damage, another.* It is now beyond doubt (*h*) that

> "a combination of two or more persons wilfully to injure a man . . . is unlawful and, if it results in damage to him, is actionable" (*i*).

That is to say, actionable as the tort of conspiracy. And, at least in its modern form, this tort has particular application to cases concerned with economic rivalry (*k*).

The essence of the tort of conspiracy is therefore wilful combination (*l*) to injure the plaintiff which in fact causes him loss or damage. The elements of combination and damage need no explanation; but the element of "wilfulness", or intent, is a difficult one. The courts have to consider the purpose or object of the combination, and to determine whether it is based upon a desire to cause damage to the plaintiff. This is not a simple enquiry, and each decision must necessarily depend upon all the circumstances (*m*).

Two things are however clear from the authorities. First, it is not *essential* to establish that the defendants were actuated by

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(*g*) The element of combination is essential to the tort, as to the crime. The reasons are historical; the tort springs from the crime, and the modern crime was the creation of the Star Chamber which was much concerned in suppressing combinations. As Burke said, "Liberty when men act in bodies, is power". To-day, however, it seems unreasonable to some that mere numbers should make unlawful that which is otherwise lawful; for a Hitler may by himself have greater power than a multitude! See *Crofter Hand Woven Harris Tweed Co., Ltd.* v. *Veitch*, [1942] 1 All E. R. 142, 148; [1942] A. C. 435, 443; *per* Viscount SIMON, L.C.

(*h*) Since *Mogul S.S. Co.* v. *McGregor, Gow & Co.*, [1892] A. C. 25; *Allen* v. *Flood*, [1898] A. C. 1; *Quinn* v. *Leathem*, [1901] A. C. 495 (dubbed by Lord CAVE, L.C., in *Sorrell's Case* the "famous trilogy"). And *Sorrell* v. *Smith*, [1925] A. C. 700, and the *Crofter Case*, [1942] 1 All E. R. 102; [1942] A. C. 435.

(*i*) *Sorrell's Case*, [1925] A. C. 700, 712; *per* Lord CAVE, L.C.

(*k*) Though it is not limited to it: see *Clifford* v. *Brandon* (1809), 2 Camp. 358; *Gregory* v. *Duke of Brunswick* (1844), 6 Man. & G. 205; *Thompson* v. *British Medical Association*, [1924] A. C. 764.

(*l*) But the tort "is complete only if the agreement is carried into effect so as to damage the plaintiff": *Marrinan* v. *Vibart*, [1962] 1 All E. R. 869; 871; [1963] 1 Q. B. 234, 238–239; *per* SALMON, J. (affirmed C. A. on other grounds; [1962] 3 All E. R. 380; [1963] 1 Q. B. 528). In other words there must be some overt act to evidence the intent, mere agreement is not enough; see also the *Crofter Case* (next note) at pp. 146, 157 and 439, 461 respectively.

(*m*) *Crofter Hand Woven Harris Tweed Co., Ltd.* v. *Veitch*, [1942] 1 All E. R. 142, 164; [1942] A. C. 435, 472; *per* Lord WRIGHT.

"malice" (in the sense of spite or ill-will); nor will the presence of such evil motive *necessarily* render the defendants liable—for glee, for instance, at a rival's discomfiture, though perhaps not morally praiseworthy, is not in itself unlawful. But on the other hand where there is malice this fact may tend strongly to prove the will to injure (*n*). Secondly, if the defendants' object in causing the plaintiff's loss is to further their own legitimate economic or other interests they will certainly not be liable.

Thus in *Quinn* v. *Leathem* (*o*) the plaintiff was a wholesale butcher and the defendants were trade union officials. Wishing to ensure that the former should employ all-union labour, the latter in effect asked him to dismiss his non-union men and replace them by union men. This the plaintiff refused to do, and even offered to pay the men's subscriptions to make them members. The offer was refused, and the defendants then approached one Munce, a butcher—customer of the plaintiff's—and told him that unless he ceased to deal with the plaintiff they would call out his *union* men. Munce did cease to deal with the plaintiff (committing no breach of contract thereby), and the plaintiff thus suffered loss. The jury having found that the defendants' actions were actuated by malice, the defendants were held liable.

But suppose on the other hand that individuals or companies combine to form a "ring" (*p*) agreeing to restrict prices among themselves; although this combination may cause loss to others outside the ring, whose businesses become in consequence "undercut", such people would at common law have no claim in conspiracy. For in such a case the defendants' purpose will not be a desire to injure, but the protection of their own interests (*q*). And similar reasoning will apply where interests other than business interests are involved (*r*).

Further difficulty arises from the fact that the motives of conspirators are often, and indeed usually, mixed; and it is the

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(*n*) *Ibid.*

(*o*) [1901] A. C. 495: see Lord WRIGHT's analysis of this decision in the *Crofter Case*. See also *British Motor Trade Association* v. *Salvadori*, [1949] 1 Ch. 556; *Huntley* v. *Thornton*, [1957] 1 All E. R. 234.

(*p*) For the present purpose the Restrictive Trade Practices Act, 1956 (36 Halsbury's Statutes (2nd Edn.) 931), is disregarded.

(*q*) See *Mogul S.S. Co.* v. *McGregor, Gow & Co.*, [1892] A. C. 25; *Ware & De Freville, Ltd.* v. *Motor Trade Association*, [1921] 3 K. B. 40; *Thorne* v. *Motor Trade Association*, [1937] 3 All E. R. 157; [1937] A. C. 797; *Scala Ballroom (Wolverhampton), Ltd.* v. *Ratcliffe*, [1958] 3 All E. R. 220; *J. T. Stratford & Sons, Ltd.* v. *Lindley*, [1964] 3 All E. R. 102; [1965] A. C. 269.

(*r*) See *Crofter Hand Woven Harris Tweed Co., Ltd.* v. *Veitch*, [1942] 1 All E. R. 142; [1942] A. C. 435; *Morgan* v. *Fry*, [1968] W. L. R. 506, 516—the "closed shop" principle is regarded as a legitimate trade union interest.

predominant object of the combination that has therefore to be ascertained (*s*).

It remains to be added that the Trade Disputes Act, 1906, s. 1 (*t*) provides immunity from civil actions for conspiracy to persons who are acting *in contemplation or furtherance of a trade dispute*. But this immunity will only be afforded if the acts concerned are not unlawful independently of the element of combination (*u*); and it must also be stressed that it only applies where a "trade dispute" is genuinely involved (*a*).

