conduct or intervention does not necessarily negative causal relationship between the negligent act and the ultimate consequences. If it be voluntary in the fullest sense then it will do so. If, however, it is non-voluntary in that it would not have occurred but for the defendant's original act, then it will not negative causal relationship unless it is unusual—that is something unreasonable or unwarrantable.[27] The wife's conduct in leaving her husband owing to his supposed injury could not be described as reasonable, if only on public policy grounds. Indeed one of the most interesting points about the case was the illustration it afforded of the way in which the law is formed by public policy—the judicial interpretation of what marriage means to the community—

> "If she thought about her matrimonial obligations at all, she probably regarded them . . . as imposing upon her no duty to stand by and support her husband in sickness and in health. I decline to hold that her conduct was reasonable as being such as would occur in an ordinary case and with ordinary persons acting according to the accepted standards of the community."[28]

A very similar case to the present was *W.* v. *Minister of Pensions*[29] where Denning J. (as he then was) held that a soldier who claimed that his chronic state of anxiety had been caused by his wife's misconduct while they were separated owing to his war service, could not demand compensation for his illness as being due to his war service. The misconduct of his wife, though it would not have occurred but for his absence was not what could reasonably be expected. The plaintiff's separation from his wife merely provided the conditions in which the cause operated.[30]

27. See, e.g. (1) The Orepesa [1943] P. 32 at p. 37 per Lord Wright.
(2) *Summers* v. *Salford Corporation* [1943] A.C. 283 at p. 296 per Lord Wright.
(3) 72 L.Q.R. "Causation in the Law", p. 58, 260, 398, by Professor Hart and A. M. Honoré.
28. [1958] S.A.S.R. at p. 186.
29. [1946] 2 A.E.R. 501.
30. [1946] 2 A.E.R. 501 at p. 502-3 per Denning J. See also *Lynch* v. *Knight* (1861) 9 H.L.C. 577, *Lambert* v. *Eastern National Omnibus Co. Ltd.* [1954] 2 A.E.R. 719—as to what is "reasonable" conduct by a spouse.

CONSTITUTIONAL LAW

Section 92: What is Essential to Interstate Trade and Commerce

The test of how far the protection of Section 92 extends has always been elusive. Recently the value of the distinction between what is essential and non-essential to inter-State trade and commerce has been discussed.[1] The High Court in *Russell* v. *Walters*[2] preferred a test of "practical reality": "The question of when and

1. See: P. H. Lane, 32 A.L.J. 335, and Prof. Ross Anderson, 33 A.L.J. 276 and 294.
2. (1957) 96 C.L.R. 177.

where inter-State transit begins and ends is a question to be decided not upon the terms of a contract but as a matter of practical reality depending on the facts of each particular case."[3] Two illustrations of the application of this principle are to be found in decisions of the South Australian Supreme Court.

In *Fry* v. *Russo*[4] the respondent had driven an unregistered motor vehicle contrary to Section 7 (1) of the Road Traffic Act 1934-1956. The majority (Reed J. dissenting) accepted his defence that, at the time, he was engaged in an activity of inter-State trade and commerce. The respondent had for some years been engaged in carrying goods inter-State. Having returned from Melbourne, he drove his semi-trailer to a factory to enquire about another load, but, being unable to obtain one, he went to a service station to have his semi-trailer serviced. The Magistrate found that, on leaving the factory, the respondent had gone to the service station solely for the purpose of having his vehicle serviced. The Magistrate found, moreover, that the respondent had, at all times, travelled by the shortest possible route and, at the time when he was stopped by a police constable, was returning home by the shortest possible route. The charge was dismissed by the Magistrate on the ground that the vehicle was being used for the purpose of inter-State trade and commerce. The complainant, on appeal, accepted the Magistrate's view of the evidence but challenged the conclusion, contending that the servicing of the vehicle, though it may be an ancillary, was not an incident of inter-State trade and commerce.

