Free Life The Journal of the Libertarian Alliance
Vol. 2 : No.1 Winter 1981 - *Article 4 of 7*

A new look at trade union immunities

Graham Smith

The question of trade union immunities has arrived on the political scene with a vengeance. The present Conservative government issued two Working Papers largely devoted to the subject, leading to an Employment Act which radically altered the law on immunities, as well as the recent Green Paper. The Select Committee on Employment has chosen immunities as a special topic of investigation. The courts entered the fray with a series of controversial decisions in the *McShane*, *Duport* Steel and *United Biscuits* cases. Suddenly trade union immunity is a topic on which no Member of Parliament can afford to be without an opinion.

It was not always so. In the mid-seventies when organisations such as The Freedom Association (then the National Association for Freedom) took the lead in criticising trade union privilege there was little general awareness that immunities even existed, let alone of what their effects were.

Growing criticism by academics, notably some of those associated with the Institute of Economic Affairs, and the widening of trade union immunity in the 1976 Trade Union and Labour Relations (Amendment) Act, leading to the systematic unionisation of the advertising industry by the print union SLADE, focussed attention on trade union immunity. The related but separate question of the law of picketing was brought into the political arena by the violent mass picketing outside the gates of Grunwick.

A MORE SUBTLE APPROACH

It is instructive to compare the current Employment Act with the 1971 Industrial Relations Act. That sorry piece of legislation, comprising 170 sections and nine schedules, sought to impose a complex regulatory scheme on trade unions, laying down in the minutest detail how they ought and ought not to behave. The Act was an attempt by the state to administer the affairs and activities of trade unions. Because this was so obvious to trade unionists, the trade union leaders were able to muster massive opposition to the Act, and boycott it by refusing to register.

The Employment Act is much more subtle. Instead of attempting to regulate the affairs of trade unions, it alters the extent to which trade unions may harm other individuals by restricting union immunities. Unions remain for the most part private organisations able to act as they wish within specified limits, though there are some regulatory aspects of the Act, particularly in relation to the closed shop and state funding of secret ballots. The Employment Act is closer to a libertarian approach than the Industrial Relations Act. It asks the right question: where should be the boundary line beyond which a trade union must not step? But has the Act found the right answer?

SHOULD UNIONS BE ILLEGAL?

Trade unions and those involved in trade disputes are privileged. They are immune from laws which apply elsewhere. Libertarians oppose privilege, but we cannot assume that just because immunities exist they should be abolished. It may just be that the laws from which some people are exempt should not exist in the first place, so that the immunities should extend to all and thus cease to be privileges.

If all trade union immunities were abolished the entire trade union movement would become illegal. This is an indication that some of the common law from which trade unions are exempt may not be justifiable. So the simple call for abolition of union privileges made by Hayek and others needs to be carefully examined. This point was touched on by Professor David Bentley in a letter to *The Times* in 1977, replying to Hayek:

"What Professor Hayek should be questioning is the immunity of unions and their members when they engage in industrial action. But this is merely a statutory extension of the common law right of businessmen to wage economic warfare

(singly or in combination) against competitors. Recognition of such combinations was afforded by the famous *Mogul* decision in the 1890s; that the common law would eventually have accepted a like right for workmen seems certain. The Liberals got in first but it is laissez-faire economics that is the real culprit. This may of course be less palatable for Professor Hayek than for some critics of the way we run things in Britain."

Bentley is saying here that immunity is a logical application of economic liberalism, which in general Hayek approves. Bentley takes this to reflect badly on liberalism, but his point could be interpreted differently. Perhaps consistent *laissez-faire* liberals should defend trade union immunities.

So what are these immunities? The important immunities are those given to a person acting "in contemplation or furtherance of a trade dispute". These are exemptions from the crime of conspiracy, the torts of conspiracy, intimidation and inducing breach of contract and the doctrine of restraint of trade.

A tort is the basic common law cause of action where one individual has unlawfully harmed another. The action is the sole concern of the two parties. A crime is a nationalised tort, where the state considers the wrong to be of such gravity that it must step in to ensure that the wrongdoer receives just punishment.

