# GREGORY v. DUKE OF BRUNSWICK RE-EXAMINED

" The question whether there is such a tort as conspiracy is essentially a modern question." So wrote Holdsworth in 1925.[1] He was writing immediately after the decision in *Sorrell* v. *Smith*[2] but even in the light of that case it would seem that he still had his doubts whether there was such a tort. To-day it is generally assumed that there is a tort of conspiracy though it is still extremely difficult to find a straightforward authority to that effect. The tort of conspiracy posits a state of affairs where two or more persons are held to be liable for doing in combination an act which would not be tortious if done by one. A clear decision to that effect is hard to come by. The leading cases which are supposed to hold that there is a tort of conspiracy are all cases where it has been held that *assuming there is a tort of conspiracy* the defendants have a defence that they are acting in furtherance of legitimate interests.[3]

However, assuming there is a tort of conspiracy we need to give it a pedigree. When was it born and who were the parents? Unfortunately no indisputable birth certificate is in sight. It looks as if it had been conceived in the *Mogul* case[4] and finally delivered in *Quinn* v. *Leathem*,[5] but there are some who would put it later. One thing is clear: it cannot be fathered on the old action on the case for conspiracy. This action was solely concerned with conspiracies to pervert legal process and by the seventeenth century it had undergone a metamorphosis into the modern action for malicious prosecution with all traces of the element of conspiracy extinct.

It is presumably a desire to give this modern tort of conspiracy a decent ancestry which leads judges and writers to refer to the early nineteenth century case of *Gregory* v. *Duke of Brunswick*.[6] The purpose of this article is to examine this case in detail and to show that it provides no evidence at all for the existence of a tort of conspiracy in 1843. Indeed, to refer to *Gregory* v. *Duke of Brunswick* in relation to the modern cases immediately provokes a query as to what happened to the tort between 1843 and the cases at the end of the century. But first let us look at some of those who have prayed in aid *Gregory* v. *Duke of Brunswick*.

Jenks' *Digest of Civil Law* and Odgers on the *Common Law* are fair examples of general works which straightforwardly accept the case as an early instance of the action for conspiracy. Jenks' *Digest*[7] cites it

1. *H.E.L.*, viii, 392.
2. [1925] A.C. 700.
3. *Harris Tweed* case [1942] A.C. 435; *Sorrell* v. *Smith (supra); Thomson Ltd.* v. *Deakin* [1952] Ch. 646.
4. [1892] A.C. 25.
5. [1901] A.C. 495.
6. (1843). For citations see note 25, *post.*
7. 4th ed., 451, 452. This section is by Sir John Miles, revised by Winfield.

twice : once as an early example and once as specific authority for the proposition that a combination, not amounting to a criminal conspiracy, with the design of causing harm gives a cause of action. Odgers[8] cites it as authority for the existence of the tort though he points out that "the action failed because the plaintiff failed to satisfy the jury that in fact there was a conspiracy." Street, [9] after defining the tort of conspiracy, goes on to give the various forms which an actionable conspiracy may take and includes that "of members of a theatre audience to hiss an actor off the stage." Halsbury's *Laws of England* (Hailsham edition)[10] cites the case without comment as an authority for the proposition that there is a tort of conspiracy. Charlesworth [11] is even more positive, for he says: "The Court held that the plaintiff's declaration alleging conspiracy was a good one,[12] and consequently the case is direct authority in favour of the action of conspiracy."

On the other hand some writers have been a little suspicious of the case. Clerk and Lindsell[13] cite the case as the earliest in which the tort of conspiracy appears, but cautiously add that it is "susceptible of other explanations." Pollock [14] approached the case with great caution: he appreciated that the case did not directly raise the question whether conspiracy was of itself a cause of action, and assumes that it was treated as evidence of malice. Pollock's view is equally clearly shown by a characteristic footnote to an article by Sarat Chandra Basak in the *Law Quarterly Review.*[15] The author of the article wrote: "The case (sc. *Gregory* v. *Duke of Brunswick)* was treated as one of conspiracy." This statement earned a footnote: "I cannot agree to this — F.P."