ILLUSTRATION 118

Where damage to the plaintiff results, it is an actionable conspiracy for two or more persons to combine with the object of injuring another.

Huntley *v.* Thornton, [1957] 1 All E. R. 234.

Defendants were the secretary and members of the district committee of plaintiff's trade union. Due to the fact that the plaintiff had refused to join an illegal strike and that he had been disrespectful to themselves, defendants asked their executive council (their union superiors) to expel him from the union. The executive council having refused, defendants then purported to expel him themselves, and by writing to other district committees and various other means, effectively kept plaintiff out of work. *Held:* Defendants were liable; the executive council having refused to expel plaintiff, they had no right to do so; and their actions after the council's refusal were not dictated by any desire to protect union interests, but were simply the result of personal grudge. This fact also deprived them of immunity under the Trade Disputes Act, since furthering a grudge is not engaging in a trade dispute.

ILLUSTRATION 119

It is not an actionable conspiracy for two or more persons to combine to protect their common interest, even though such combination inflicts loss upon others.

(*s*) See *Crofter Case*, [1942] 1 All E. R. 142, 149, 166; [1942] A. C. 435, 445, 478.

(*t*) 5 Halsbury's Statutes (2nd Edn.) 885, amending Conspiracy and Protection of Property Act, 1875, s. 3. For definition of "trade dispute" see s. 5 (3) of the 1906 Act and n. (*k*) above.

(*u*) In *Rookes* v. *Barnard* (Illustration 117) the point was raised that the threat of a single one of the intimidators to break his contract would have had no effect upon B.O.A.C. and it was therefore argued that the agreement to intimidate fell within the protection of s. 1 of the Trades Disputes Act, 1906; but it was ruled that the protection provided by the section would not cover the case of a conspiracy to commit a wrong *capable* of being committed by one person, as intimidation is: consequently the defendants were not protected.

(*a*) *Huntley* v. *Thornton* (Illustration 118).

Crofter Hand Woven Harris Tweed Co., Ltd. v. Veitch, [1942] 1 All E. R. 142; [1942] A. C. 435.

Appellants were producers of cloth on the island of Lewis. Respondents were trade union officials. Respondents wished to obtain all-union membership in certain mills on the island, and also to obtain higher wages for their members in these mills. The owners of the mills were unable to increase the wages (and consequently to attract more union membership) of their workers because appellants' competition made it impossible for them to raise their prices. With a view to eliminating this competition, respondents instructed the dockers at the port of Stornoway (who were union members) to refuse—without any breach of contract—to handle appellants' goods. The dockers complied; and the appellants, thus finding their business seriously threatened, sought an interdict (injunction) to direct respondents to raise this embargo. *Held:* Appellants' claim failed: respondents' action was not an illegal conspiracy, since their action was dictated by a desire to protect legitimate union interests.

CHAPTER 19

MALICIOUS FALSEHOOD

This is another tort usually connected with commercial matters. It is the tort of *maliciously making a false imputation which causes damage* (*a*) *to the plaintiff, otherwise than by way of his reputation, by acting upon the mind of a third person or persons.*

Malicious falsehood (*b*) differs from *defamation* in that *malice* must be established (*c*); and here "malice" seems to mean "some dishonest or otherwise improper motive" (*d*) which will generally take the form of "wilful and intentional doing of damage without just cause or excuse" (*e*). Further, whereas defamation (*f*) is an attack upon reputation, malicious falsehood is an attack upon some pecuniary interest of the plaintiff (*g*). Thus to say that A is a "dishonest trader" is defamatory, but to say that A has closed his business (*h*) is not, though the latter statement may give rise to an action for malicious falsehood if malice is proved (*i*).

Obviously this tort also differs from *deceit* in that in deceit the obnoxious statement is primarily addressed to the plaintiff himself, who acts upon it to his damage, whereas in malicious falsehood it is addressed to some other person or people.

(*a*) Subject to the Defamation Act, 1952, s. 3 (below).

(*b*) Alternatively called "injurious falsehood"; "malicious" is the word adopted in the Defamation Act, 1952, s. 3 (below).

(*c*) See in particular *Balden* v. *Shorter*, [1933] 1 Ch. 427; *Joyce* v. *Motor Surveys, Ltd.*, [1948] Ch. 252; *London Ferro-Concrete, Ltd.* v. *Justicz* (1951), 68 R. P. C. 261.

(*d*) *Balden's Case*, [1933] 1 Ch. 427, 430; *per* MAUGHAM, J.

(*e*) *Joyce's Case*, [1948] Ch. 252, 254; *per* ROXBURGH, J. The idea that "malice" in this context has the less positive meaning of "without just cause or excuse" (see *Royal Baking Powder Co.* v. *Wright, Crossley & Co.* (1900), 18 R. P. C. 95, 99; *per* Lord DAVEY) is now out of favour. The reference to "damage" in ROXBURGH, J.'s *dictum* must be understood now subject to the Defamation Act, s. 3.

(*f*) In some of the cases malicious falsehood is spoken of as "defamation"; but it is probably better to keep the terminology distinct.

(*g*) But imputations which disparage goods directly may also be libellous *indirectly*, as *e.g.* by imputing lack of skill: see *Griffiths* v. *Benn* (1911), 27 T. L. R. 346. Where this is so the plaintiff will choose the lesser onus of proving libel rather than taking upon himself the burden of having to establish malice.

(*h*) *Ratcliffe* v. *Evans*, [1802] 2 Q. B. 524 (Illustration 120).

(*i*) See *Pearl Location International A.S.B.L.* v. *Yaseen*, [1964] R. P. C. 345.

Proof of actual damage used to be essential to liability in all circumstances (*k*), but the Defamation Act, 1952, s. 3 now provides that in an action for malicious falsehood (*l*)

> "... it shall *not* be necessary to allege or prove special damage—(a) if the words (*m*) upon which the action is founded are calculated to cause pecuniary damage to the plaintiff and are published in *writing or other permanent form*: or (b) if the said words are *calculated to cause the plaintiff pecuniary damage* in respect of any *office, profession, calling, trade or business* held or carried on by him *at the time of publication*" (*n*).

In an action brought under this section evidence of special damage is irrelevant since the damage which the court or jury are entitled to take into account is such as the words are "calculated" to cause (*o*).

