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The California Supreme Court Rejects *Per Se* Liability For Damages Inflicted By Illegal Public Sector Strikes

WILLIAM H. MANZ*

Despite laws in most states banning public employee strikes,¹ they continue to occur. Undeterred by statutory penalties, public sector unions persist in using the strike weapon to achieve their goals. In only a few jurisdictions do legislatively imposed sanctions include the possibility of lawsuits by injured parties. Alaska,² Iowa,³ and Kentucky⁴ allow employers to bring contract damage actions. Five

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   A labor contract executed in this state by a labor organization that has no local in this state or which contract is not to be executed by one or more of its locals in this state may not be enforced in the courts of this state unless the labor organization has registered with the department and complied with all regulations adopted by it.

   Terms of any collective bargaining agreement may be enforced by a civil action in the district court of the county in which the agreement was made upon the initiative of either party.

   Suits for violation of agreements between a public employer and a labor organization representing fire fighters may be brought by the parties to such agreement in the circuit court of the county of the employer or in cases where the state is the employer in the Franklin Circuit Court.
other states have laws providing for employer actions against unions which have struck illegally. No state has a statute expressly giving private parties a similar right of action.

Accordingly, when illegal public sector strikes have resulted in damage actions, courts have had to act without explicit legislative guidance. They have been forced to choose between the often conflicting goals of modern public sector labor policy. The critical question has been whether the alleged benefits of permitting damage actions outweigh their acknowledged potential to disrupt public sector labor relations.

5. See, Fla. Stat. Ann. § 447.507(4) (West 1981): An employee organization shall be liable for any damages which might be suffered by a public employer as a result of a violation of the provisions of s. 447.505 by the employee organization or its representatives, officers, or agents. The circuit court having jurisdiction over such actions is empowered to enforce judgments against employee organizations, as defined in this part, by attachment or garnishment of union initiation fees or dues which are to be deducted or checked off by public employers. No action shall be maintained pursuant to this subsection until all proceedings which were pending before the commission at the time of the strike or which were initiated within 30 days of the strike have been finally adjudicated or otherwise disposed of. In determining the amount of damages, if any, to be awarded to the public employer, the trier of fact shall take into consideration any action or inaction by the public employer or its agents that provoked or tended to provoke the strike by the public employees. The trier of fact shall also take into consideration any damages that might have been recovered by the public employer under subparagraph (6)(a)(4).

In 1986, in *City and County of San Francisco v. Local 38*, the California Supreme Court rejected an employer’s damage action. This ruling is highly significant. It disapproved the 1977 California Court of Appeal holding in *Pasadena Unified School District v. Pasadena Federation of Teachers* that illegal public sector strikes were tortious per se. *Local 38* follows the judicial trend which has emerged in illegal strike cases during the past decade. Every ruling but *Pasadena* had rejected theories of liability that would have exposed public employee unions to lawsuits from a wide range of potential plaintiffs.

*Local 38* is also notable for its almost total reliance on public policy. In choosing public policy as the basis for its holding, the court conforms to preceding illegal strike opinions. Although prior decisions include such factors as legislative intent, tort doctrine or contract theory, all were expressly influenced to varying degrees by public policy considerations.

This article will examine *Local 38*’s rejection of per se liability. It will also review other theories of liability utilized in illegal strike cases. Finally, this article will consider what influence public policy questions have on the judicial decisions.

I. THE *LOCAL 38* DECISION

The *Local 38* case arose out of a strike by members of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 38, against the City of San Francisco. The strike was settled soon after the city obtained a preliminary injunction against the union and its leaders. The litigation resulting from the strike, however, took far longer to resolve.

The dispute between the city and the union first reached the court of appeals in *City and County of San Francisco v. Evankovich*. The issue in the case was what effect section 527.3 of the Code of

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9. *City and County of San Francisco v. Local 38*, 42 Cal. 3d at 812, 726 P.2d at 539, 230 Cal. Rptr. at 857. The court refers to this theory as prima facie tort, but the more commonly used term is tort per se.
11. *Local 38*, 42 Cal. 3d at 812, 726 P.2d at 539, 230 Cal. Rptr. at 857.
Civil Procedure had on a court's right to enjoin a public employees' strike. Holding that a public strike could be enjoined, the court reiterated that in the absence of statutory authority, public employees in California had no right to strike. The court added that the objectives of Local 38's strike were unlawful.

The city subsequently sued the union and won a jury award of $4,080,000 in compensatory damages. The union appealed. Before the court of appeal could rule, the California Supreme Court, in County Sanitation Dist. No. 2 v. Los Angeles County Employees Association, held that only public employees' strikes which threatened the public's health and safety were unlawful at common law.

The court of appeals ruled, before being reversed by the California Supreme Court, that there was no doubt that Evankovich had declared Local 38's strike illegal, and held that the union was collaterally estopped from contesting that issue. It stated that Pasadena was not overruled by County Sanitation because the California Supreme Court had "determined that the strike was legal." Pasadena was then relied upon to find that the strike was a "tort for which damages may be recovered." The union then appealed to the California Supreme Court. In an opinion by Justice Broussard, with

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13. CAL. CIV. PROC. CODE § 527.3 (West 1979).
17. City and County of San Francisco v. Local 38, 42 Cal. 3d at 812, 726 P.2d at 539, 230 Cal. Rptr. at 857.
19. County Sanitation, 38 Cal. 3d at 587, 699 P.2d at 849, 214 Cal. Rptr. at 439.
21. Local 38 217 Cal. Rptr. at 169.
22. Id. at 169-70.
only Justice Lucas dissenting, the court rejected per se liability, stating "until the Legislature enacts to the contrary, the illegality of a strike without more is not grounds for a damage suit by the [public] employer."  

II. THEORIES OF LIABILITY FOR UNLAWFUL PUBLIC STRIKES

Parties claiming injuries that arise from illegal public sector strikes have utilized various causes of action. In their consideration of these causes of action, courts have demonstrated an unwillingness to establish any broad-based theory of liability. Instead, as will be discussed in the following section, the courts have either rejected the plaintiff's liability theories or construed them in such a manner so as to limit their utility to only a small number of future litigants.

A. Per Se Liability

The theory of liability with the greatest potential impact on public sector labor relations is the tort per se concept of Pasadena. The court in Pasadena, relying on San Diego Building Trades Council v. Garmon, declared that the law established a duty to refrain from acts harmful to persons, property or rights of another, and that an illegal act causing such harm constituted an actionable tort. This meant that any illegally striking union, regardless of the service it provided, could be potentially liable, to an employer as well as to a wide range of third parties.

In his County Sanitation concurrence, Justice Kaus stated, "I believe it is improper to import tort remedies that were devised for different situations into this sensitive [public sector] labor relations arena." This is exactly what occurred when the Pasadena court applied Garmon v. San Diego Building Trades Council to a public employees strike. Pasadena involved a peaceful one day strike by school teachers. Garmon was a 1955 private sector case resulting from picketing and threatening conduct directed against a lumber-

\[23. \text{City and County of San Francisco v. Local 38, 42 Cal. 3d 810, 819, 726 P.2d 538, 543, 230 Cal. Rptr. 856, 862 (1986).} \]
\[24. 49 \text{ Cal. 2d 595, 320 P.2d 473 (1958), rev'd on other grounds, 359 U.S. 236 (1959).} \]
\[25. \text{Pasadena Unified School Dist. v. Pasadena Fed'n. of Teachers, 72 Cal. App. 3d 110, 113, 140 Cal. Rptr. 41, 49 (1977).} \]
\[26. \text{County Sanitation Dist. No. 2 v. Los Angeles County Employees Ass'n., 38 Cal. 3d 564, 592, 699 P.2d 835, 854, 214 Cal. Rptr. 424, 443 (1985) (Kaus, J., concurring).} \]
\[27. \text{Pasadena, 72 Cal. App. 3d at 103, 140 Cal. Rptr. at 43.} \]
yard. In addition, two opinions cited by the Garmon court in formulating its tort doctrine, James v. Marinship Corp. and Loup v. California S.R.R. Co., are far removed in both time and circumstance from a modern public sector labor dispute.