A doctrine, such as that of restraint of trade, is not a cause of action. You cannot sue someone for acting in restraint of trade. But if someone sues you for breach of contract and you can convince the judge that the contract is in restraint of trade, he can declare the contract void so that your opponent's action will fail.

RESTRAINT OF TRADE

The doctrine of restraint of trade enables a court to declare void a contract agreed between two or more individuals if the court decides that the agreement is an unreasonable restriction on the liberty of an individual to trade as he chooses. The doctrine is a species of judicial interference with freedom of contract. Its significance for trade unions is that if it were not for immunity the courts would declare trade union rules void as being in unreasonable restraint of trade. In 1867 a court held that a trade union's registration under the Friendly Societies Act was invalid because its objects were in restraint of trade. Twelve years earlier a court had struck down an employers' agreement requiring members to abide by majority decisions as to wages and hours. Part of the reason for this judgement seems to have been that to have upheld the employers' association rules would have meant upholding trade union rules as well. The court assumed that trade union rules were unenforceable as being in restraint of trade. The 1871 Trade Union Act provided that trade union objects were not to be deemed illegal or void merely because they were in restraint of trade. The Act thus reversed the common law rule. The doctrine of restraint of trade, enforced by the courts, suffers from the same flaw as anti-trust action pursued by the Executive. It tends to be arbitrary in application, dependent upon the prevailing political and economic beliefs of the judges who enforce it.

The application of the doctrine has varied considerably over the years. In the highly regulated Elizabethan economy, all restraints of trade were held void. By the nineteenth century it had become extremely difficult, except in contracts restraining employees or sellers of a business from future competition, to claim restraint of trade. Since the turn of the century the pendulum has swung back to greater willingness to invoke the doctrine.

People generally in favour of the free market often support restraint of trade doctrines on the ground that complete freedom of contract destroys competition and threatens freedom of trade. Yet it is far from clear that this is so. A greater threat to freedom of trade is state intervention in the economy. Indeed, in many of the cases in which restraint of trade has been invoked, the restrictive practice in question has arisen in circumstances of state regulation. The doctrine of restraint of trade negates freedom of contract. In many of its applications it is an attempt to put right the harmful effects of other state intervention. The only sure remedy in such cases is to remove the original intervention. There must

be considerable doubt whether the doctrine of restraint of trade is justifiable.

TORT OF CONSPIRACY

The justification for the tort of conspiracy is equally doubtful. The tort is intended to provide a means of redress for harm done by a group of people which any one person alone could not do. If conspiracy were a mere procedural device to enable a group of people to be sued as a group, there could be no objection to it. But conspiracy is a substantive cause of action, the wrong deriving from the fact of the combination.

Conspiracy exists in two-forms. One is conspiracy to achieve lawful ends by unlawful means. There is no immunity from this type of conspiracy. The other is conspiracy to achieve unlawful ends by lawful means, from which there is immunity.

There can be little objection to the first type of conspiracy from which there is no immunity, because the use of unlawful means would be actionable in itself. Here the conspiracy element is akin to a mere procedural device. The second type of conspiracy law is, however, questionable. The essence of this tort is the motive or purpose of the person in question. It enables judges to import questions of public interest into the law, and to declare otherwise lawful action to be unlawful because the law does not approve of the end to which the action is directed. It seems strange to hold unlawful a conspiracy to do something which is itself non-invasive and consequently ought to be lawful.

CRIME OF CONSPIRACY

The same objections apply to aspects of the crime of conspiracy, which is based on the same principles and was pioneered by the Court of Star Chamber. On one occasion the courts convicted a person for conspiracy to trespass. Trespass is a tort. It is not a criminal offence. But conspiracy to trespass apparently is criminal. Similarly if trade union immunity were abolished, the entire trade union movement could conceivably be held to be a criminal conspiracy in restraint of trade, even though restraint of trade is not even a tort, let alone a crime.