Although this tort may take as many forms as the broadness of its definition suggests (*p*), the commonest are *slander of title* and *slander of goods*. In the former guise the tort arises when the defendant makes a false and malicious statement about the plaintiff's title to his property (*q*), as where he depreciates its value by himself claiming title to it. In the latter guise it arises where the defendant makes a false and malicious statement disparaging the goods of another without claiming title to them.

It is *not* actionable for a man to "puff" his wares by proclaiming their superiority over those of rivals; for this is legitimate business competition (*r*). But there are limits even to this right of self-advertisement where the statements made are untrue and malice

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(*k*) *White* v. *Mellin*, [1895] A. C. 154. Though evidence of *general* loss of business, as opposed to loss of particular customers was, and is, enough: *Ratcliffe's Case*, [1892] 2 Q. B. 524.

(*l*) Including actions for slander of title and slander of goods.

(*m*) As defined in s. 16 (1) of the Act.

(*n*) Italics ours. See *Fielding* v. *Variety Incorporated*, [1967] 2 All E. R. 497; [1967] 2 Q. B. 841.

(*o*) *Calvet* v. *Tomkies*, [1963] 3 All E. R. 610.

(*p*) See, *e.g. Ratcliffe* v. *Evans*, [1892] 2 Q. B. 524; *Casey* v. *Arnott* (1876), 2 C. P. D. 24 (imputation of unseaworthiness in ship); *Shapiro* v. *La Morta* (1923), 40 T. L. R. 201 (artiste loses engagement by defendant's allegation that she is engaged by him).

(*q*) See, *e.g. Hargrave* v. *Le Breton* (1769), 4 Burr. 2422; *Greers, Ltd.* v. *Pearman & Corder, Ltd.* (1922), 39 R. P. C. 406; *British Railway Traffic and Electric Co.* v. *C.R.C. Co. and London County Council*, [1922] 2 K. B. 260; *Loudon* v. *Ryder (No. 2)*, [1953] Ch. 423. There is however no such thing as a "title" to the *name* of a house: *Day* v. *Brownrigg* (1878), 10 Ch. D. 294.

(*r*) If actions based upon "puffing" were allowed "the Courts might be constantly employed in trying the relative merits of rival productions": *White* v. *Mellin*, [1895] A. C. 154, 164–5; *per* Lord HERSCHELL, L.C. And see *Hubbuck & Sons, Ltd.* v. *Wilkinson, Heywood and Clark, Ltd.*, [1899] 1 Q. B. 86, 91.

is present: for example it might be actionable in a district where there are only two local newspapers in circulation for the proprietors of one of them to proclaim "where others count by the dozen, we count by the hundred" if the statement was untrue, aimed maliciously at the rival, and (apart from the Defamation Act) special damage were proved (*s*). It may also be malicious falsehood to advertise articles at a cut price thus causing trade customers to withdraw orders from the manufacturer (*t*).

Without proof of damage (where necessary) and malice there can be no claim for damages, nor apparently for an injunction (*u*), but the court can pronounce a declaratory judgment under the powers vested in it by virtue of R.S.C. Ord 15, r. 17 (*a*).

ILLUSTRATION 120

It is an actionable wrong maliciously to make false statements to third parties which cause pecuniary damage to the plaintiff.

Ratcliffe *v.* Evans, [1892] 2 Q. B. 524.

Defendant maliciously published a statement in his newspaper to the effect that the plaintiff's firm, "Ratcliffe & Sons", had ceased to exist. Plaintiff suffered general loss of custom as a result. *Held:* Plaintiff succeeds: "That an action will lie for written or oral falsehoods, not actionable *per se* nor even defamatory, where they are maliciously published, where they are calculated in the ordinary course of things to produce, and where they do produce, actual damage is established law" (*b*). Moreover proof of general loss of custom, as opposed to loss of particular customers, sufficed to support the claim.

(*s*) *Lyne* v. *Nicholls* (1906), 23 T. L. R. 86. And see *Alcott* v. *Millar's Karri and Jarrah Forests, Ltd.* (1904), 91 L. T. 722.
(*t*) *Rima Electric, Ltd.* v. *Rolls Razor, Ltd.*, [1965] R. P. C. 4.
(*u*) See *White* v. *Mellin*, [1895] A. C. 154, 167.
(*a*) *Loudon* v. *Ryder* (*No.* 2), [1953] Ch. 423.
(*b*) [1892] 2 Q. B. at p. 527; *per* BOWEN, L.J.

CHAPTER 20

UNFAIR COMPETITION: PASSING OFF

The wrong of "passing off" is that species of unfair competition by which one person, by the use of deceptive devices, attempts to obtain the economic benefit of the reputation which another has established for himself in any trade or business. It has always been actionable at common law, though in modern times the usual practice is to proceed in the Chancery Division and claim an injunction to prevent the continuance of the abuse, and an inquiry into damages or an account of profits.

The principle of this tort is that "no man can have any right to represent his goods as the goods of somebody else" (*a*). If therefore the goods of a trader have been sold under a particular name or description, or have been identified by some particular mark (*b*) in such a way that in the course of time the goods so named, described, or marked have become generally identified in the mind of the public as the goods of that trader, it is actionable for any other person to sell goods under that or some similar (and misleading) name, description or mark, if the result will be that a purchaser is likely to be misled (*c*); and this will apply even if the (*d*) name or description used is merely a description of the goods as such.

The same applies where goods have become generally recognized as the goods of the plaintiff by reason of something in their get up (*e*) or appearance which is characteristically his; and even in cases

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(*a*) *Reddaway* v. *Banham*, [1896] A. C. 199, 204; *per* Lord HALSBURY, L.C.

(*b*) *Rodgers* v. *Nowill* (1847), 5 C. B. 109.

(*c*) *T. Wall & Sons, Ltd.* v. *Wells Whip, Ltd.*, [1966] R. P. C. 197 ("Walls Super Whip";: "Wells Whip"): *Associated Booking Corporation* v. *Associated Booking Agency*, [1964] R. P. C. 372: *Southern Music Publishing Co., Ltd.* v. *Southern Songs, Ltd.*, [1966] R. P. C. 137.