As noted in Local 38, courts in several other states have refused to apply Pasadena's per se liability doctrine. The West Virginia Supreme Court of Appeals rejected a similar theory in City of Fairmont v. Retail, Wholesale, and Department Store Union. The employer asserted that the illegality of a peaceful hospital workers' strike gave rise to a common law cause of action. In ruling for the union, the court, rather than follow Pasadena, chose to adopt the view of the Michigan Supreme Court in Lamphere Schools v. Lamphere Federation of Teachers, and declined to "judicially extend under our common law powers a remedy for damages." Lamphere most emphatically rejected per se liability. The court declared that there was no such thing as the tort of an illegal teachers' strike; such a cause of action would open a Pandora's box. The Michigan court in Lamphere went beyond a mere refusal to create a new tort remedy. It carefully scrutinized the Michigan Public Employment Relations Act (PERA) and concluded that its remedies were exclusive. Accordingly, the Michigan Employment Relations Commission was found to have sole jurisdiction when charges of

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29. 25 Cal. 2d 721, 155 P.2d 329 (1944). In this case an injunction was affirmed which restrained the corporation from firing, under a closed shop agreement, nonunion black workers.
30. 63 Cal. 97 (1883) (railroad contract).
31. City and County of San Francisco v. Local 38, 42 Cal. 3d 810, 814, 726 P.2d 538, 541, 230 Cal. Rptr. 856, 859 (1986). Not mentioned by the Local 38 court was an approving reference to Pasadena in Boyle v. Anderson Fire Fighters Ass'n, 497 N.E.2d 1073, 1079 (Ind. App., 1986). This opinion was handed down only one month before Pasadena's per se theory was disapproved. Boyle arose out of an illegal firefighters' strike which took place in 1978. The strikers not only refused to report for work, but actively interfered with efforts to extinguish the blaze which destroyed the plaintiffs' property. This was a violation of Indiana Code Section 35-44-3-8 (1982) which makes it a misdemeanor to interfere with a fireman in the performance of his duty. The focus of the court's discussion was the liability of the individual strikers. Union liability was predicated on its responsibility for the acts of its members. Boyle, at 1083. The defendant's petition for a rehearing was denied on May 28, 1987. As of this writing the parties have petitioned the Indiana Supreme Court to hear the case.
32. 283 S.E.2d 589 (1980).
34. City of Fairmont, 283 S.E.2d at 595.
35. Lamphere, 400 Mich. at 129, 252 N.W.2d at 829.
36. Id. at 133, 252 N.W.2d at 831.
38. Lamphere, 400 Mich. at 112, 252 N.W.2d at 821.
unfair labor practices or misconduct arose in the public sector.39

The Lamphere result, if also applied to third parties, would leave such persons without a remedy. As one critic of Lamphere correctly points out, "[u]nion defenses against sanctions sought by the public employer would not necessarily constitute a defense to the tort claims of private citizens if those claims did not depend on a violation of the statute."40 Further, precluding the claims of third parties would be contrary to the United States Supreme Court’s handling of the preemption issue.41 The United States Supreme Court has ruled that comprehensive labor legislation will not necessarily preclude private damage actions.42

The nonpreemption rationale has been followed by a New York court. The Appellate Division, Second Department, rejected union claims that New York’s public labor legislation, the Taylor Law,43 precluded third party actions.44 The court stated that the Taylor Law "was not intended to govern public employee relations with the general public..."45 The court added that when a remedy was meant to be exclusive under the Taylor Law it was so stated. The court held that there was no provision in the legislation which limited

39. Id. at 117, 252 N.W.2d at 824.
41. United Constr. Workers Affiliated With United Mine Workers v. Laburnum Constr. Corp, 347 U.S. 656 (1954). In Laburnum, the Court ruled that the National Labor Relations Act did not preclude an employer from seeking damages for a union’s tortious strike activity.
45. Caso, 43 A.D.2d at 163, 350 N.Y.S. at 176.
the remedies available against a striking public employee union.\textsuperscript{46}

Private plaintiffs injured by another illegal New York City transit strike tried to take the New York Court of Appeals a step further in\textit{Burns, Jackson, & Miller v. Lindner.}\textsuperscript{47} The plaintiffs argued that, far from precluding private action, the Taylor Law actually implied a cause of action for third party plaintiffs.

In seeking such an implied remedy, the\textit{Burns} plaintiffs were supported by highly persuasive authority from the United States Supreme Court. At one point in time, the Supreme Court looked more toward fulfilling legislative goals.\textsuperscript{48} However, in\textit{Cort v. Ash} the Court adopted the principle that Congressional silence created the presumption that Congress meant to imply no such remedy.\textsuperscript{49}

In dealing with the implied third party action issue, New York's highest court structured its analysis according to\textit{Ash}. As described by the court of appeals, these criteria included: first, whether the plaintiff is part of the class for whose especial benefit the statute was enacted; second, whether there is any indication from the statutory language, legislative history or the statutory remedial schemes of an intent to grant or deny a private right of action; finally, whether allowing such an action would further the purposes of the legislation.\textsuperscript{50}

After an extensive review of the Taylor Law's legislative history, the court held that the plaintiffs were indeed part of the class for whose benefit the statute was enacted.\textsuperscript{51} The court, however, ruled against an implied right of action because "the provisions of the present statute and the history of their enactment strongly suggest that a private action was not intended."\textsuperscript{52} It was noted that allowing

\begin{itemize}
\item \textsuperscript{46} Id. at 164, 350 N.Y.S.2d at 177.
\item \textsuperscript{50} Burns, 59 N.Y.2d at 325, 451 N.E.2d at 463, 464 N.Y.S.2d at 716.
\item \textsuperscript{51} Id. at 329, 451 N.E.2d at 465, 464 N.Y.S.2d at 718. Prior New York opinions had produced diverse results. In\textit{Steitz v. City of Beacon}, the court found no civil liability for an individual when a city had failed to maintain proper water pressure.\textit{Steitz v. City of Beacon}, 295 N.Y. 51, 57, 64 N.E.2d 704, 709 (1945). The\textit{Burns} court favored, however, the result reached in\textit{Abounader v. Strohmeyer & Arpe Co.}, 243 N.Y. 458, 154 N.E. 309 (1926). The\textit{Strohmeyer} court found a food packer who had violated a statutory duty liable to a private citizen. Id. at 460, 154 N.E. at 311.
\item \textsuperscript{52} Burns, 59 N.Y.2d at 329, 451 N.E.2d at 465, 464 N.Y.S.2d at 718.
\end{itemize}
private actions would further the Taylor Law goal of deterring illegal strikes, but would be inconsistent with the primary purpose of the Taylor Law.\textsuperscript{53} This was held to be "defus[ing] the tensions in public employer-employee relations by reducing the penalties and increasing reliance on negotiation and the newly created Public Employment Relations Board [PERB] as a vehicle toward labor peace."\textsuperscript{54}

A key factor in the rejection of the implication theory was the Taylor Law's complex enforcement scheme.\textsuperscript{55} The court held that the enactment of such elaborate procedures strongly suggested that no other remedies were intended.\textsuperscript{56} This ruling was in line with the approach taken by the United States Supreme Court in Middlesex County Sewerage Authority v. National Sea Clammers.\textsuperscript{57} The Court held that the elaborate enforcement procedures of the Federal Water Pollution Act\textsuperscript{58} ruled out the possibility of Congressional intent to provide additional judicial remedies for private citizens.\textsuperscript{59}

A failure to act may also give evidence of legislative intent. In Jamur Productions Corporation v. Quill,\textsuperscript{60} the Condon-Waldin Act,\textsuperscript{61} New York's old public labor enactment, was found to contain no implied remedy. The legislature's subsequent failure to specifically include private action in the Taylor Law was seen by the court as further evidence that no implied remedy was intended.\textsuperscript{62}