The most pertinent comment on *Gregory* v. *Duke of Brunswick* is to be found in Ball's *Leading Cases on the Law of Torts.*[16] Ball's thesis was to deny, as was asserted by some writers of the time, that every malicious act causing damage was actionable: he thought instead that there was a small list of torts in which the gist of the action was malice, and one of these was interference in a man's trade. He therefore asserts that conspiracy in itself, however malicious, is not actionable unless there is an overt act which is otherwise tortious. He explains *Gregory* v. *Duke*

8. 3rd ed., vol. 1, p. 641.
9. *Law of Torts*, p. 366.
10. Vol. 32, p. 522. The author of this section was Sir Henry Slesser.
11. 36 *L.Q.R.* 40.
12. It will be shown subsequently that this statement is quite contrary to the facts.
13. *Law of Torts*, 8th ed., p. 22.
14. *Law of Torts*, 15th ed., p. 241.
15. 27 *L.Q.R.* at p. 306.
16. Published 1884: pp. 158, 164. This book, which owes much to Bigelow's book, is rarely referred to to-day, but it has considerable merits. It preceded Pollock on *Torts* by four years, and was the first attempt in England to tackle the subject scientifically.

*of Brunswick* in this way: it is a distinct tort maliciously to interfere with another's trade or occupation,[17] and though it would be impossible in the case of an isolated act of hissing by one spectator to prove malice, yet "if the hissing or hooting of a single individual were shown from its continuousness or loudness, or in any other way, to amount to a malicious interference with the profession of an actor, there can be little doubt that such conduct would be held to be actionable."

When we turn to the law reports there is ample support for the belief that *Gregory* v. *Duke of Brunswick* is, if not the *fons et origo*, at least a very early example of an actionable conspiracy. Yet it is noticeable that this belief was non-existent for nearly fifty years after the case was decided. Up to 1889 if *Gregory* v. *Duke of Brunswick* was cited at all it was cited on the niceties relating to *venire de novo* and the effects on costs.[18]

The *Mogul* case[19] is the first time we find it referred to as a tort case[20] when Bowen L.J. referred to "the intentional procurement of a violation of private rights" and instanced as an example "the obstruction of actors on the stage by preconcerted hissing" for which he cited *Gregory* v. *Duke of Brunswick.* But Bowen L.J. did not mention conspiracy. As an authority on conspiracy *Gregory* v. *Duke of Brunswick* is first cited in *Temperton* v. *Russell*[21] where Lopes L.J. seemed to regard it as depending on conspiracy. On the other hand in the same case Lord Esher merely regarded it as a case of malicious interference without any implication that it depended on conspiracy.[22]

It is in *Quinn* v. *Leathem*[23] that the first positive statement appears. Lord Macnaghten says: "Does a conspiracy to injure, resulting in damage, give rise to civil liability? It seems to me that there is authority for that proposition... *Gregory* v. *Duke of Brunswick* is one authority and there are others." And in the *Harris Tweed* case[24] Lord Wright assumes without question that *Gregory* v. *Duke of Brunswick* is a clear example of a conspiracy case.

Before we proceed to examine the case in detail it should be observed that it was an extensively reported case. Most of those who have cited

17. The *pre-Allen* v. *Flood* view. He rests this view on *Keble* v. *Hickeringell (infra).*
18. See *Campbell* v. *R.* (1874) 11 Q.B. 799; *Pollitt* v. *Forrest* (1847) 11 Q.B. 949; Scott v. *De Richebourg* (1851) 11 C.B. 447; *Cotterell* v. *Jones* (1851) 21 L.J.C.P. 2.
19. (1889) 23 Q.B.D. at p. 614.
20. Apart from *Henwood* v. *Harrison* (1872) L.R. 7 C.P. 606, where it is cited obiter in a libel case as an instance of fair comment.
21. [1893] 1 Q.B. at p. 731.
22. *Ibid.*, p. 728.
23. [1901] A.C. at pp. 510-511.
24. [1942] A.C. at p. 478.

the case in the courts or in print have contented themselves with a reference to one or other of the reports in Manning and Granger. To get the complete picture reference should be made to all reports, including collaterals, at all stages.[25] Also, before we consider the course of the litigation, a word about the *dramatis personae.* The plaintiff, Barnard Gregory, was a highly successful journalist, and his success was not surprising in view of his professional methods. He founded a paper, 'The Satirist,' which specialised in digging up the less reputable events, real or imagined, in the lives of public figures. When the defamatory script was ready for publication it was sent to the victim with an intimation that it was about to be published unless the victim chose to pay for its suppression. Either way Barnard Gregory prospered: he collected the blackmail money, or published the racy details and saw the circulation figures of 'The Satirist' soar.[26] On the front page of his paper Gregory had published his manifesto: "Satire is my weapon. I was born a critic, and my nurse recorded that I hissed as soon as I saw light." It is odd that this hissing babe should have grown up to complain of what must have been the most sustained demonstration of hissing ever recorded.