(*d*) But the name must be sufficiently similar to cause general confusion; "Office Cleaning Services" is thus not sufficiently similar to "Office Cleaning Association—*Office Cleaning Services, Ltd.* v. *Westminster Office Cleaning Association*, [1944] 2 All E. R. 269; [1946] 1 All E. R. 320 (H. L.): *Credit Management Co., Ltd.* v. *Credit Management*, [1961] R. P. C. 157; *Morecambe and Heysham* v. *Mecca, Ltd.*, [1966] R. P. C. 423 ("Miss Great Britain", "Miss Britain"); *Gordon Fraser Gallery, Ltd.* v. *Tatt*, [1966] R. P. C. 505.

(*e*) *Blofeld* v. *Payne* (1833), 4 B. & Ad. 410. And see *Tavener Rutledge, Ltd.* v. *Specters, Ltd.*, [1959] R. P. C. 83, affirmed, [1959] R. P. C. 355.

where a particular form of process (*f*) (as opposed to a particular class of goods) has come to be recognized as the plaintiff's. Indeed appearance, or get up, as opposed to a name may be vital where goods are sold abroad to illiterate people (*g*). But the mere fact that the defendant's goods incorporate an idea similar to the plaintiff's cannot convict the defendant of passing off: though it might amount to an infringement of copyright (*h*). Further it may also be passing off to represent that the goods of another person, though his, are goods of some other class or quality than they really are. Thus for example in *Gillette Safety Razor Co., and Gillette Safety Razor, Ltd.* v. *Franks* (*i*), the infant defendant (an enterprising, if misguided, youth) was restrained by injunction from selling *used* Gillette razor blades at very low prices which he had collected, enclosed in the plaintiff's wrappings, and sold as new. Indeed the classes of passing off cannot be catalogued, since there are as many ways of effecting it as commercial ingenuity can devise (*k*).

It is however for the plaintiff to establish that the name, description, or mark of the goods, or whatever it may be, is in fact identifiable with his business; for apart from the law relating to trade marks, no new trader who sets up in business is entitled to claim exclusive property in a particular line. Such a right is an economic asset which, like other assets, must usually be acquired (*l*)—however rapidly (*m*)—though those who produce goods in a particular geographical area which are identified in the public mind

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(*f*) *Edge & Sons, Ltd.* v. *Niccolls & Sons, Ltd.*, [1911] A. C. 693; *Sales Affiliates, Ltd.* v. *Le Jean, Ltd.*, [1947] Ch. 295 ("Jamal" hair wave).

(*g*) *White Hudson & Co., Ltd.* v. *Asian Organization, Ltd.* [1965] 1 All E. R. 1040 (sweets in red wrappers); *Lee Kar Choo* v. *Lee Lian Choon* [1966] 3 All E. R. 1000; [1967] A. C. 602.

(*h*) *Universal Agencies (London), Ltd.* v. *Paul Swolf*, [1959] R. P. C. 247 (corkscrews with human heads, but entirely different heads).

(*i*) (1924), 40 T. L. R. 606. See also *Spalding & Bros.* v. *A. W. Gamage, Ltd.* (1915), 84 L. J. Ch. 449: *Wilts United Dairies, Ltd.* v. *Thomas Robinson, Sons & Co., Ltd.*, [1958] R. P. C. 94: *Morris Motors, Ltd.* v. *Lilley*, [1959] 3 All E. R. 737: *Norman Kark Publications Ltd.* v. *Odhams Press, Ltd.*, [1962] 1 All E. R. 636.

(*k*) See, *e.g. Illustrated Newspapers, Ltd.* v. *Publicity Services (London), Ltd.*, [1938] 1 All E. R. 321; [1938] Ch. 414.

(*l*) See *Oertli A.-G.* v. *E. J. Bowman (London), Ltd., Page & Co. (Turmix Sales), Ltd., Farnsworth, Parness and Marlow*, [1957] R. P. C. 388: *Compatibility Research, Ltd.* v. *Computer Psyche Co., Ltd.*, [1967] R. P. C. 201. The onus upon the plaintiff will be particularly heavy in cases (such as *Reddaway* v. *Banham*) where the descriptive name that has become connected with his wares is in origin simply a description of a particular kind of article, such as "cellular cloth", see *Cellular Clothing Co.* v. *Maxton and Murray*, [1899] A. C. 326.

(*m*) *Stannard* v. *Reay*, [1967] R. P. C. 589 ("Mr. Chippy" for mobile fish and chips van—goodwill acquired in one month).

with the name of that area (as in the case of "Champagne", grown in the Champagne district of France) may bring an action in the nature of a passing off action against producers outside that area who attach that name to their goods. Here of course the right arises from the very fact of producing within the area concerned (*n*).

On the other hand, it does sometimes happen that a name or description of a class of goods which first gains public recognition as that of a particular trader becomes so well-known that it ceases to be identified with him and becomes simply a general name for a particular kind of goods. For instance, "Harvey's Sauce" was once held to have become a general designation for a kind of sauce; and to have ceased to be connected in the mind of the public with Harvey, its original maker (*o*). In such a case the maker, by the very success of his venture, will lose his right to protection; but it will, in these circumstances, be for the *defendant* to establish that the name has lost its unique connection.

It now seems (*p*) that the name which the plaintiff seeks to uphold must be one which has been acquired by actual user in this country. For example, if an internationally known chain of hotels seeks to safeguard itself by a passing-off action in England, it will not be enough to establish that renown or even intensive advertisement have given it a reputation here; some actual business which has created goodwill by operating in this country must also be proved. Though in such a case it might be enough to show that accommodation abroad had been arranged through agents in England (*q*).

In a passing off action the plaintiff need not prove either that the defendant was fraudulent (*r*), or that anyone was *actually* deceived, or that he actually suffered damage (*s*).

"All that need be proved is that the defendants' goods are so marked, made up, or described by them as to be *calculated* to mislead

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(*n*) *J. Bollinger* v. *Costa Brava Wine Co., Ltd.*, [1959] 3 All E. R. 800; [1960] Ch. 262.

(*o*) *Lazenby* v. *White* (1871), 41 L. J. Ch. 354 n., and see *Liebigs Extract of Meat Co.* v. *Hanbury* (1867), 17 L. T. 298. Contrast *Havana Cigar and Tobacco Factories, Ltd.* v. *Oddenino*, [1924] 1 Ch. 179 (Corona cigars).

(*p*) See *Alain Bernardin et Compagnie* v. *Pavilion Properties, Ltd.*, [1967] R. P. C. 581: distinguishing on this point *Poiret* v. *Jules Poiret, Ltd.* (1920), 37 R. P. C. 177 and *Sheraton Corporation of America* v. *Sheraton Hotels, Ltd.*, [1964] R. P. C. 202.