The Court of Appeals' rejection of the implication doctrine is highly significant. As noted by the court, an implied remedy would have provided a "private action, which would impose per se liability without any of the limitations applicable to the common-law forms of action..."\textsuperscript{63} With an implied remedy, there would have been no inherent means of restricting the number of prospective litigants.\textsuperscript{64} Theoretically anyone who suffered injury could have brought suit.\textsuperscript{65}

By limiting New York plaintiffs to traditional causes of action, the

\textsuperscript{53} Id. at 329-30, 451 N.E.2d at 465-66, 464 N.Y.S.2d at 718-19.
\textsuperscript{54} Id. at 330, 451 N.E.2d at 466, 464 N.Y.S.2d at 719.
\textsuperscript{55} Id.
\textsuperscript{56} Id.
\textsuperscript{57} 453 U.S. 1 (1980).
\textsuperscript{58} 33 U.S.C. §§ 1251-1376 (1982).
\textsuperscript{59} Middlesex County Sewerage Auth. v. Nat'l Sea Clammers, 453 U.S. 1, 14 (1980).
\textsuperscript{61} N.Y. Crv. SERV. LAW § 108 (McKinney 1959). (Repealed 1967.)
\textsuperscript{62} Jamur, 51 Misc. 2d at 505, 273 N.Y.S.2d at 352.
\textsuperscript{63} Burns, 59 N.Y.2d at 330, 451 N.E.2d at 466, 464 N.Y.S.2d at 719.
\textsuperscript{64} See Note, Private Damage Actions Against Public Sector Unions For Illegal Strikes, 91 HARV. L. REV. 1309, 1320 (1978).
\textsuperscript{65} See id.
court of appeals provided future courts with the means of avoiding the undesirable effects of broadly construed public union liability.

B. Intentional Tort

Aside from Pasadena, the most notable victory for a plaintiff in an illegal public sector strike case is State v. Kansas City Firefighters.\(^6\) Dissatisfied with traditional tort theories, the court found the union liable to the State of Missouri in “intentional tort.”\(^6\) When considering Kansas City, the Local 38 court distinguished it from Pasadena because the illegality of the Kansas City strike was predicated on the violation of a statute rather than a common law proscription.\(^6\) The differences between the two cases are, however, more extensive. The law applicable to Local 38,\(^6\) contains administrative remedies. In contrast, the Missouri statute provides no administrative mechanism or provision for enforcement.\(^7\)

More importantly, the decisions differ in both scope and rationale. In Kansas City, the illegality of the union’s act did not suffice to establish its liability. The key factor was the court’s finding of an intent to harm the employer. This intent was found because of the certainty of the strike’s harmful consequences for the employer.\(^7\) The court stated, “it is not the violation alone [by strike] which

\(^{66}\) Kansas City, 672 S.W.2d at 110. The court declined to rule whether a third party could bring an action. Id. at 110.

\(^{67}\) Kansas City, 672 S.W.2d at 116. The court declined to rule whether a third party could bring an action. Id. at 110.


\(^{69}\) Kansas City, 672 S.W.2d at 107-8. The statute in question states: “[n]othing contained in sections 105.500 to 105.530 shall be construed as granting a right to employees covered in sections 105.500 to 105.530 to strike.” Mo. REV. STAT. § 105.530 (1978).

\(^{70}\) Kansas City, 672 S.W.2d at 112. In support of this principle, the court cited Wilt v. Kansas Area Transportation Authority, 629 S.W.2d 669, 672[S] (Mo. App. 1982), and the Restatement. On this question, the Restatement view provides:

An intentional tort is one in which the actor intends to produce the harm that ensues; it is not enough that he intends to perform the act. He intends to produce the harm when he desires to bring about that consequence by performing the act. As indicated in § 8A, he also is treated as intending that consequence if he knows or believes that the consequence is certain, or substantially certain, to result from his act.

Restatement (Second) of Torts § 870 comment b (1979).
fastens liability upon the public employees, but the intention that harm to the public employer shall result.""} The Missouri court added that it was not the unlawfulness of the act ""which proves the tort and legal injury, but that the harm actually suffered was [intentional]... ."

Finally, unlike Pasadena, the Kansas City court was careful to narrow the scope of its ruling. In this respect the court was in accord with the Restatement view, ""that in some cases in which a claim may be entirely novel the court may decide to limit the liability to the situation in which the defendant acted for the purpose of producing the harm involved."" In Kansas City, the court stated, ""we confine our analysis to the public employee function in suit—fire-fighting."

C. Prima Facie Tort

The court in Kansas City briefly considered, but rejected, the theory of prima facie tort. It defined this concept as an offense consisting of an intentional infliction of harm without sufficient justification, by an act that would be otherwise lawful. Like per se liability, this is a cause of action potentially available to a wide range of possible plaintiffs.

In Kansas City, it was held that prima facie tort as a remedy ""does not readily transpose from the private sector to public sector labor disputes."" The court had difficulty with two elements of the cause of action: the lack of sufficient justification and the need for

72. Kansas City, 672 S.W.2d at 112.
73. Id.
74. RESTATEMENT (SECOND) OF TORTS § 870 comment b (1979).
75. Kansas City, 672 S.W.2d at 111.
77. Kansas City, 672 S.W.2d at 115.
78. Id. at 115.
an act which would be otherwise lawful. The court held prima facie tort to be inapplicable to an unlawful strike because the illegality of the act deprived the union of "justification for the harm which results to the public employer from the interruption of a vital governmental service."\textsuperscript{79}

The lawful act issue was viewed with more importance by the Appellate Division in \textit{Burns, Jackson, \& Miller v. Lindner}.\textsuperscript{80} Finding ample precedent rejecting prima facie tort claims based on illegal acts, the Appellate Division held that an illegal strike could not serve as a predicate for the cause of action.\textsuperscript{81} The question, however, is not as clear in its resolution. Early prima facie tort cases do not mention a requirement that the act complained of be legal.\textsuperscript{82} The \textit{Restatement} also states that the illegality of the act may be strongly indicative of liability.\textsuperscript{83} Accordingly, when \textit{Burns} reached the court of appeals, the lawful act question was left open.\textsuperscript{84} Citing to the \textit{Restatement}, the court of appeals stated that an unlawful act need not be excluded as a predicate.\textsuperscript{85}

The court of appeals instead focused on the defendant’s intentions. In this respect courts have been unwilling to rule that an illegal strike

\textsuperscript{79}. Id.
\textsuperscript{81}. Burns, 88 A.D.2d at 72, 432 N.Y.S.2d at 93 (2d Dept. 1982), aff’d, 59 N.Y.2d 315, 451 N.E.2d 459, 464 N.Y.S.2d 712 (1983). A line of cases did support this holding. In \textit{Ruza v. Ruza}, 1 A.D.2d 669, 146 N.Y.S.2d 808 (1st Dept. 1955), a complaint alleging a tortious conspiracy was dismissed. In \textit{Brandt v. Winchell}, 238 A.D. 338, 127 N.Y.S.2d 865 (1st Dept. 1954), plaintiff alleging acts akin to libel, slander and malicious prosecution was told his action should be based on traditional tort. In \textit{Sommer v. Kaufman}, 59 A.D.2d 843, 399 N.Y.S.2d 7 (1st Dept. 1977), a cause of action alleging acts of bribery was dismissed. The only public sector union case where the prima facie tort cause of action was upheld was \textit{Board of Education of Farmingdale Union Free School District v. Farmingdale Classroom Teachers Association}, 38 N.Y.2d 397, 343 N.E.2d 278, 380 N.Y.S.2d 635 (1975), involving an otherwise lawful activity, the subpoenaing of witnesses by the union.
\textsuperscript{83}. "[O]f course acts that are in violation of civil or criminal statutes or that are tortious with respect to third parties may be strongly indicative of liability." \textit{Restatement (Second)} of \textit{Torts} § 870 comment h (1979).
\textsuperscript{84}. Burns, Jackson, \& Miller v. Lindner, 59 N.Y.2d at 333, 451 N.E.2d at 468, 464 N.Y.S.2d at 721.
\textsuperscript{85}. Id. The court’s mention of the issue was criticized by Chief Justice Cooke. He states, "[I]nasmuch as the court expressly does not now decide whether unlawful acts can be the predicate for prima facie tort, the abstract discussion of the merits of the proposition (pp 332-333) is jurisprudentially unwise and will serve only to confuse litigants and the courts." 59 N.Y.2d at 337, 451 N.E.2d at 470, 464 N.Y.S.2d at 723. (Cooke, C.J., concurring).
was aimed at individual third parties. In *Jamur Productions Corporation v. Quill*, the union escaped liability because the strike "was in actuality directed at no one in particular, except for the employer who did not sue." 87