Charles-Frederick, Duke of Brunswick, succeeded his father who fell at Quatre-Bras in 1815. He was very rich and very incompetent, and in 1830 after a revolution in Brunswick the German diet declared him incapable and he retired to England which he hoped to use as a base for a diplomatic offensive which would recover his dukedom. In 1841 he joined the list of Gregory's victims but he was not one to suffer silently under attack. He immediately took proceedings against Gregory for criminal libel and the defendant was sentenced to six months' imprisonment. But Gregory, who had been more or less continually engaged in the courts over a period of sixteen years, knew all the intricacies of the law and practice relating to libel and by judicious delaying tactics he was able to stave off the imprisonment for nine years.

H. W. Vallance was the Duke's attorney, but quite apart from a professional interest in the Duke's affairs he seems to have held strong opinions about Barnard Gregory, and it was because he went beyond the function of an attorney and joined in the scheme to ruin Gregory that he appears in the action as a co-defendant.

Gregory was more than a mere vulgar scribbler. Those who did not come under his lash spoke of him as a quiet and refined person. He was also an amateur actor of merit, and some regarded him as the equal of most professionals. But, as everyone knows, any actor regards his career as incomplete until he has satisfied the great ambition — to play

25 The case is reported at 6 M. & G. 205, 1 C. & K. 24, 6 M. & G. 953, 7 Scott (N.R.) 972, 2 L.T. (O.S.) 188, 13 L.J.C.P. 34, 3 C.B. 481 and 2 H.L.C. 415.

26. Its circulation was 10,000, which is quite substantial when compared with The Times' circulation at this period of something under 30,000.

Hamlet. And as Gregory was not one to do things in a small way he decided to play Hamlet in the best possible arena — namely, at Covent Garden. How he induced Bunn, the manager of Covent Garden, to stage the show is not known for certain. Bunn was a very astute manager, with such tragedians as Macready and Keen at his call, and he must have sensed trouble when Gregory proposed to strut on to the stage of London's most fashionable theatre. But we know that Bunn had gone bankrupt a few months previously, and it may well be that Gregory knew of some discreditable feature which would give him the opportunity of applying the usual pressure.

The opening night — and as it proved the closing night — was on February 13,1843. The two defendants, the Duke and Vallance, occupied a prominent position in one of the stage boxes in a crowded house. As soon as Hamlet made his appearance pandemonium broke out. In the subsequent proceedings Gregory claimed that 200 were suborned to take part in the demonstration, but contemporary accounts state that the whole audience joined in the tumult. It seems that the averment in the declaration that these persons did " hoot, hiss, groan and yell, and make a great noise, outcry, uproar and riot" was not the ordinary exaggerated language of the pleaders of that time. On the other hand the noise cannot have been continuous, for at one stage Vallance came to the front of his box and addressed the audience to the effect that Gregory was "unfit to appear before the mothers, wives and daughters of England."

Gregory took swift action. He must have issued his writ forthwith for the pleadings were delivered so speedily that the first hearing came before the Court of Common Pleas on May 31, 1843.[27] This was the hearing of the plaintiff's special demurrer.

The declaration averred that the two defendants, the Duke and Vallance, together with other persons whose names were unknown, "contriving and maliciously intending to injure and aggrieve the plaintiff...did, amongst themselves, conspire, combine, confederate, and agree together" to prevent the performance; that the defendants "in pursuance of, and according to the said conspiracy...hired and engaged 200 persons...to hoot, hiss, yell, and groan;" and that the defendants and the 200 did hoot, hiss, yell and groan.

The defendants' pleading took the form of four pleas.[28] The first was to plead the general issue of not guilty. The second and third pleas denied as to different parts of the declaration that the plaintiff was about to use the profession of actor for profit. The fourth plea, which is the important one for our purposes, pleaded that as to so much of the

27. 6 M. & G. 205.