(*q*) See *Bernardin's Case* ("Crazy Horse Saloon")—last note—and the interpretation there put upon *Poiret's* and *Sheraton Cases*.

(*r*) But where the passing off is innocent it seems that damages may, perhaps, only be nominal: *Draper* v. *Trist*, [1939] 3 All E. R. 513.

(*s*) *Ewing* v. *Buttercup Margarine Co., Ltd.*, [1917] 2 Ch. 1; *R. and J. Pullman, Ltd.* v. *Pullman* (1919), 36 R. P. C. 240.

ordinary purchasers and to lead them to mistake the defendants' goods for the goods of the plaintiffs" (*t*).

Thus in *J. Bollinger* v. *Costa Brava Wine Co., Ltd.* (*u*) it was held that the ordinary public would be misled by the description "Spanish Champagne" into thinking that they were getting the true product of France. Where the defendant has acted innocently, and has ceased the practice complained of on notice of the plaintiff's rights, the court will not award damages or order an account of profits (*a*).

It must be added that, the basis of the action for passing off being the tendency to deceive or mislead the public, it is not as such actionable passing off at common law merely to use the trade name or trade mark of another person. But by the Trade Marks Acts (*b*), validly registered trade marks have, like patents, been made a species of property and it *is* actionable under these Acts simply to infringe a trade mark by using or imitating it (*c*). In many cases, therefore, the plaintiff in a passing off action will be well advised (if a registered mark is involved) to improve his chances of success by adding a claim for infringement.

ILLUSTRATION 121

It is an actionable wrong for a person to represent his goods as the goods of somebody else.

Reddaway *v.* Banham, [1896] A. C. 199.

Appellants had for some years made and sold "Camel Hair Belting", and this name had come to mean in the trade their belting and nothing else. Respondents began to sell belting made of camels' hair and stamped it "Camel Hair Belting"; this was calculated to mislead purchasers and to pass off respondents' goods as appellants'. *Held:* Injunction granted to restrain respondents from using the words "Camel Hair" *without clearly distinguishing* their belting from appellants' (*d*).

(*t*) *Reddaway* v. *Bentham Hemp-Spinning Co.*, [1892] 2 Q. B. 639, 644; *per* LINDLEY, L.J. (italics ours).

(*u*) (No. 2), [1961] 1 All E. R. 561.

(*a*) *Edelsten* v. *Edelsten* (1863) 1 De G. J. & S. 185; *Slazenger & Sons* v. *Spalding and Brothers*, [1910] 1 Ch. 257.

(*b*) See now the Trade Marks Act, 1938 (25 Halsbury's Statutes (2nd Edn.) 1180).

(*c*) Detailed works such as Kerly on *Trade Marks* and Blanco White, *Trade Marks and Unfair Competition*, should be consulted.

(*d*) See also *Wotherspoon* v. *Currie* (1872), L. R. 5 H. L. 508 ("Glenfield Starch"); *Montgomery* v. *Thompson*, [1891] A. C. 217 ("Stone Ale"); *Delavelle (G.B.), Ltd.* v. *Harry Stanley* (1946), 63 R. P. C. 103 ("Blue Orchid" brilliantine).

Similarly, where there is common ground between the activities of plaintiff and defendant, and the plaintiff has acquired a public reputation under a particular name from which he derives economic gain, it may be passing off for the defendant to use the same name or one so closely akin to it as to be calculated to deceive. Thus for example in *Hines* v. *Winnick* (*e*) the plaintiff, a professional musician, had for some time conducted the defendant's band for broadcast performances under the name of "Dr. Crock", and this name had become generally identified with the plaintiff. It was held that the defendant was thereafter not entitled to use the name "Dr. Crock" in connection with anyone other than the plaintiff in respect of performances similar in kind to the plaintiff's. But actions of this nature will only lie if the activities of the parties are sufficiently akin for the public to be misled. Hence the action failed in *McCulloch* v. *A. Lewis May* (*Produce Distributors*), *Ltd.* (*f*) where a well-known broadcaster who employed the name of "Uncle Mac" sought an injunction against a firm of manufacturers of puffed wheat who were distributing their wares as "Uncle Mac's Puffed Wheat".

But there is a further difficulty, and this is caused by the fact that it would seem obviously just (*g*) to say that

> "A man is *entitled to carry on his business in his own name* so long as he does not do any more than to cause confusion with the business of another, and *so long as he does it honestly*" (*h*).

Thus it is probably (*i*) the law that if a man called Williams sets up shop next door to the shop of another Williams, the latter will have no right of action against the former solely upon the ground that his customers are likely to be misled (*k*). And this principle has also been applied in the case of people, such as actors (*l*), who have honestly acquired an *assumed* name by which the public

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(*e*) [1947] 2 All E. R. 517; [1947] Ch. 708; compare *Brestian* v. *Try*, [1958] R. P. C. 161, and contrast *Serville* v. *Constance*, [1954] 1 All E. R. 662, where the plaintiff, a newcomer to England, was held not to have acquired *in this country* the reputation of "welter-weight champion of Trinidad".

(*f*) [1947] 2 All E. R. 845. See also *Hall of Arts and Sciences* v. *Hall* (1934), 50 T. L. R. 518.

(*g*) But see doubts of Court of Appeal: *Baume & Co., Ltd.* v. *A. H. Moore, Ltd.*, [1958] 2 All E. R. 113, 116.

(*h*) *Joseph Rodgers & Sons, Ltd.* v. *W. N. Rodgers & Co.* (1924), 41 R. P. C. 277, 291; *per* ROMER, J.

(*i*) See note (*g*), above.

(*k*) *Burgess* v. *Burgess* (1853), 3 De G. M. & G. 896 (Illustration 122); *Turton* v. *Turton* (1889), 42 Ch. D. 128; *Rodgers* v. *Rodgers* (1924), 41 R. P. C. 277. See similar provision as to trade marks: Trade Marks Act, 1938, s. 8 (25 Halsbury's Statutes (2nd Edn.) 1186).

(*l*) Or journalists: *Forbes* v. *Kemsley Newspapers, Ltd.*, [1951] 2 T. L. R. 656.

knows them. So in *Jay's, Ltd.* v. *Jacobi* (*m*) the plaintiff's manager, whose real name was Mrs. Jacobi, had long been known to customers as "Miss Jay"; when she set up a nearby business on her own under the name of "Jays", the plaintiffs sought to restrain her from using it on the ground that confusion would be caused. But it was held that the assumed name was one which the defendant had become entitled to use in business just as much as her true name, and the claim failed.