The intent standard applied by the court of appeals in *Burns* went beyond merely having to demonstrate an intent to harm the plaintiff. The court ruled against the plaintiffs because they failed to plead "disinterested malevolence." 88 There could be no recovery unless the defendant acted with a malicious motive "unmixed with any other and exclusively directed to injury and damage of another." 89

Although this standard may be criticized as overly strict, 90 it is a better choice than the lawful act requirement of the Appellate Division. Under that theory, a defendant would be able to hide behind the unlawfulness of his own actions. 91 In effect, however, the court of appeals' approach is no more helpful to prospective plaintiffs than that of the Appellate Division. Given the demonstrated reluctance of courts to find that illegal public sector strikes were aimed at third parties, it would be extremely difficult to prove that the union struck with the sole motive of injuring an employer or member of the public.

New York is not the only jurisdiction where prima facie tort failed as a cause of action because of a perceived lack of malevolence. In *Maidlow v. City of Toledo*, the Ohio Court of Appeals refused to

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86. One exception was the New York Supreme Court, Special Term, which delivered the initial opinion in *Burns*. Here, the court stated, "it is generally recognized that the public union strikes are necessarily aimed at the public, not the public employer." 108 Misc.2d 438, 468, 437 N.Y.S.2d 895, 903 (Sup. Ct., Queens County 1981), modified, 88 A.D.2d 50, 452 N.Y.S.2d 80 (2d Dept. 1982), aff'd, 59 N.Y.2d 314, 451 N.Y.2d 314, 464 N.Y.S.2d 712 (1983).


89. See also, *Beardsley v. Kilmer*, 236 N.Y. 80, 140 N.E. 203 (1923).


apply the theory to a case arising from the death of a bus driver murdered while the police participated in a city employees’ strike.92 It was held that “the facts of the instant case do not support the existence of an essential element of prima facie tort - intentional harm, or full knowledge or malevolence that the action will cause harm to the plaintiff.”93

The Maidlow court also objected to the nature of the plaintiff’s damages. Noting that prima facie tort had been traditionally applied to cases involving economic harm and trade losses, the court declined to expand the doctrine to include noneconomic losses and personal injuries.94 It added that “[u]ntil the existence and application of the prima facie tort theory is more clearly delineated in Ohio, appellants must seek alternative remedies in recovery.”95

D. Interference With Business

The portion of Pasadena left intact by Local 38 was the right of an employer to seek redress for tortious inducement of breach of contract.96 Third parties seeking compensation for interference with their prospective contractual relationships have not been successful.97 In Burns, at the Appellate Division level, the court followed general

92. Maidlow v. City of Toledo, No. L-81-120, slip op. (Ohio Ct. App. Dec. 4, 1981) (LEXIS, State Library, Ohio file) at 19. Maidlow arose out of a strike by a group of public employee unions, including the police. The court never declared the strike illegal. Under a former section of the Ferguson Act, a public employee who failed to report for work was not officially on strike until he was notified of the fact by his employer. Ohio Rev. Code Ann. § 4117.04 (Anderson 1980). This notification was never sent to the Toledo strikers. Maidlow, No. L-81-120 at 6. It should be noted that the plaintiffs’ chances of maintaining a prima facie tort cause of action were poor in any case since the doctrine had not been judicially recognized in Ohio.

93. Maidlow, No. L-81-120 at 19.
94. Id. at 20.
95. Id. at 20-21.
96. City and County of San Francisco v. Local 38, 42 Cal. 3d 810, 819, 726 P.2d 538, 543, 230 Cal. Rptr. 856, 862 (1986).
97. A plaintiff was successful in a tortious interference with contract action in an English decision. Falconer v. ASLEF and NUR, [1986] IRLR 331 (County Court, Sheffield) (LEXIS, Enggen library, cases file). Here, the plaintiff was inconvenienced and put to extra expense by a rail strike. As an advance purchaser of a ticket, the plaintiff was found to be in privity of contract with British Rail. It was held that the union’s constructive knowledge of this contract was sufficient to establish liability. This represented a departure from past English cases which required actual knowledge. See, e.g., Dimbleby & Sons Ltd. v. N.U.J., [1984] 1 W.L.R. 427 and Merkur Island Shipping Corp. v. Laughton, 2 A.C. 570, [1983]. Like Kansas City, Falconer was careful to limit the scope of its opinion. The court stated that its judgment related only to those cases where the facts were identical to the case at hand.

That Falconer could have been litigated required unusual circumstances. The Trade Union and Labour Relations Act of 1974, 22 & 23 Eliz. 2, ch. 52, §§ 13-14, grants unions immunity from tort liability for actions in furtherance of a trade dispute. In Falconer, the union failed to ballot its members before calling the strike. This failure removed their tort immunity under the Trade Union Act of 1984, 32 & 33 Eliz. 2, ch 49, § 10.
New York precedent in holding that the defendants’ knowledge must be specified. 98 The court of appeals later characterized the interference caused by the transit strike as “incidental.” 99 It concluded by stating “as a matter of policy we should not recognize a common law cause of action for such incidental interference when the Legislature has, in establishing an otherwise comprehensive labor plan for the governance of public employer-employee relations, failed to do so.” 100

As in prima facie tort, a claim of business interference can also run afoul of the element of intent. 101 Burke & Thomas, Inc. v. International Organization of Masters, 102 is a prime example of judicial determination not to find such intent. If ever a plaintiff could have hoped to prevail on a claim of business interference it was here. The striking union cut off all ferry service (the only public access) to some popular island vacation resorts. 103 Making the situation even more blatant, the strike was deliberately timed to coincide with the Labor Day weekend. 104

Showing an obvious aversion to a broad based theory of union liability, the Washington Supreme Court failed to find liability because the object of the strike was to pressure the employer, not to injure the third parties. 105 Like the Burns court, the Burke & Thomas court stressed the policy basis of its decision. 106 Strikes and resultant harm to third parties and their contractual relationships were no longer a part of tort law, but were instead now part of labor law. 107

E. Public Nuisance

A traditional common law cause of action commentators suggest for use in illegal public sector strike cases is public nuisance. 108 The

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98. Burns, 88 A.D.2d 50, 72, 452 N.Y.S.2d 80, 93 (2d Dept. 1982).
100. Id.
101. See notes 86-91 supra and accompanying text.
102. 600 P.2d 1282 (Wash. 1978).
103. Id. at 1283.
104. Id.
105. Id. at 1285.
106. Id. at 1287.
107. Id. at 1288, citing 4 RESTATEMENT (SECOND) OF TORTS, p.2 (1979). The Burke & Thomas court states, “[o]bviously the law of labor disputes and their effect on contractual relations has ceased to be regarded as a part of Tort Law and has become an integral part of the general subject of Labor Law, with all its statutory and administrative regulations, both state and federal.” The court contrasted this statement with the extensive treatment of the tortious nature of illegal strikes found in the RESTATEMENT OF TORTS, pp. 91-181 (1939). This difference was noted by the Local 38 court. Local 38, 42 Cal. 3d at 816, 726 P.2d at 541, 230 Cal. Rptr. at 859.
108. See, e.g., Note, Private Damage Actions, supra note 64, at 1322. For a full discussion
Restatement (Second) of Torts defines public nuisance as an unreasonable interference with a right common to the general public. Unreasonableness is determined in part by whether the conduct involved creates a significant interference or is proscribed by law.