TORT OF INTIMIDATION

The tort of intimidation is more difficult to assess. Its essence is a threat to do an unlawful act so as intentionally to compel someone to do some act whereby he suffers loss. Or, in a three-party situation, similarly to intimidate a third party so that he does something lawful which causes loss to the plaintiff. The problem arises when you consider what constitutes an unlawful act. A threat of violence may be an unlawful act. But the law goes beyond threats of violence. In the case which led to limited immunity from intimidation being granted in trade disputes, the court decided that a threat to break a contract was an unlawful act. In the case in question a trade union threatened to strike in defiance of a 'no-strike' agreement in order to persuade the employer to dismiss a non-unionist. The non-unionist was granted damages against the union official concerned.

The court was saying in effect that because the law will enforce a contract if a party complains that the other party has broken it, there is a general principle of public policy that contracts ought not to be broken, and that to break a contract is unlawful in a wider sense than merely giving the other party a remedy. This extension of breach of contract is justifiable only if there is an analogy between threatening violence and threatening to break an agreement. If there is none, a third party should not be able to sue as a result of one party to a contract threatening to break it.

BREACH OF CONTRACT

The tort of inducing breach of contract is the most important tort from which trade unionists are immune. It is this tort which employers used to sue trade unionists in the spate of industrial relations litigation in 1978 and 1979.

Whilst the ramifications of this branch of the law are now complex, they derive from one simple case, decided in 1853, *Lumley v Gye*. Mr Lumley had contracted Miss Wagner to sing exclusively in his theatre. Mr Gye then tried to persuade Miss Wagner by offering her money to break her contract and refuse to perform. The court held that Lumley could

obtain .remedy against Gye. It was said that Gye had induced Wagner to break her contract, causing harm to Lumley. Mr Lumley could have sued Miss Wagner for damages if he had so wished. This case established that he could also sue Mr Gye. But as between Lumley and Gye there was no coercion and no contract. All the parties' actions were voluntary. Lumley had a perfectly good remedy against Wagner. It is difficult to see then why Lumley should have had a remedy against Gye. It might have been different if Gye had used force, for instance kidnapping Wagner. Then Lumley ought to have had a remedy against Wagner and Wagner against Gye. But Wagner was entirely free to choose whether or not to break her contract with Lumley. It seems arguable that Lumley's only remedy should have been against Wagner.

The intrigues of Lumley, Wagner and Gye may seem a little remote from modern industrial relations. But they are highly relevant. For as in that case, the voluntary act of offering money was enough to make Gye liable, so today, acts of withdrawing labour or refusing to handle goods may make employees and union officials liable for inducing breaches of, for instance, commercial contracts entered into by employers. If the Lumley and Gye case was wrongly decided and if withdrawal of labour and blacking are voluntary acts, then the whole edifice of inducing breach of contract comes crashing to the ground.

The major question is whether strikes and blacking are voluntary acts. They are certainly breaches of contract for which the employees in question could be dismissed. But that does not mean that they are coercive acts in the sense that assault or kidnap are. Strikes and blacking can sometimes look very coercive, mainly through the enormous losses which they can cause. Hayek sees some forms of trade union activity as coercive. But essentially strikes and blacking are games of bluff between employees and employers. They contain no element of physical coercion against person or property. They can therefore be seen as voluntary actions for which the only available remedies should be those relating to breach of the employment contracts involved.

Drawing together the discussion of the various immunities, it can be seen that there are arguments in favour of all the major trades dispute immunities. The purpose of this article is to air these arguments for discussion. If they are more compelling than the arguments against immunities there will be considerable implications for trade union policy. Measures restricting trade union immunities would have to be seen as unjustifiable.

We have not touched in this article on the important question of how far legislation other than trades union immunities tends to give unions near-monopoly power. Undoubtedly there is much intervention which, intentionally or not, puts trade unions in a privileged position and ought to be abolished. It is possible that such intervention is much more important to the privileged economic position of trade unions than are the immunities.