This statement must, however, be carefully qualified in two ways. First, though it may be that a man is in general entitled to make use of his own name,

> "no man is entitled so to describe or mark his *goods* as to represent that the goods are the goods of another" (*n*).

Thus a man called "Pears" may trade in soap as "Pears", but he may not ("Pears' Soap" being a well-established brand) *mark* his goods as "Pears' Soap", for the name, together with the mark on the soap, are *not* by nature his (*o*). Secondly, the use either of one's own name or of an assumed name must be honest; and a man may be restrained even from using his own name in business or professional matters if it is clearly established that his intention in doing so is to draw custom away from the plaintiff (*p*). But of course the plaintiff's case in this kind of situation will be much easier to establish if the name being used with such an intent is an assumed one (*q*); for if a person deliberately takes on the "semblance of somebody else" (*r*) it is reasonable to infer that he does it for a purpose.

Further, the rule that a man is entitled to make use of his own name has a special application in relation to companies. For a company, being a fictional and not a real person, has no "real" name of its own; hence its name must be a fancy name or a borrowed one. Where the name is, as it were, borrowed from a real person a special principle comes into play; it is not permissible to *lend one's name to another* if this is calculated to cause confusion (whether the

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(*m*) [1933] All E. R. Rep. 690; [1933] 1 Ch. 411. See also *Massam* v. *Thorley's Cattle Food Co.* (1880), 14 Ch. D. 748; *John Brinsmead & Sons, Ltd.* v. *Brinsmead & Sons, Ltd.*, (1913), 30 R. P. C. 493.

(*n*) *Rodgers* v. *Rodgers* (1924), 41 R. P. C. 277, 291; *per* ROMER, J. (italics ours).

(*o*) See also *Baume & Sons, Ltd.* v. *A. H. Moore, Ltd.*, [1958] 2 All E. R. 113.

(*p*) *Short's, Ltd.* v. *Short* (1914), 31 R. P. C. 294.

(*q*) See *Burgess* v. *Burgess* (1853), 3 De G. M. & G. 896, 905; *per* TURNER, L.J. And see *F. Pinet et Cie* v. *Maison Louis Pinet, Ltd.*, [1898] 1 Ch. 179; *Poiret* v. *Poiret (Jules), Ltd.* (1920), 37 R. P. C. 177; *John Dickinson & Co.* v. *Apsley Press, Ltd.* (1937), 157 L. T. 135.

(*r*) *Pinet's Case*, [1898] 1 Ch. 179, 181; *per* NORTH, J.

name be real or assumed, in the sense above explained), and this applies where the "borrower" is a company (*s*). But it does seem that, by way of qualification to this rule, a person who has acquired goodwill in a business connected with his own name *may* pass it to a company subsequently formed, as part of the sale of the goodwill (*t*).

ILLUSTRATION 122

As a general rule, in the absence of an intent to deceive, a man is entitled to conduct business under his own name.

Burgess *v.* Burgess (1853), 3 De G. M. & G. 896.

For many years Burgess the elder had made and sold "Burgess's Essence of Anchovies". His son set up a separate business, and made and sold a similar article under the same name. *Held:* The son could not be prevented from doing this. "All the Queen's subjects have a right to sell these articles in their own names, and not the less so that they bear the same name as their fathers. . . . If any circumstance of fraud . . . had accompanied . . . the case, it would stand very differently" (*u*).

It is finally worth noting that the coming into operation of the Trade Descriptions Act, 1968, may have the effect of reducing the number of passing off actions. For this Act makes it an offence, *inter alia*, by any means to give a false indication as to the person by whom goods are manufactured; and this may resort to the criminal law becoming more common than resort to the civil law in this sphere.

(*s*) *Tussaud* v. *Tussaud* (1890), 44 Ch. D. 678; *Fine Cotton Spinners and Doublers' Association, Ltd., and Cash and Sons, Ltd.* v. *Harwood Cash & Co., Ltd.*, [1907] 2 Ch. 184. See also Companies Act, 1948, s. 18 (2) (3 Halsbury's Statutes (2nd Edn.) 474)—company registered with name likely to cause confusion may be ordered to change.

(*t*) *Kingston, Miller & Co., Ltd.* v. *Thomas Kingston & Co., Ltd.*, [1912] 1 Ch. 575.

(*u*) (1853), 3 De G. M. & G. at pp. 903–4; *per* KNIGHT BRUCE, L.J.

CHAPTER 21

DECEIT OR FRAUD

In order to establish liability in the tort of deceit (*a*)—or "fraud"—it must be shown that (1) the defendant made a false statement of fact, (2) this statement was made fraudulently, (3) it was made with the intent that the plaintiff should act upon it, (4) that the plaintiff did so act, and (5) that he suffered damage thereby.

1. A FALSE STATEMENT OF FACT

In order to be actionable the defendant's statement must be a statement of *fact* and it must also be *false*.

A true statement cannot be fraudulent even though the effect of making it may be to induce the plaintiff to act to his detriment. Thus where a man sold some pigs which he knew to be infected with typhoid "with all faults" it was held that he could not be liable; for his statement was true, and he had not said anything which concealed the real state of affairs (*b*).

In most instances fraudulent statements are false simply in the sense that they are untrue—for instance had the defendant in the case just mentioned said that his pigs were in perfect health he would have been liable. But sometimes a statement though literally true, may purposely convey an erroneous impression; and in this case it may be actionable. For example the telling of a partial truth may be a misrepresentation of the whole truth; "if pretending to set out a report of a surveyor, you set out two passages in his report and leave out a third passage which qualifies them, that is an actual misstatement" (*c*). Further, statements need not necessarily be made in words, for acts can also mislead (*d*), and where

(*a*) We are not here concerned with "constructive" or "equitable" fraud which is the breach of a duty arising out of a fiduciary or other similar relationship between the parties: see *Nocton* v. *Lord Ashburton*, [1914] A. C. 932. Nor with the criminal aspects of the subject: *Barclays Bank, Ltd.* v. *Cole*, [1966] 3 All E. R. 948; [1967] 2 Q. B. 738—a charge of robbery is not an allegation of fraud.