The concept of an illegal strike as a public nuisance has found favor with the courts. In United Steelworkers of America v. United States, Justices Harlan and Frankfurter held that a government's authority to enjoin strikes causing a national emergency was a form of jurisdiction traditionally exercised over public nuisances.

Unfortunately for prospective plaintiffs, the illegality of a public sector strike may not be sufficient to establish a public nuisance cause of action. For any chance of success, the interrupted service must be of vital importance. As one commentator points out, one could hardly maintain an action in public nuisance against a union whose illegal strike had closed the municipal golf course or swimming pool.

Even a strike affecting a vital service may not be a sufficient predicate. In Fulenwider v. Firefighters Association, the plaintiff seemed to have been in good position to establish the existence of a public nuisance; lack of fire protection surely creates a potentially dangerous situation. In fact, the Tennessee Court of Appeals had little difficulty in upholding the plaintiff's right to bring the suit. The Tennessee court stated that "the complaint alleges facts from which it could be concluded that the defendants calling on or endorsing the strike, an illegal act, have created a condition which could be found to be a public nuisance."

In reversing, the Tennessee Supreme Court did not rule that a firefighter's strike could never be a public nuisance. It held that mere failure to report to work did not create the condition. The court stated that a public nuisance would have existed only if the strikers...
had started fires or had actively interfered with fire protection services.\(^\text{117}\)

This strict standard sharply limits the future utility of the cause of action. For any chance of success, a plaintiff in Tennessee will have to demonstrate the kind of active interference with a vital public service that actually took place during the Kansas City circumstances.\(^\text{118}\)

The reasoning of the Tennessee Supreme Court is difficult to justify when one considers the dangers inherent in a firefighters' strike. More convincing is the dissenting opinion of Justice Fones, who states:

> I seriously question the validity of the distinction the majority makes between "direct action" such as blocking the streets and "indirect action" the legal label they place on an illegal strike. If the inevitable result of an illegal strike is to create an unreasonably dangerous condition endangering the lives and property of the citizenry, I find it totally immaterial whether the proximate cause thereof was a direct or indirect act.\(^\text{119}\)

If the court was determined to rule against the *Fulenwider* plaintiff, it would have been on firmer ground stressing the causation issue since the evidence presented on this question was described as meager.\(^\text{120}\)

Contrasted with *Fulenwider* in rationale, but not in the ultimate result, is *Burns, Jackson, & Miller v. Lindner*.\(^\text{121}\) Like the firefighters in *Fulenwider*, the transit workers in *Burns* merely failed to report for work. However, unlike *Fulenwider* there was no dispute over whether the strike had created a public nuisance.\(^\text{122}\) This was of no help to the plaintiffs whose cause of action ultimately failed on the issue of special damages.

On the subject of special damages, Prosser states:

> It must be repeated again that the business interference, and the type of pecuniary loss resulting from it must be particular to the plaintiff, or to a limited group in which he is included. When it

\(^{117}\) *Id.*

\(^{118}\) See *State v. Kansas City Firefighters*, 672 S.W.2d 99 (1984).

\(^{119}\) *Fulenwider*, 649 S.W.2d at 274 (Fones, J., dissenting).

\(^{120}\) *Id.*


\(^{122}\) The defendant union made no attempt to contest this issue, probably because the disruptive effect of their strike was so obvious. One commentator states that the inconvenience resulting from a transit strike is "no less than that caused by the classic public nuisance of the obstruction of a public highway." Note, *Private Damage Actions*, supra note 64, at 1329.
becomes so general and widespread as to affect a whole community, or a very wide area within it, the line is drawn.\textsuperscript{123}

In reality, the \textit{Burns} plaintiffs were not in a favorable position to claim special damages. The losses they alleged, lost business profits and additional out-of-pocket expenses, were of the kind suffered by innumerable businesses throughout the city. Previously, in \textit{Jamur Productions Corporation v. Quill}, a company alleged similar damages resulting from a transit strike and the court determined that the losses were no different from those of many others.\textsuperscript{124} As one commentator states, “it would seem that economic losses which result from such situations as a transit strike do not constitute particular injury and are therefore not recoverable under the public nuisance doctrine.”\textsuperscript{125}

Surprisingly, the plaintiffs in \textit{Burns} were initially able to overcome the special damages obstacle. Engaging in some dubious reasoning, the Supreme Court, Special Term, held that the injury to the public was the disturbance of public transportation and an impaired efficiency of city services.\textsuperscript{126} This interpretation meant that the law firms' economic losses were indeed particular to them and other members of their class.

On appeal, the Appellate Division rejected this reasoning, stating that the damages suffered were common throughout the city.\textsuperscript{127} The court of appeals agreed, holding that “[t]he economic loss which results from a transit strike is not recoverable in a private action for public nuisance because the class includes all members of the public who are affected by the strike.”\textsuperscript{128}

Thus, like \textit{Fulenwider v. Firefighter Association}, the court of appeals' opinion, while not ruling out public nuisance as a cause of

\textsuperscript{123} Prosser, \textit{supra} note 108, at 1015. The \textit{Burns} plaintiffs had little problem establishing that economic loss could qualify as special damages. There is sufficient New York precedent on this issue. \textit{See}, e.g., \textit{Wakeman v. Wilbur}, 147 N.Y. 657, 42 N.E. 341 (1895); \textit{Francis v. Schoellkopf}, 53 N.Y. 152 (1873).


\textsuperscript{125} \textit{Note, Private Damage Actions, supra} note 64, at 1331.

\textsuperscript{126} \textit{Burns, Jackson, \\& Miller v. Lindner}, 108 Misc.2d at 475, 437 N.Y.S.2d at 895 (1981), \textit{modified} 88 A.D.2d 50, 452 N.Y.S.2d 80 (1982), \textit{aff'd} 59 N.Y.2d 315, 451 N.E.2d 459, 464 N.Y.S.2d 712 (1983). This reasoning was criticized as possibly diserving the policies underlying the special damages rule. \textit{Note, Statutory and Common Law Considerations, supra} note 40, at 1295, n. 138. In the other extreme, the \textit{Maidlow} court stated that the fatal injuries of the murdered bus driver were “not different in character or kind from the public generally.” \textit{Maidlow, No. L-81-120} at 7-8.


\textsuperscript{128} \textit{Burns}, 59 N.Y.2d at 335, 451 N.E.2d at 469, 464 N.Y.S.2d at 722.
action against public unions, has the effect of sharply curtailing its usefulness for future plaintiffs. Essentially eliminated by the court’s traditional interpretation of the special damages rule are actions arising from the two most common forms of illegal strikes, those staged by teachers and transit workers. The cause of action would only be of value to those persons who suffer peculiar damages to person or property because of a strike that imperils the public safety, such as one by firemen, police, or sewage plant workers.

F. Negligence

Negligence as a cause of action in illegal strike cases presents many difficulties for the plaintiff because of the need to show a duty of care, foreseeability and proximate causation. The need to apply traditional tort principles, combined with a reluctance of courts to allow third party damage actions against public sector unions has led courts often to find one or more of these elements lacking.

It may be quite difficult to establish that the union owes any duty to the public or to any individual citizen. Very often, the governmental unit itself owes no duty to provide the service in question. In Maidlow v. City of Toledo, the court found that the union owed no duty to the deceased bus driver. Even the Tennessee Court of Appeals opinion in Fulenwider, which was otherwise favorable to the plaintiff, stated that the union owed no duty to an individual property owner to furnish adequate fire protection.