Napier C.J. applied the language of the Privy Council in *Hughes and Vale Pty. Ltd.* v. *The State of N.S.W.*[5] and the High Court in *Nilson's Case*.[6] He concluded that the vehicle, while being driven to be serviced, was being "operated in course of and for the purpose of inter-State trade", or, using the High Court phrasing, was being "used exclusively in or for the purposes of inter-State trade". He did not restrict the course of inter-State trade to actually coming or going inter-State, but the vehicle must be on the road for no other purpose, nor, referring to the concession made by the appellant that the protection of Section 92 extended to cover the driving of the vehicle to the factory with a view to obtaining a load, could it divagate about the country-side "plying for hire if it was to remain under the protection of Section 92". Napier C.J. arrived at his decision without using any test. Having decided that the protection of Section 92 cannot be restricted to actually coming or going inter-State, he decided that the servicing of a vehicle is an activity of inter-State trade and commerce.

Ross J, too, was of the opinion that the protection of Section 92 extends further than actual transportation across the border. The problem is to say at what point that protection ends. Ross J. relied on the test in *Russell* v. *Walters* and found that practical reality demanded that Section 92 extend to the servicing of the vehicle, which was an "inseparable concomitant" of the respondent's business as an inter-State carrier: and so long as the journey taken was not

3. ibid at p. 184.
4. [1958] S.A.S.R. 212.
5. (1954) 93 C.L.R. at 35; [1955] A.C. 241.
6. (1955) 93 C.L.R. 292.

unreasonable, the service station need not be one closest to the respondent's home.

The appellant had relied strongly on a dictum in *Grannall* v. *Marrickville Margarine Pty. Ltd.*[7] There Dixon C.J., McTiernan, Webb and Kitto JJ. stated: "The idea that because the freedom of trade, commerce and intercourse among the States is assured by the Constitution, all matters that are incidental or ancillary to such trade, commerce and intercourse are in the same way protected from interference or control is quite fallacious."[8] Both Napier C.J. and Ross J. rejected the contention that the servicing of the vehicle could be regarded as being a matter merely "incidental or ancillary" to inter-State trade. On the other hand Reed J. concluded that the respondent's use of his vehicle in the present case must be "inseparable", "indispensable" or "essential" to the carriage of goods inter-State before Section 92 would protect him; and that the driving of the vehicle to be serviced was at most "an act preparatory to a transaction of inter-State trade or commerce, or accessory to it." In addition, Reed J. reserved his opinion as to whether a journey to ascertain whether goods were available for transport would be protected by Section 92.

Hence in the present case Napier C.J. cited no test to arrive at his decision; Ross J. relied on the "practical reality" test of *Russell* v. *Walters;* Reed J., having quoted several dicta, seemed to rely on the "essential or non-essential" test suggested by Dixon C.J., McTiernan J. and Webb J. in *Hughes and Vale Pty. Ltd.* v. *The State of N.S.W.* (No. 2).[9] The practical reality of vehicular transport, it would seem, demands the servicing of vehicles. Those vehicles used in inter-State trade must be serviced. It is not unreasonable, therefore, to extend the protection of Section 92 to the driving of a semi-trailer to and from a garage for servicing. However, that conclusion is an arbitrary one and a different answer could easily be made, as in most Section 92 cases, if there were some differences of fact and circumstance to be considered.

In *Ridland* v. *Dyson*[10] the question was not how far the protection of Section 92 extended but whether it covered the transaction at all. The facts were clouded by what Napier C.J. described in his judgment as a "fog of uncertainty." It was, however, common ground that the respondent had driven a vehicle on which goods were carried for hire without a licence contrary to Section 14 of the Road and Railway Transport Act 1930-1957. The Magistrate found that the vehicle was engaged in inter-State trade and, therefore, exempted by Section 92 from the provisions of that Act. Napier C.J., sitting alone, allowed the complainant's appeal. The respondent testified that he had been instructed to pick up timber at Mt. Gambier and take it to Port Adelaide. His wife owned and operated a truck per medium of a driver whom she employed and paid. The respondent had instructed his wife's driver to pick the timber up in Mt. Gambier and bring it—in her truck—to his depot at Dartmoor. There the load was off-loaded on to one of the respondent's vehicles, and so

7. (1955) 93 C.L.R. 55.
8. ibid at 77.
9. (1955) 93 C.L.R. 113 at 123.
10. [1959] S.A.S.R. 72.