28. The fullest account of the defendants' pleas is to be found at 1 C. & K. 26.

grievances as related to the hooting, hissing, etc., the plaintiff was the proprietor of 'The Satirist' which published indecent and lewd articles and libels, that the plaintiff published libels and was a common libeller and defamer for hire, that the plaintiff was a blackmailer, that the plaintiff's appearance on the stage was a scandal, nuisance and outrage, and that worthy, modest and respectable persons would be kept away from the theatre. "Wherefore the defendants...did then, in order to compel the plaintiff to desist and forbear from appearing on the said stage...and to prevent, so far as in them lay, the said scandal, nuisance and outrage, a little hoot, hiss, groan and yell at the plaintiff...as lawfully they might."

The plaintiff demurred to the fourth plea, and the defendants joined in the demurrer. The plaintiff's case on the demurrer was that the declaration had averred a conspiracy and a hooting, etc. in pursuance thereof, whereas the fourth plea purported to justify only the hooting, etc., and said no word about the conspiracy. It is obvious that this plea was formally bad. If a plaintiff avers A and B, a plea which purports to be a confession and avoidance must confess and avoid both A and B. In this case the fourth plea did not deal with the averment of conspiracy and the court had little difficulty in sustaining the demurrer. In consequence the plaintiff obtained judgment on the fourth plea, but an enquiry as to damages was stayed pending the trial on the other issues.

The trial came on three weeks later before Tindal C.J.[29] The line taken by the defence was that the character of the plaintiff was so notorious that the uproar in the theatre had been the spontaneous expression of disgust by the audience and not induced by the defendants, and for that purpose they unsuccessfully sought to put in evidence copies of "The Satirist' containing some of the more objectionable libels. However, the defendants achieved their object another way. As is well known, a party who demurs admits the facts in the pleading to which he demurs, and in demurring to the fourth plea Barnard Gregory had admitted that he was a common libeller, defamer for hire and a blackmailer.

In his summing up Tindal C.J. told the jury that the law on the subject lay within a narrow compass. Theatre audiences had a right to express "their free and unbiassed opinions," but at the same time "parties have no right to go to a theatre by a preconcerted plan to make such a noise that an actor, without any judgment being formed on his performance, should be driven from the stage." The jury found for the defendants.

29. 1 C. & K. 24. It is a striking commentary on the supposed dilatoriness of litigation in the unreformed courts of the first part of the nineteenth century that in this case the pleadings were closed, the demurrer heard and the case tried within five months of the events complained of.

In the next term the plaintiff moved for a new trial on the ground of misdirection, and also for a *venire de novo* on the ground that the jury ought to have assessed damages on that part of the record to which the demurrer applied.[30] This latter point was dealt with very shortly by the court — perhaps too shortly. The judges seem to have regarded it as technically a good point, but as the jury had found for the defendants on the general issue "the court is at no loss as to the judgment which they ought to pronounce on the whole record." On the other hand the record had already been drawn up to include the proceedings on demurrer, and that record stated: "Wherefore the said plaintiff ought to recover his damages on the occasion of the premises..." The plaintiff's demand for a *venire de novo* does not concern us here. It branched off as a distinct piece of litigation and eventually arrived in the House of Lords.[31]

The complaint as to misdirection was that the Lord Chief Justice at the trial had not directed the jury that it was open to them to find a verdict against *one* defendant only: on the contrary he had told them that unless there was a combination or conspiracy they ought to find for the defendants. Serjeant Shee for the plaintiff argued that "such an action as the present, though commonly called an action for conspiracy, was in reality an action for tort, and would lie though only one was guilty." [32] Tindal C.J. appears to have admitted that he may not have given a clear direction on the possibility of finding against one defendant only, but he was "following that which had been chalked out by the plaintiff's counsel."

In other words the plaintiff was now denying that the gist of his action was conspiracy. And the court agreed with him! But they took the view that as he had elected to base his case on a de facto conspiracy he could not now turn round and complain that the jury had not been invited to consider a case not based on conspiracy. Coltman J., delivering the judgment of the court, said: "My brothers Erskine and Maule and I [33] are of opinion that, after deliberately making this election, he is not entitled to come to the court and apply for a new trial on the ground that the Lord Chief Justice did not make a case for the jury which his counsel had properly declined to make."