This reasoning has been criticized by one commentator who urges courts to establish that unions owe a duty not to interfere with governmental public service. This position was recently taken by the court in Boyle v. Anderson Firefighters Association. The court in Boyle held that the striking firefighters under both their labor contract and fire department rules “owed the Owners a duty not to

130. 1979-81 PBC (CCH) ¶ 36,956, at 37,757. See also Jackson v. Byrne, 738 F.2d 1443 (7th Cir. 1984). This case arose out of an illegal firefighters’ strike in Chicago. Here, the plaintiffs structured their lawsuit as a civil rights action. In rejecting the cause of action, the court concluded “[t]he firefighters may have violated state law forbidding work stoppages by essential civil servants and could very well be liable to plaintiffs under principles of state tort law. Nonetheless, the firefighters, standing under no constitutional duty to act, did not affect a deprivation within the meaning of the Fourteenth Amendment.” Id. at 1446.
131. See Note, Statutory and Common Law Considerations, supra note 40, at 1278.
strike or, conversely, the Strikers owed the Owners a duty to fight the fire.\textsuperscript{133}

Even if a duty of care can be established, the element of causation may prove fatal to the plaintiff's cause of action. It may be difficult to demonstrate that the harm claimed would not have occurred but for the strike. In \textit{Maidlow}, the court held that even if negligence could be shown, the criminal act of a third party broke the "causal chain of negligence as a matter of law."\textsuperscript{134} It also stated that the plaintiff's injuries were remote and indirect.\textsuperscript{135} As previously noted, the \textit{Fulenwider} court was unwilling to hold that the plaintiff's property was destroyed as a direct result of the strike. The court in \textit{Fulenwider} characterized the damage as an incidental byproduct of the work stoppage.\textsuperscript{136}

This reluctance to finding a causal link between the plaintiff's injuries and the strike has also occurred in cases where it is clear that no harm would have been suffered if the strike had not taken place. In \textit{Jamur Productions Corporation v. Quill}, the damages the plaintiff claimed were caused by the transit strike were held to be too remote and indirect to permit recovery.\textsuperscript{137} In \textit{Burke & Thomas}, the court reiterated the theme that the effect of strikes "on remote parties is only incidental, even though it may be substantial."\textsuperscript{138}

Finally, there has also been a refusal to find the plaintiff's damages foreseeable. This reasoning was used in both \textit{Maidlow}\textsuperscript{139} and \textit{Jamur}.\textsuperscript{140} Even under traditional standards this position is highly questionable. As one court correctly pointed out, it was "the very inevitability of damage which led to the prohibition of public strikes."\textsuperscript{141}

\textbf{G. Conspiracy}

Another cause of action which might be available to a broad range of plaintiffs is conspiracy. Conspiracy, however, has been brushed

\begin{itemize}
\item \textbf{133.} \textit{Id.} at 1081.
\item \textbf{134.} \textit{Maidlow}, No. L-81-120 at 13.
\item \textbf{135.} \textit{Id.} at 7-8, citing the trial court, 1981-83 \textit{PBC} (CCH) ¶37,321 (Ohio C.P. 1981).
\item \textbf{136.} 649 S.W.2d at 272. This conclusion was criticized by the \textit{Boyle} court which stated, "the destruction of property by fire does not seem to be merely an incidental or secondary by-product of an illegal strike . . . ." \textit{Id.} at 1082. The court was clearly influenced by the fact that strikers were at the scene and refused to assist in fighting the fire.
\item \textbf{137.} 51 Misc.2d at 509, 273 N.Y.S.2d at 355.
\item \textbf{138.} 600 P.2d 1282, 1286 (Wash. 1978).
\item \textbf{139.} \textit{Maidlow}, No. L-81-120 at 19.
\item \textbf{140.} \textit{Jamur}, 51 Misc.2d at 509, 273 N.Y.S.2d at 355.
\item \textbf{141.} Caso v. Dist. Council 37, 43 A.D.2d at 163, 350 N.Y.S.2d at 177.
\end{itemize}
aside by those courts which have considered it. In *Burns*, the Appellate Division followed longstanding New York precedent in rejecting the cause of action, stating there was no such independent tort as conspiracy. Even the court in *Boyle v. Anderson Firefighters Association*, was most unsympathetic to the union, and declined to find that the independent tort existed.

**H. Contract**

A final claim made by third party plaintiffs in illegal strike cases is that they, as members of the public, were third party beneficiaries of the union’s collective bargaining agreement with the public employer. As one commentator states, “[i]n the case of transit services, . . . those who rely on others being able to use the services could be intended beneficiaries.” One court has held that if the contract includes a no strike clause, unions may be liable for damages if they violate such a clause.

An initial problem for the plaintiff may be that the union’s contract had expired. As one commentator states, once a contract has expired, a union’s obligation not to strike can no longer be based on a contractual duty. This is what frustrated the plaintiffs’ contract based cause of action in *Burns*, where the terms of the contract were not deemed to have survived its expiration.

However, even if the contract is still in force, the plaintiffs still must overcome the traditional judicial attitude toward defendants who have agreed to provide public services for governments. This doctrine, as expressed in the 1928 landmark New York case of *Moch v. Rensselaer Water Co.* states that in order for the plaintiff to prevail, he must show that the contract in question provided compensation for those injured as a result of its breach. The rationale of this rule, the need to protect contractors from potentially ruinous liability, has been criticized as unnecessary in the public sector.

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149. *Id.* at 164, 159 N.E. at 897.
context. As is correctly pointed out, the union can always avoid liability by not striking.\textsuperscript{150}

Such criticism notwithstanding, it is the traditional approach that has been favored by those courts which have considered the problem with regard to public sector strikes. In \textit{Burns}, the court held the plaintiffs were only incidental beneficiaries, adding that imposition of liability on a contractual basis would impose a crushing burden on the defendants.\textsuperscript{151} Similar sentiments were expressed in \textit{Burke \& Thomas} where the court stated that the "creation of third party beneficiaries requires that the parties assume a direct obligation to the intended beneficiary at the time they enter the agreement."\textsuperscript{152}

This continued application of traditional contract law would rule out, for all practical purposes, third party beneficiary actions against public sector unions. It would be a rare union that would enter into an agreement stipulating to liability as to members of the public injured by a breach. As one commentator predicts, contract-based actions will prove less useful to third parties than to employers.\textsuperscript{153}

\section*{IV. Public Policy}

The outright rejection or limitation of the above causes of action obviously is not solely the product of legal theorizing. Underlying these judicial opinions are perceptions about the public policy implications of allowing employers or third parties to bring damage actions against public employee unions. As previously noted, the reason that the \textit{Local 38} decision stands apart is the reliance upon public policy. The court made this clear when it stated, "[o]ur principal objection to \textit{Pasadena's} prima facie tort theory, however, relates not to the lack of precedential support, but to the relative roles of the courts and the Legislature in establishing rules to govern labor-management relations."\textsuperscript{154}

\begin{itemize}
\item \textsuperscript{150} Note, \textit{Private Damage Actions}, supra note 64, at 1327; Note, \textit{Damage Liability}, supra note 6, at 1135-36.
\item \textsuperscript{152} \textit{Burke \& Thomas, Inc. v. Int'l Org. of Masters}, 600 P.2d 1282, 1285 (Wash. 1978).
\item \textsuperscript{153} Note, \textit{Damage Liability}, supra note at 1334.
\item \textsuperscript{154} \textit{City and County of San Francisco v. Local 38}, 42 Cal. 3d 810, 815, 726 P.2d 538, 541, 230 Cal. Rptr. 856, 859 (1986).
\end{itemize}
This need for judicial restraint has long concerned the courts. An early example is *Jamur Production Corporation v. Quill*. In *Jamur*, the court stated, “[i]n view of the nature of the field, [and] the afore-expressed need for judicial restraint, . . . the tortious based causes must be held insufficient at law.”155 Over ten years later, the *Burke & Thomas v. International Orgnization of Masters* opinion expressed the same belief, holding that “progress in public employee labor relations, and the public welfare in general, are best served at this time by a rule of judicial neutrality and restraint.”156 Still later, the *Fairmont* court stated that “[m]ost if not all the commentators in the labor law area agree that the complex issues in this field are ill suited to any comprehensive judicial solution.”157