transported from Dartmoor, in Victoria, to Port Adelaide, in South Australia. His Honour accepted the Magistrate's finding that the timber had been taken over the Victorian border and there transhipped to avoid the operation of the South Australian law. But "the fog of uncertainty" surrounded the question whether the respondent's wife was in fact carrying on a separate business at the material time. The wife had not kept separate books; at the relevant time she was in ill-health, and the respondent had directed the use of her vehicle and driver; the respondent had received all payments and arranged the cartage; and four months later no payment had been made to the wife for the use of her vehicle in the transaction. His Honour concluded from these facts that the arrangement to carry the timber was made between the respondent and the consignor company. The timber was carried, therefore, under the respondent's contract to transport it from Mt. Gambier to Port Adelaide. Instead of two contracts as alleged, there was only one.

The onus of proof was on the respondent to bring himself within the protection of Section 92, and, in default of evidence to the contrary, His Honour assumed that the respondent had engaged himself to carry the timber, if not by the shortest, by some recognized route. There was no contract providing for a deviation into Victoria, and, despite the fact that such a deviation was made, the transaction was in no way altered from a contract of carriage intra-State to one inter-State: no protection could be afforded, therefore, by Section 92.

Napier C.J. agreed that it was a question of fact and degree whether a journey across the border would invest a transaction with the character of inter-State trade and commerce. But in the present circumstance, he held that the deviation was not genuinely intended as a performance of the contract but was solely for some purpose of the carrier; he was "on a frolic of his own". For that reason the facts were not covered by the High Court's decision in *Naracoorte Transport Pty. Ltd.* v. *Butler*.[11] Here there was one single contract of hire; in that case there were two. For those reasons His Honour allowed the appeal. It would seem that, had the respondent been more precise in his conduct of the transaction, he may have brought himself within the sanctity of Section 92: had two contracts of carriage been made by the respondent the facts may have been covered by the *Naracoorte Case* and the same decision reached.

Be that as it may, Napier's C.J. approach to the problem is interesting to compare with that of the High Court in two 1959 decisions. In *Beach* v. *Wagner*,[12] a carrier contracted to carry wool from Bungunya, in Queensland, to Brisbane. The road from Bungunya to Goondiwindi is, in certain weather, unsuitable for the diesel and semi-trailer operated by the carrier. It was his practice, therefore, to drive to his depot at Boggabilla in New South Wales, tranship the load to his semi-trailer and proceed then to Brisbane. While driving from Bungunya to Boggabilla on such a journey the carrier was alleged to have committed an offence contrary to the State Transport Facilities Act (Queensland) 1946-1955. The Court in a joint judgment held that the transaction fell within the protection of Section 92. There

11. (1956) 95 C.L.R. 455.
12. (1959) 33 A.L.J.R. 62.

was no reason why the carrier should not have had a depot in New South Wales; nor was there any reason why he should not carry goods there from Queensland and there ship them back to Queensland. It was in the course of his business to do so, and the transaction was none the less one of inter-State trade and commerce, because the wool returned to Queensland. The Court regarded the case as complementary to the *Naracoorte Case.*

The facts of *Beach* v. *Wagner* are almost identical to those of *Ridland* v. *Dyson.* One distinction, however, is that the road from Bungunya to Goondiwindi is in certain weather unsuitable for a semi-trailer, though it will carry a smaller vehicle, while the road from Mt. Gambier to Port Adelaide is a bitumen road. Yet the carrier in *Beach* v. *Wagner* could as easily have established his depot in Queensland somewhere near Goondiwindi, whence the road is a bitumen one to Brisbane, as in New South Wales. There were not two separate contracts of carriage; nor were there two carrying companies. To grant the protection of Section 92 to a journey across the border which was not necessary is to stretch the interpretation of the Section to a doubtful limit and with respect it is submitted that the Court went too far. The place of the depot could have, at least, been questioned.