(*b*) *Ward* v. *Hobbs* (1878), 4 App. Cas. 13.

(*c*) *Arkwright* v. *Newbold* (1881), 17 Ch. D. 301, 318; *per* JAMES, L.J.

(*d*) *R.* v. *Barnard* (1837), 7 C. & P. 784 (wearing cap and gown in order to convey the impression that the wearer was a member of a university).

a man takes active steps to prevent the truth from being discovered, as by covering up defects in an article for sale, this may also amount to actual misstatement. And in some circumstances mere silence too may become fraud: as where a man makes a statement and before it is acted upon he discovers either that it was untrue at the time he made it, or that though true then, it has ceased to be so since; if he fails to correct it he may be liable (*e*).

In order to be actionable the statement must be one of fact and not just an expression of opinion or a promise. But it is not always easy to distinguish between opinion and representation of fact; for to profess to hold an opinion which one does not really hold is in itself a misrepresentation of fact (*f*). Moreover a false assertion of a present intention to do something in the future may sometimes be more than a promise and amount to a misrepresentation, for the state of mind of one who makes an assertion "is as much a fact as the state of his digestion" (*g*).

2. MADE FRAUDULENTLY

The defendant's statement must have been made with fraudulent intent (*h*); and it was finally decided in the leading case of *Derry* v. *Peek* (*i*) that the common law conception of fraud is a narrow one Fraud will be established—and will only be established

> "when it is shewn that a false representation has been made (1) Knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false" (*k*).

Careless misstatement, even though made upon unreasonable grounds, will not amount to *fraud* (*l*); and if the defendant honestly believes that his statement is true he cannot be liable (*m*). No

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(*e*) See *Brownlie* v. *Campbell* (1880), 5 App. Cas. 925, 950; *per* Lord BLACKBURN.

(*f*) *Anderson* v. *Pacific Fire and Marine Insurance Co.* (1872), L. R. 7 C. P. 65, 69.

(*g*) *Edgington* v. *Fitzmaurice* (1884), 29 Ch. D. 459, 483; *per* BOWEN, L.J.

(*h*) *Tackey* v. *McBain*, [1912] A. C. 186.

(*i*) (1889), 14 App. Cas. 337 (Illustration 123).

(*k*) (1889), 14 App. Cas. at p. 374; *per* Lord HERSCHELL.

(*l*) Though, as has been explained (above, pp. 178–179) careless misstatement may now in some circumstances be actionable in negligence and under the Misrepresentation Act, 1967.

(*m*) But it seems that he may be if he uses a statement he thinks to be true for a deceitful purpose: *Taylor* v. *Ashton* (1843), 11 M. & W. 401, 415; *per* PARKE, B.

negligence however blameworthy will constitute fraud (*n*). On the other hand where the intent to deceive is present, there is no need also to establish that the defendant was actuated by a desire to benefit himself; his motive is immaterial (*o*).

ILLUSTRATION 123

In order to be actionable the defendant's statement must be fraudulent, not merely unreasonable.

Derry *v.* Peek (1889), 14 App. Cas. 337.

Appellants were directors of a tramway company. Respondent had taken shares in this company upon the faith of statements made in a prospectus to which appellants were parties to the effect that the company had Board of Trade authority for the use of steam power instead of the animal power that was then usual. In fact appellants had no such authority. *Held:* Since appellants honestly believed the statement they had made, however unreasonably, they could not be made liable in fraud (*p*).

3. INTENT THAT THE PLAINTIFF SHALL ACT UPON THE STATEMENT

The right of action is confined to the person or persons who are intended to act upon the statement. Thus for instance, since the usual object of a company prospectus is to induce people to apply for the *allotment* of shares, and not to induce them to buy shares already issued, although people who sustain damage by applying for *allotment* upon the basis of a fraudulent (*q*) prospectus can always sue, those who buy issued shares by means of similar inducement cannot do so (*r*) unless they can show that the particular prospectus in question was also intended as a persuasion to them (*s*).

But it is not necessary that the representation should be made to the plaintiff directly; it is sufficient if the representation is made

(*n*) *Le Lievre* v. *Gould*, [1893] 1 Q. B. 491; *Candler* v. *Crane, Christmas & Co.* [1951] 1 All E. R. 426; [1951] 2 K. B. 164.

(*o*) *Smith* v. *Chadwick* (1884), 9 App. Cas. 187, 201; *per* Lord BLACKBURN

(*p*) As to the liability of directors and others for statements in a prospectu under the modern law see Note at the end of this Chapter.

(*q*) Where fraud *is* present they can, of course, sue even without the aid o the Companies Act, 1948, s. 43 (3 Halsbury's Statutes (2nd Edn.) 493), an see p. 298, *post*.

(*r*) *Peek* v. *Gurney* (1873), L. R. 6 H. L. 377 (Illustration 124).

(*s*) *Andrews* v. *Mockford*, [1896] 1 Q. B. 372.

to a third person to be communicated to the plaintiff (*t*), or to be communicated to a class of person of whom the plaintiff is one, or even if it is made to the public generally with a view to its being acted on, and the plaintiff, as one of the public, acts on it and suffers damage thereby (*u*).

ILLUSTRATION 124

The plaintiff must be a person who was intended to act upon the statement.

Peek *v.* Gurney (1873), L. R. 6 H. L. 377.

Respondent company directors issued a prospectus which, to their knowledge, contained false statements. The allotment of shares having been completed, appellant bought some of them not as an original allottee, but on the market, though he made his purchase in reliance upon the prospectus; having incurred loss thereby he sued respondents. *Held:* The claim failed; appellant was not in these circumstances so connected with respondents as to be able to succeed. The consequences of the fraud only extended to the original allottees.

4. THE PLAINTIFF MUST HAVE ACTED UPON THE STATEMENT

Fraud is actionable if it deceives, not if it fails to do so. And it is therefore essential for the plaintiff to establish that he was misled by the statement and that the acted upon it (*a*). Thus if a man reads a fraudulent prospectus and thereafter applies for shares in a company he will have no cause of complaint if it appears that his judgment in making the application would not have been affected had he known the true state of affairs which the prospectus concealed (*b*). It appears, however, that it is not a defence that the plaintiff was careless in allowing himself to be deceived (*c*).

(*t*) See *Langridge* v. *Levy* (1837), 2 M. & W. 519; [1838] 4 M. & W. 337 (gun fraudulently represented to be sound sold to father for use of son).