Such concerns have been repeatedly noted by the California Supreme Court. *San Diego Teacher's Association v. Superior Court*158 stated that a court “cannot with expertise tailor its remedy to implement the broader objectives entrusted to [the Public Employment Relations Board].”159 In *El Rancho Unified School District v. National Education Association*,160 the court observed that the penalties available to the Public Employment Relations Board “are far more likely to accomplish the Legislature’s goal of ‘foster[ing] constructive employment relations (§ 3540)’ and ‘the long-range minimization of work stoppages’ than an after-the-harm-is-done award of damages.”161 This position was reiterated by Justice Kaus concurring in *County Sanitation District No. 2 v. Los Angeles County Employees Association*.162 He stated,

[i]n the absence of a determination by the Legislature that a tort action, resulting in a money damage award determined by a jury many years after the strike, is the appropriate method for dealing with public employee strikes, I do not believe the judiciary should, on its own, embrace this “solution” to the problem.163

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161. Id. at 961, 663 P.2d at 902, 192 Cal. Rptr. at 132, citing *San Diego Teachers*, 24 Cal. 3d at 13, 593 P.2d at 846, 154 Cal. Rptr. at 901.
163. Id.
Finally, in *Local 38* itself, the court stated that the area of labor relations has been marked by a withdrawal of the judiciary and a "steady growth of statutory and administrative regulation."\(^{164}\)

This growth and the complexity of modern labor legislation has presented courts with difficult choices. Often the same enactments which make strikes illegal seek to promote harmonious labor relations. Public labor peace may depend as much or more on healthy public sector unions and a true bargaining balance than on the threat of punitive action. Thus, courts granting a right of action to an employer or third party could be furthering a legislative goal of deterring strikes while simultaneously undermining the legislature's overall public sector labor scheme.

A major judicial concern has been the possibility that court imposed sanctions will interfere with legislatively enacted means of dispute resolution. This factor was recognized long ago by Justice Douglas. In his dissent in *United Construction Workers With United Mine Workers v. Laburnum*, he wrote of controversies dragging on through the courts, robbing administrative remedies of the healing effects they were meant to have.\(^{165}\) In *Local 38*, the court stated "[t]here remain today relatively few cases in which the imposition of a judicial remedy of tort damages would not impinge directly upon an established administrative mechanism for resolving disputes between a public employer and its employees."\(^{166}\) The court in *Lamphere School v. Lamphere Federation of Teachers* stressed the need to avoid judicial interference, holding that "[c]ourts venture into dangerous and basically uncharitable waters when they 'tinker' with existing legislative schemas."\(^{167}\)

In *Burke & Thomas Inc. v. International Organization of Masters*, the court expressed the belief that allowing third party lawsuits would render the action of the

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\(^{164}\) City and County of San Francisco v. Local 38, 42 Cal. 3d 810, 816, 726 P.2d 538, 542, 230 Cal. Rptr. 856, 860 (1986).

\(^{165}\) 347 U.S. 656, 671 (1953) (Douglas J., dissenting). Justice Douglas' prediction about labor cases dragging through the courts has been confirmed. The *Local 38* strike took place in 1976. The *Burns* transit strike took place in 1980. A final ruling was handed down in 1983, but only before the case had been heard at each of the three main levels of the New York court system.

At the time of this publication *Boyle v. Anderson Firefighters Ass'n*. was still being appealed. See supra note 31. Recently, in *Rivard v. Chicago Firefighters Union*, 145 Ill. App. 3d 207, 494 N.E.2d 756 (1986), it was held that the union, as an unincorporated association, could be sued in its own name. This decision is on appeal to the Illinois Supreme Court. The strike which gave rise to this case occurred in 1980.

\(^{166}\) *Local 38*, 42 Cal. 3d at 816, 726 P.2d at 542, 230 Cal. Rptr. at 860.

public service commission “a meaningless exercise, since enormous penalties not subject to their control could be imposed on one of the parties.” The court added that employer suits would also be highly undesirable because “the employer would have a powerful penalty within its control which is not subject to the commission’s jurisdiction, further eroding the authority of that body to equitably adjust the dispute.”

It has also been recognized that the utilization of damage actions to prevent strikes may result in prolonging those walkouts that do occur. This position was accepted by the court in Burns, Jackson, & Miller v. Lindner although it was held not to be sufficient grounds to pre-empt third party action. In Lamphere School v. Lamphere Federation of Teachers, the court stated the “[e]ventual settlements could be prolonged pending the resolution of multiple tort claims and counterclaims . . . and, at the same time, exacerbate labor-management disputes.” Similar sentiments were expressed in Local 38. Local 38 held that such tort actions “may have a destabilizing effect, prolonging public employee strikes and exacerbating inequalities in bargaining power.”

This concern regarding the balance of bargaining positions and the possible ruinous effect of damage actions on public employee unions has been noted by both courts and commentators. These considerations were a key factor in Local 38. The court concluded its discussion of public policy issues by stating, “judicial intervention to weight the bargaining balance in favor of public employers, by threatening to impose ruinous judgments of unions, is not a desirable or workable method of dealing with public employee strikes.”

Lamphere stated that the “uneasy balance of labor-management power which exists in the public sector could easily be upset” by permitting employer suits. The Burns court expressed the same

169. Id.
170. Note, Private Damage Actions, supra note 64, at 1320.
173. Local 38, 42 Cal. 3d at 818, 726 P.2d at 543, 230 Cal. Rptr. at 861.
174. See, e.g., Note, Private Damage Actions, supra note 64, at 1320; Note, Prima Facie Tort, supra note 66, at 699. This problem has also been noted by the federal courts. See, e.g., Nat’l Airlines v. Airline Pilots Ass’n Intern., 431 F. Supp. 53, 54 (S.D. Fla. 1976).
175. Local 38, 42 Cal. 3d at 818, 726 P.2d at 543, 230 Cal. Rptr. at 861.
176. Lamphere, 400 Mich. at 131, 252 N.W.2d at 830.
attitude toward third party damage claims, indicating that such actions would impose a crushing burden on unions and striking employees. The court in Burns added that the imposition of unlimited per se liability "would inevitably upset the delicate balance established after twenty years of legislative pondering."

It has been suggested that the bargaining balance should not be considered in weighing the pros and cons of permitting damage actions. One commentator states that "this view implies that the legislature intended that the possibility of public employee strikes play a role in the bargaining relationship, which seems unlikely in light of the explicit prohibition of such strikes." Regardless of the merits of this contention, it must be questioned whether injecting another destabilizing influence into the already volatile world of public sector labor relations is really in the interest of the general public.

A final policy-based objection arises from the large number of persons usually affected by a public sector strike. Defendant unions sometimes raise the specter of innumerable lawsuits as a justification against approving employer or third party damage actions. The Michigan Supreme Court in Lamphere Schools v. Lamphere Federation of Teachers feared that allowing employers to sue public employee unions would create "labor law logjams." One commentator has suggested that the principles of foreseeability and causation be applied to limit the number of plaintiffs entitled to sue under the theories of implied right of action and third party beneficiary.

The fears expressed in Lamphere, however, may be exaggerated. The use of class action suits are unlikely unless the union has significant assets. Thus, a fear of clogging the courts, even in our litigious society, may be the least important ramification in permitting damage actions against public sector unions.

Those favoring damage suits are not necessarily unmindful of the aforementioned policy considerations. In limiting the scope of its ruling to firefighters' strikes, the State v. Kansas City Firefighters

178. Id. at 330, 451 N.E.2d at 466, 464 N.Y.S.2d at 719.
179. Note, Private Damage Actions, supra note 64, at 1320.
180. Lamphere, 400 Mich. at 131, 252 N.W.2d at 830.
181. Note, Private Damage Actions, supra note 64, at 1327. Another commentator suggests limiting a right of action to firefighter and police strikes. See, Note, Illegal Public Employee Strikes, supra note 66, at 309.
182. See Note, Statutory and Common Law Considerations, supra note 40, at 1301. Note, Damage Liability, supra note 6, at 1101, n.87 (in jurisdictions allowing civil damage actions against illegally striking unions, no such suits had occurred).
court stated, "[w]e agree that sound judicial policy prompts that a
court refrain from a rampant exercise of its coercive power in this
delicate area of public employment."183 However, any adverse effects
are deemed of lesser importance than protecting the public and
maintaining public services.184 The prevailing public policy is ex-
pressed in statutory or common law pronouncements declaring public
sector strikes to be unlawful.

