

ROOKES v BARNARD and the RE-EMERGENCE OF JUDICIAL INTERVENTION IN INDUSTRIAL DISPUTES

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The legal events culminating in the Trade Disputes Act primarily consisted of a series of judicial decisions that effectively overturned those aspects of the trade union reforms of the 1870s which it had been thought had rendered it lawful for trade unions to organise industrial action. Whilst the most famous of these decisions was the decision of the Law Lords in the *Taff Vale* case, the main damage was done by earlier decisions – in particular *Quinn v Leatham* (1901) and *Lyons v Wilkins* (1896) – that rendered tortious the organisation of all forms of industrial action and reduced lawful picketing to a purely symbolic act. A tort is a civil wrong rather than a criminal offence, and it is an area of the common law that is made by judges rather than Parliament. The imposition of these legal liabilities was implemented through language that characterised industrial action as conspiracies to engage in law-breaking and an excess of privilege. Taken together these judgments constitute what I have called a process of legal or judicial mystification of industrial relations.

The overall effect of this mystification has been to inform public consciousness through statements by politicians and the media that various forms of industrial action are illegal, that is, contrary to the criminal law. As demonstrated by empirical research I conducted in the late 1980s sought to show, this mystification has long extended even to trade union activists. With respect to both trade unionists and the public in general, this has been particularly the case with respect to sympathetic industrial action, unofficial action unsupported by a secret ballot and so-called secondary picketing.

In the period between 1906 and World War II there was a process of judicial disengagement in industrial relations as part and parcel of a state strategy to use less coercive strategies to create a ‘responsible’ trade unionism free from industrial militancy. In the words of Winston Churchill: “It is not good for trade unions that they should be brought in contact with the courts, and it is not good for the courts... Where class issues are involved, it is impossible to pretend that the courts command the same degree of general confidence. On the contrary, they do not, and a very large number of our population has been led to the opinion that they are, unconsciously no doubt, biased.”

This process was not, of course, a smooth and consistent one – particularly given the need from the perspective of employers and the State to defeat the General Strike of 1926. Nevertheless, by the beginning of the 1950s it would have been accurate to conclude that the judges had collectively opted out of intervention in industrial disputes. In particular, as demonstrated by the decision in *Thomson v Deakin* (1951), there was a clear reluctance to create new liabilities in the law of tort that would circumvent the immunities contained in the 1906 Act. However, the increase of industrial militancy in the 1960s – particularly rank and file militancy expressed through unofficial strikes – resulted in the re-emergence of judicial intervention as heralded by the decision of the Law Lords in *Rookes v Barnard* (1964).

The way in which judicial mystification works is through a combination of restrictive interpretation, outflanking of statutory immunities by creating new forms of common law liability and using language which casts industrial action in the worst possible light. Thus in *Quinn v Leathem* threatening to organise industrial action to prevent the use of non-union labour was defined a conspiracy to injure another's business. In the words of Lord Brampton the actions of the trade union defendants constituted: "a conspiracy formed by a number of unscrupulous enemies acting under an illegal compact, together and separately...Such a conspiracy is a powerful and dangerous engine...employed by the defendants for the perpetration of organised and ruinous oppression." Anyone coming across these words out of context could reasonably assume they were describing a mafia-type organisation not a trade union.

The method employed by Brampton was both a reflection of the past and an indicator for the future in terms of facilitating and implementing judicial intervention. Indeed, the industrial relations context which generated the decision in *Rookes v Barnard* was not dissimilar to that in *Quinn v Leathem* in that the problem was one of non-union labour, albeit in this case caused by Rookes resigning from his union. The employer BOAC, in breach of a closed shop agreement with the union, failed to dismiss him. In response, two elected union representatives and a paid union official informed the company that industrial action would take place if Rookes was not dismissed. The company decided to dismiss Rookes, who then sued the union representatives and the official for damages. The wider context in which this litigation occurred is also important as had industrial action taken place it would have been both unconstitutional and unofficial and both these forms of industrial action were increasingly becoming focal points of concern on the part of state and employers in the early 1960s. Moreover, the closed shop had always attracted some controversy as an industrial relations institution, and the collectivist philosophy underlying it conflicted with judicial perceptions of individual liberty.

Quotes from judgments of all of the five Law Lords are illuminating. Essentially, they all compared threats to strike with threats to inflict violence and thus the defendants' actions could be regarded as tortious intimidation. Moreover, as in *Quinn v Leathem*, the Law Lords held that the defendants had engaged in an unlawful conspiracy. In the words of Lord Hodson: "It would be strange if threats of violence were sufficient and the more powerful weapon of a threat to strike were not...The injury and suffering caused by strike action is very often widespread as well as devastating, and a threat to strike would be expected to be certainly no less serious than a threat of violence."

To this day most trade unionists (and indeed labour lawyers) find it 'strange' that a threat to strike can be unlawful whereas the organisation of it would not be. The logic of the decision is to adopt a collective bargaining strategy that consists of calling a strike and then informing the employers why. Indeed, it was this logic which was to cause concern even amongst the senior judiciary as soon as the decision was given. The ideological consequences of portraying strike action to be at least as bad as inflicting violence are obvious, as is the resurrection of the language of conspiracy.