However, the High Court in the recent case of *Harris* v. *Wagner*[13] has made some attempt to limit the effect of *Beach* v. *Wagner* and the result is very similar to the decision of Napier C.J. in *Ridland* v. *Dyson.* A carrier contracted to carry wool from Jandowae in Queensland, to Brisbane. However, the terms of the contract of carriage were that the load should be carried from Jandowae to Tweed Heads and then from Tweed Heads to Brisbane. The payment would be for carriage from Jandowae to Tweed Heads, and a separate payment for the journey from Tweed Heads to Brisbane: the contract was of the nature that Napier C.J. suggested in *Ridland* v. *Dyson* would perhaps be invested with the protection of Section 92. The carrier was apprehended while driving from Tweed Heads to Brisbane. His conviction for driving not in accordance with the State Transport Facilities Acts 1946-1955 was upheld by the High Court.

The substance of Their Honours' judgments was that while the expression inter-State trade covered journeys across the State lines and such journeys were free by virtue of Section 92, unnecessary journeys across the border, though they could not be prohibited, did not change intra-State transactions into inter-State transactions, sheltering under Section 92. The carrier had driven to within eight miles of Brisbane from Jandowae, but then had detoured seventy miles south to Tweed Heads, stopped for a short period, and driven back to Brisbane. While at Tweed Heads nothing was loaded or unloaded on to the truck. The Court found that this was, therefore, an unnecessary journey and did not alter the true nature of the transaction: the contract remained one to carry goods intra-State: Section 92, therefore, afforded no protection. The journey to Tweed Heads was nothing more than what Taylor J. described as a "superficial excrescence". Napier C.J. described the carrier's journey in *Ridland* v. *Dyson* from Mt. Gambier to Dartmoor as a "frolic of his own". The different words express the same result. But the more direct

13. (1959) 33 A.L.J.R. 353.

approach of Napier C.J. may be preferred to the circuitous means used by some of the High Court.

Beach v. *Wagner* was relied on by the carrier in *Harris* v. *Wagner*. Those judges, who did distinguish that decision did so on the ground that it was necessary for the carrier in the *Beach Case* to go to Boggabilla, for his depot was there: at the same time, however, they did not query the fact that this depot was at Boggabilla and not Goondiwindi. *Harris* v. *Wagner* seems to be clearly complementary to *Ridland* v. *Dyson* although unfortunately only one member of the High Court refers to the South Australian decision. Menzies J. pointed out that Napier C.J. in *Ridland* seemed to stress the absence of any contractual obligation to divagate into Victoria. In reaching his decision Menzies J. however, refused in *Harris* v. *Wagner* to regard the existence of a contractual obligation to travel from Jandowae to Brisbane by way of Tweed Heads as decisive in favour of the appellant. This would seem to indicate that Menzies J. at least, would uphold the *Ridland* decision even if the original pean in *Ridland* had not been clouded by a "fog of uncertainty."

CONTRACT PENALTY CLAUSES

Principles to Apply in Determining Validity

The authoritative statement of the principles for ascertaining whether a contractual term is a penalty is that of Lord Dunedin in *Dunlop Pneumatic Tyre Co. Ltd.* v. *New Garage and Motor Co. Ltd.*[1]:

"1. Though the parties to a contract who use the words 'penalty' or 'liquidated damages', may prima facie be supposed to mean what they say, yet the expression used is not conclusive. The Court must find out whether the payment stipulated is in truth a penalty or liquidated damages. . . .

2. The essence of a penalty is a payment of money stipulated as *in terrorem* of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage. . . .

3. The question whether a sum stipulated is penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged of as at the time of the making of the contract, not as at the time of the breach. . . .

4. To assist this task of construction various tests have been suggested which if applicable to the case under consideration may prove helpful or even conclusive."

In *Arlesheim* v. *Werner*,[2] Napier C.J. accepted this passage as the basis of a judgment concerning a damages clause in a contract of service to work as a ladies' hairdresser. The respondent agreed with the appellant company, Arlesheim Ltd., to give six months' notice before terminating her employment. If the appellant left without giving this notice the contract stipulated that she would pay the appellants the sum of £56/10/- as liquidated and ascertained damages.

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1. [1915] A.C. 79 at 86-87.
2. [1958] S.A.S.R. 136.