Coltman J. went on to say that as a matter of law on the declaration as framed one defendant might be convicted though the other was

30. 6 M. & G. 953.
31. For the later stages of this litigation see 3 C.B. 481 and 2 H.L.C. 415.
32. In the report at 13 L.J.C.P. at p. 36 Serjeant Shee for the plaintiff is reported as saying: "The whole of the declaration relating to the conspiracy might have been left out: the gist of the action is the making of a disturbance in the theatre, and thereby driving the plaintiff from the stage."
33. Cresswell J. was apparently not present and Tindal C.J., though present, refrained from taking part in the judgment in view of the fact that his direction had been called in question.

acquitted but then he pointed out his evidential difficulty. The act of hissing in a theatre is prima facie a lawful act, and "even if it should be conceded that such an act, though done without concert with others, if done from a malicious motive, might furnish a ground of action, yet it would be very difficult to infer such a motive from the insulated acts of one person unconnected with others."

Enough has now been said to put *Gregory* v. *Duke of Brunswick* in the right perspective. The plaintiff in his declaration certainly framed his case as one of conspiracy. Whether the declaration was a good declaration as pleaded did not need to be considered by the court. It was suggested in argument that exception might have been taken to the declaration if notice had been given.[34] The ruling at the first hearing on the special demurrer does not support a case for there being a tort of conspiracy. It merely held that if a plaintiff avers a conspiracy a plea of confession and avoidance must answer the averment. At the trial the plaintiff set out to prove a conspiracy in fact. The fact that the plaintiff failed to gain a verdict shows nothing. The verdict was probably based on nothing more substantial than that the jury had no use for Gregory. The motion for a new trial merely shows that a plaintiff who has failed at the first trial cannot have a second trial for the purpose of trying out a different set of tactics.

There remain two points to be considered. Firstly, what would have happened if the plaintiff had succeeded in obtaining a verdict at the trial? Would the defendants have moved in arrest of judgment and then taken exception to the declaration? It would at once have solved the problem we are concerned with if the court had been required to rule on the validity of a declaration alleging a conspiracy to hiss. But even in those circumstances the exact point we are seeking might have escaped decision for the declaration averred malice as well as conspiracy. And this leads to the other point to be considered. Would the court in 1843 have held that a malicious hissing by one person did not constitute a tort?

The whole tenor of the case gives colour to the view that the judges in 1843 were satisfied that a proved malicious hissing by one person was a tort, and this view of the case was approved by Fitzgibbon L.J. in the Irish case of *Sweeney* v. *Coote*.[35] In that case in the course of argument Ronan K.C. said: "*Gregory* v. *Duke of Brunswick* clearly lays down that acts which would be lawful when committed by each individual separately become unlawful when there is a prior concert of persons to do them..." In his judgment Fitzgibbon L.J. answered: [36] "That case *(Gregory* v. *Duke of Brunswick)* did not decide that an individual can maliciously interfere with the performance of an actor, thereby causing pecuniary loss to him, and not be answerable."

34. 6 M. & G. at p. 218.
35. [1906] 1 I.R. 51.
36. *Ibid.*, 109,

To hoot and hiss an actor without more is clearly no tort. Actors, like artists and writers, submit their performances to the judgment of the public. They hope for cheers, but they cannot complain if they get hoots instead. To applaud or to hoot in a theatre is the individual's privilege of expressing his pleasure or displeasure at the performance. On the other hand such a privilege might well be held to be negatived by the presence of malice. Whether in the light of *Bradford Corporation* v. *Pickles*[37] and *Allen* v. *Flood*[38] such a proposition could be sustained to-day is questionable, but there is little doubt that in 1843 the court would not have held that one person could maliciously ruin a performance by malicious hooting. *Keble* v. *Hickeringell*[39] would have been sufficient authority for that proposition. It will be recollected that in that case the court held that a defendant who maliciously shot at wild duck in order to prevent them entering the plaintiff's decoy was held liable. Lord Holt giving judgment said: "If he had occasion to shoot, it would have been one thing; but to shoot on purpose to damage is another thing, and a wrong."

The proper interpretation of *Gregory* v. *Duke of Brunswick* is therefore this. To hoot as a spontaneous expression of one's judgment on a performance is not unlawful. To hoot as an expression of malevolence towards an actor for reasons unconnected with the performance is actionable. For two or more to conspire to hoot is clear evidence that the subsequent hooting is not the spontaneous expression of a judgment but the result of a pre-arranged demonstration of malevolence. Each conspirator is liable, not because he conspired, but because he has proved his malice. As Lord Holt might have said: "If he had occasion to hoot it would have been one thing, but to hoot on purpose to damage is another thing, and a wrong."

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37. [1895] A.C. 587.
38. [1898] A.C. 1.
39. (1705) Holt 14, 17, 19; 3 Salk. 9; 11 Mod. 73.

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