At the time the decision in *Rookes* was given, there was still the 'little' problem that s.3 of the Trade Disputes Act conferred immunity from liability for inducing breaches of contracts of employment. The Law Lords got around this by the time (dis)honoured

method of circumventing the statutory immunities by creating new tortious liabilities – in this instance the use of unlawful means to induce breaches of employment contracts – and then ‘discovering’ that the pre-existing immunity did not cover the new form of liability that the court had identified. For example, as Lord Devlin gleefully observed, the words of the 1906 Act covered acts of inducement, but not threats to induce. Therefore, having extended the scope of tortious intimidation to include threats to induce breaches of contract as well as threats to commit acts of violence, the statutory immunity as it then stood provided no barrier to the imposition of this new liability.

As a decision imposing a new form of liability, *Rookes v Barnard* has been of little significance since 1965 when the Trade Disputes Act was amended to extend immunity to threats to induce breaches of contract. However, the decision remains of utmost historic significance in that it heralded a return by the judges to intervention in industrial disputes and a return to the techniques of legal mystification as the method of intervention. Initially, the judges themselves including most notably Lord Denning, given his anti-union decisions in the late 1960s and 1970s, displayed concern about re-entering the arena of industrial relations. Thus, in the immediate aftermath of *Rookes v Barnard*, Denning in his judgments in the cases of *Stratford v Lindley* (1964) & *Morgan v Fry* (1968) spoke in terms of the need to recognise the right to strike. He was therefore of the view that decision in *Rookes v Barnard* should be limited to its facts.

However, by the end of the 1960s Denning was at the forefront of decisions that abandoned the caution the judges had exercised in *Thomson v Deakin*. In the case of *Torquay Hotel v Cousins* (1969), under Denning’s leadership, the Court of Appeal significantly expanded the circumstances in which interference with the performance of commercial contracts is unlawful, and, into the bargain, created a new tort of interference with trade. To this day, the precise nature of this latter tort remains uncertain, but there can be no doubts as to its existence as a basis for further expanding the boundaries of legal liability. It is these torts that render unlawful the organisation of any solidarity industrial action (though liability is imposed as a result the total withdrawal of immunity – other than in the context of lawful picketing – that was originally effected by the Employment Act of 1990). It was also Denning who, in the 1970s, took the lead in re-defining solidarity action as secondary action and who coined the term ‘secondary picketing.’

Denning also took the lead in following the example of Lord Brampton in characterising the system of statutory immunities as privileges to break the law. In the case of *Express Newspapers v McShane* (1979) in referring to the “tremendous coercive power vested in the leaders of the union” he proclaimed: “...when Parliament granted immunities to the leader of trade unions, it did not give them any rights, it did not give them a right to break the law or to do wrong by inducing people to break contracts. It only gave them immunity if they did...the words of the statute are not to be construed widely so as to give unlimited immunity to lawbreakers.”

This statement restored to centre-stage the myth that that the system of immunities was never intended as a mechanism for granting legal rights to strike, but should be perceived as a system that protected law-breakers from legal liability. Moreover, it is

interesting to note that this statement, coming as it did after the failure of the Social Contract and the beginnings of the 'Winter of Discontent', now propagated the idea that the 'privileges' were possessed not by the union membership as a collective whole but by the union's leaders. This, in itself, was part and parcel of the mystification that industrial action was something that union leaders imposed on their members rather than being the product of the members' own wishes. The Law Lords did reverse the decisions made by Denning during this period. However, they too castigated the immunities as privileges to break the law which 'stuck in their Lordship's gorges'. Moreover, their suggestions as to how the newly elected Tory government should change the law were very much in line with the sentiments of Denning's judgments, and were clearly reproduced in the first piece of anti-union legislation of the Thatcher government – the Employment Act of 1980.

The fundamental significance of the prohibition of sympathetic industrial action and so-called secondary picketing was shown most dramatically and tragically by the defeat of the miners in 1985. It is also at the heart of the ongoing weakness of British trade unions when it comes to the organisation of industrial action that is both effective and lawful. The long-term consequence of legal mystification in this context is shown clearly by the media coverage last summer of the Gate Gourmet dispute, where once again the taking of solidarity action was castigated in the media for its illegal nature. In fact, it is the law itself that is at fault given the requirements of international law, as contained in the Conventions of the ILO, that British law should provide for legal rights to organise and take sympathetic industrial action.

Therefore it is my belief that unravelling the process of legal mystification is an important element of any campaign to secure the freedom of trade unions to organise and their members to take industrial action as envisaged by the framers of the TDA. However, such reform must be in the form of positive rights rather than a return to the method, last employed in 1974, of re-widening the scope of the statutory immunities. No system of law, be it a system of rights or a system of immunities, can prevent judges from using their creativity to impose legal liability in contexts in which they regard this as appropriate. Be this a matter of class instinct or legal philosophy judges have been, and are likely to remain, hostile to trade unionism. The historic problem with the immunities has been that, as the common law is left intact, judges are able to attack legislation as granting privileges to break the law rather than guaranteeing rights to strike. In recognising the hugely progressive role played by the TDA historically, we must understand that its method of creating rights through the provision of immunities has not served the trade union movement well.

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Anecdotally, it is perhaps interesting to note how legal mystification can percolate into the public consciousness through popular culture. For example, in a recent episode of Coronation Street non-unionised workers in the local sweatshop went on strike when one of the workers was dismissed. The strikers were then told by the employer that they were acting illegally because they had not had a secret ballot and had not given seven days notice before going on strike. These legal controls on strike action of course only apply to trade unions not workers – be they union members or, as in the case of the ‘Corrie Strikers’, have no union to represent them. However, there are now millions of people in the country who believe (or have had such a belief reinforced), wrongly, that industrial action is illegal simply because of the absence of a prior ballot.