Those favoring damage actions indicate that the threat of lawsuits
will deter illegal strikes. As one commentator claims, "a civil remedy,
in addition to specified sanctions, could force union officials to think
long and hard before authorizing a strike."185 The Kansas City court
expressed this in stating, "[a] private cause of action will impose a
cost the decision to strike must reckon with."186

Another aspect of the deterrent argument raises the possibility
that employers will waive statutory penalties to get essential services back
into operation. In this respect one commentator states that "[t]he
only method that can make a no-strike law mean what it says
regardless of the incumbent in City Hall, the State House, or the
White House, is private enforcement of the law."187 This assertion
was discussed by the Local 38 court. It noted that employer damage
suits would deter weak unions, but that strong labor organizations
could insist that the employer waive its right to tort damages.188

There is also a significant body of opinion indicating that those
who favor damage actions may be placing undue reliance on the
whole punitive approach toward public sector strikes. As one com-

184. Id. at 110.
185. Note, Prima Facie Tort, supra note 66, at 698. See also, Note, Damage Liability,
supra note 6, at 1189; Note, Private Damage Actions, supra note 64, at 1320. More recent
support for the deterrence argument appears in Egan, The Management Perspective: Can
Damage Suits be Brought Against Strikers and Their Unions?, 26 J. of LAW & EDUC. 205,
215 (1987). A companion article, however, reiterates the view that such suits may further
disrupt public sector labor relations. Slesnick, The Union Perspective: Can Damage Suits Be
186. Kansas City, 672 S.W.2d at 110.
REV. 204, 210 (1981). It is true that in the past severe penalties were sometimes not enforced.
In re DiMaggio, 19 N.Y.2d 283, 225 N.E.2d 871, 279 N.Y.S.2d 161 (1967), the court stated,
"[i]t is within the realm of common knowledge that the 'automatic' penalty provisions of
Condon-Wadlin have never been enforced (with but two exceptions) over an almost 20-year
period, in which strikes by public employees have been too numerous to recall or record in
this opinion ...." Id. at 289, 225 N.E.2d at 874, 279 N.Y.S.2d at 165. The far more
sophisticated Taylor Law, however, is being enforced. See, e.g., In re Board of Educ. of
Lakeland Central School Dist. of Shrub Oak, 59 A.D.2d 900 (1977); Buffalo Teachers Fed'n,
188. 42 Cal. 3d at 818, 726 P.2d at 543, 230 Cal. Rptr. at 861.
mentator states, "the deterrent effect of current penal provisions is dubious at best..."189 Another notes that "while statutes have banned strikes as a matter of law, even those with the most draconian sanctions have failed to prevent them as a matter of fact when bargaining deadlocks occur."190

It has also been observed that the threat of punishment may be counterproductive. One commentator states that "the obvious inequity of the purely punitive approach may encourage employee strikes rather than prevent them."191 Similar sentiments have been expressed by noted labor mediator Theodore Kheel. In considering several strikes that took place during the early years of New York's Taylor Law, he concluded that rather than preventing these walkouts, the statute exacerbated them.192

Some suggest that these arguments would apply only to confrontations between the union and its employer or the state.193 There is nothing to suggest, however, that unions which are willing to confront court injunctions and statutory penalties will be deterred by the threat of third party lawsuits. In fact, at the time the Burns action was first brought, several labor lawyers were reported as believing that such a lawsuit would have no deterrent effect on unions.194

Those favoring damage actions also note the need to compensate injured parties. With regard to public employers, Justice Lucas in his Local 38 dissent states that unlawful strikes "can result in devastating financial injury to the affected municipality. To deprive public agencies of their right to recompense for such unlawful conduct, a right enjoyed by all other persons in the absence of statutory limitations, is not only unsound but also constitutes unprecedented discrimination against California municipalities."195 One commentator expressed the same concern regarding third parties, stating that "to prohibit these [third party] suits would leave unanswered the question of justice for [those] citizens who have lost life or property through intentional wrongdoing."196

189. Dripps, supra note 1, at 617.
193. Note, Private Damage Actions, supra note 64, at 1319.
196. Note, Illegal Public Employee Strikes, supra note 66, at 309.
This line of argument, particularly with regard to third parties, has more appeal than the deterrence contention. However, given the finite nature of union assets, this argument is only valid in situations where the number of potential plaintiffs is sharply restricted. In a situation where multiple parties could present a viable cause of action, it is doubtful that any meaningful recovery could be effected. As one commentator has observed, “compensation available through tort actions against unions and their members will never equal the damages inflicted by the strike unless an adequate response to the supply elasticity problem is found.”

CONCLUSION

Given the strong negative impact that damage actions against public sector unions could have, courts have properly restricted the circumstances under which these suits may be successfully brought. The per se theory of union liability promotes the opposite situation and is unacceptable. The rejection of per se liability by the California Supreme Court in City and County of San Francisco v. Local 38, and in other decisions, is desirable.

The deterrent value of damage actions is highly suspect at best. Nor is there likelihood of individuals gaining adequate compensation from a public employees union when a strike has caused losses throughout the community. At the same time, such actions clearly have the potential to exacerbate disputes, prolong strikes, and most importantly, undermine coherent public labor policy. Public labor peace depends on the existence of healthy unions, an equitable bargaining balance and smoothly functioning administrative processes; not on additional punitive measures.

Thus, the judicial reaction to the more traditional causes of action is also acceptable. Citizens affected by strikes where the losses have been widespread, and where the amounts of damage claims are often indeterminate or speculative, have little incentive to bring suit. However, those few plaintiffs who can present compelling evidence of special damages, most likely when an illegal strike impacts public health and safety, do have the opportunity to gain recompense through such actions as public nuisance.

For the most part, judicial decisions have relied upon the application of traditional doctrines. However, rejecting liability on grounds

197. Dripps, supra note 1, at 617.
of public policy, either in part, or almost entirely, as in *Local 38*, is appropriate. In an area as sensitive as public sector labor relations, it is essential that a court be cognizant of the overall impact of its ruling. Finally, a reliance on public policy to reach a result-oriented decision is superior to questionable common law interpretations previously noted.

Ideally, as so many courts and commentators have observed, the damage action issue would be best addressed by legislatures. Despite the generally acceptable trend in court decisions, the present situation is hardly ideal. Comprehensive legislation would remove much of the expense, uncertainty and delay which exists when courts, unguided by any enactment, deal with what is usually a case of first impression.

If employers are to be granted any rights of action, they should be carefully integrated into a comprehensive public sector labor law. A better solution would be to keep public sector labor-management disputes out of the courts entirely. As one commentator notes about federal labor law, "the NLRB is the only present body with the expertise necessary to make sophisticated labor law decisions with any real continuity." This is equally true about state administrative bodies and state labor law.

With regard to third parties, unions should receive tort immunity, with narrow exceptions for well documented claims of damages arising from police or firefighters' strikes. The purpose of such exceptions should not be any futile exercise in deterrence. Rather, the aim should be to the compensation of the victim and the satisfaction of the community's sense of justice.

The possibility of such legislation in the near future is, however, not great. Thus, in the absence of legislative guidance, courts faced with damage suits against public sector unions should, in the interest of sound public labor policy, adhere to the current trend of restricting the circumstances under which such claims may be brought.

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199. See supra notes 116-117, 124, 139 and accompanying text.
201. The public has shown it will tolerate teachers and transit strikes, but those involving police and fire services are another matter. On the subject of these strikes, see Wohlers, *The Legal Realities of the Hardball Game of Firefighter and Police Strikes*, 15 Idaho L. Rev. 39 (1978).