(*u*) *Swift* v. *Winterbotham* (1873), L. R. 8 Q. B. 244, 253, cited with approval by BLACKBURN, J., in *Richardson* v. *Silvester* (1873), L. R. 9 Q. B. 34, 36.

(*a*) *Smith* v. *Chadwick* (1884), 9 App. Cas. 187.

(*b*) *Macleay* v. *Tait*, [1906] A. C. 24.

(*c*) *Redgrave* v. *Hurd* (1881), 20 Ch. D. 1. But this rule must be understood subject to the qualification that carelessness on the part of the plaintiff may in some circumstances produce a situation in which there is no fraud because the plaintiff is not in fact deceived: see *Horsfall* v. *Thomas* (1862), 1 H. & C. 90 (Illustration 125).

ILLUSTRATION 125

The plaintiff must in fact have been deceived.

Horsfall *v.* Thomas (1862), 1 H. & C. 90.

Plaintiff sued defendant for the price of a gun which he had manufactured for defendant. Defendant alleged in defence that the gun had burst, and that this was due to a defect in it which plaintiff had fraudulently concealed by putting a plug in it. The evidence showed that in fact defendant had never examined the gun. *Held:* The defence failed. "The defendant never examined the gun, and therefore it is impossible that an attempt to conceal the defect could have had any operation on his mind. . . . If the plug, which it was said was put in to conceal the defect, had never been there, his position would have been the same; for, as he did not examine the gun . . . its condition did not affect him" (*d*).

5. THE PLAINTIFF MUST HAVE SUFFERED DAMAGE BY THE DECEIT

Loss to the plaintiff is essential to success in the action, and according to the ordinary rules as to remoteness of damage, this loss must be the direct consequence of the fraud (*e*).

Having now examined the elements of liability in deceit, two further matters need to be mentioned. First, frauds in which principals and agents are concerned; secondly, statements as to credit.

In general, in fraud, as in other torts (*f*), a principal is liable for the wrongs of his servants or agents when they are acting within the scope of their employment. But fraud gives rise to special difficulties. For an *agent* may make a statement knowing it to be false while his *principal* believes it to be true; and by way of contrast, the *agent* may believe it to be true, while the *principal* knows it to be false and yet connives at the making of it (*g*). In both these kinds of circumstances the principal will be liable, since he and his servants or agents "represent but one person" (*h*).

(*d*) (1862), 1 H. & C. at p. 99; *per* BRAMWELL, B.

(*e*) See *Barry* v. *Croskey* (1861), 2 John. & H. 1, 23.

(*f*) See Part III, Chapter 1.

(*g*) *Ludgate* v. *Love* (1881), 44 L. T. 694.

(*h*) *S. Pearson & Son, Ltd.* v. *Dublin Corporation*, [1907] A. C. 351, 359 *per* Earl of HALSBURY. If *Cornfoot* v. *Fowke* (1840), 6 M. & W. 358, decided anything to the contrary it must be treated as overruled by this decision. Further, a principal will be liable for a statement made with his authority even though the authority was given after the statement was made and he believed it to be true: *Briess* v. *Woolley*, [1954] 1 All E. R. 909; [1954] A. C. 333.

Difficulty has however arisen in cases where the agent believes the statement to be true, while the principal, knowing it to be false, has *not* connived at the making of it. It seemed at one time as though the identification of principal and agent might be so far stretched as to render the principal liable even in this case (*i*); but the weight of authority is now heavily to the contrary (*k*).

By the provisions of Lord Tenterden's Act, 1828 (*l*), no action lies in respect of a fraudulent (*m*) representation as to the conduct, credit, ability or dealings of another person, made with intent to procure for him credit, money or goods, unless the representation is *in writing signed by the defendant* (*n*).

NOTE ON LIABILITY OF DIRECTORS AND PROMOTERS OF COMPANIES

It has been seen that *Derry* v. *Peek* (*o*) immediately affected the liability of such people: the effect of it was that they could not be made answerable, in the absence of *fraud*, for misrepresentations in prospectuses and it defined fraud in an extremely narrow way. This clearly exposed the public to considerable dangers and consequently the Directors' Liability Act, 1890, was passed shortly after. By that Act a new form of statutory liability was imposed by which promoters of companies were made civilly responsible for untrue statements in prospectuses without the need of proof of actual fraud. The Act is now repealed, but its provisions are re-enacted, and in some important respects extended, by the Companies Act, 1948, s. 43. In effect, directors and promoters of companies and experts who are parties to the issuing of any prospectus inviting subscriptions to the shares, debentures or debenture stock of a

(*i*) *London County Freehold and Leasehold Properties, Ltd.* v. *Berkeley Property and Investment Co., Ltd.*, [1936] 2 All E. R. 1039. Though in *Cornfoot* v. *Fowke* (1840), 6 M. & W. at p. 456, PARKE, B., stigmatized the proposition as "untenable", since both parties are in such circumstances equally innocent of intent to deceive.

(*k*) *Armstrong* v. *Strain*, [1952] 1 K. B. 232, where the later authorities are discussed. See also *Gordon Hill Trust, Ltd.* v. *Segall*, [1941] 2 All E. R. 379.

(*l*) Statute of Frauds Amendment Act, 1828, s. 6 (4 Halsbury's Statutes (2nd Edn.) 660). See *Banbury* v. *Bank of Montreal*, [1918] A. C. 626; *Bishop* v. *Balkis Consolidated Co.* (1890), 25 Q. B. D. 77; *Hirst* v. *West Riding Union Banking Co., Ltd.*, [1901] 2 K. B. 560.

(*m*) A negligent misrepresentation does not come within the relevant section: *Banbury's Case* (last note): *W. B. Anderson & Sons, Ltd.* v. *Rhodes (Liverpool), Ltd.*, [1967] 2 All E. R. 850.

(*n*) The signature must be the defendant's own: *Swift* v. *Jewsbury* (1874), L. R. 9 Q. B. 301.

(*o*) (1889), 14 App. Cas. 337.

company, are now made liable under the section, to people who subscribe on the faith of such prospectus, for *untrue statements* made herein *without reasonable grounds* (*p*). Of course, where actual fraud is established the common liability still remains.

(*p*) Section 43 of the Companies Act, 1948 (3 Halsbury's Statutes (2nd Edn.) 493), should be consulted in detail.

PART III

MISCELLANEOUS MATTERS

SUMMARY