subject matter. They were not dealing with a penal provision to be narrowly and literally construed, but with important social legislation the avowed aim of which was to provide compensation for workers for injury in all reasonable circumstances. Indeed the 1946 amendment, which (*inter alia*) included for the first time the definition of 'disease', was introduced with the intention of widely extending the scope of worker's compensation in Victoria.

Whilst it is true that the Court cannot give an Act an interpretation which is not open on its clear wording merely because such an interpretation is more likely to be the one intended by the legislature, the judgment of O'Bryan J. shows that no straining of words is required in order to hold the definition of 'disease' applicable to ss. 12 and 14. His Honour's judgment appears more in harmony with the intention of the Act and does no violence to the wording of these sections.

Finally, it does seem a rather unusual result that the definition of 'disease' in the Act should be held inapplicable to that part of the Act which deals with diseases.

J. F. FOGARTY

TORTS – LIABILITY FOR IMPAIRMENT OF HUSBAND'S RIGHT TO CONSORTIUM

Toohey v. Hollier[1]

The respondent's wife was injured in a collision between a car in which she was a passenger and one driven by appellant. Her brain was injured and as a result she suffered frequent breakdowns and was unable to perform her household duties as efficiently as before. The appellant did not deny negligence and in an action for damages brought by the respondent and his wife the trial judge awarded the respondent *inter alia* the sum of £1,000 damages in respect of the loss of *consortium*. On appeal this was affirmed. A husband's right to damages for loss of *consortium* is not limited to cases where he has sustained a total loss thereof.

It has long been settled in our law that a husband has a right of action against a stranger who injures his wife, whereby he loses her 'comfort and society'.[2] It is true that Blackstone refers to it in language suggesting that it arose only where the injury to the wife

[1] [1955] A.L.R. 302. High Court of Australia; Dixon C. J., Kitto and McTiernan JJ.

[2] See, for two early examples, *Guy v. Livesey* (1618), Cro. Jac. 501; *Hyde v. Scissor* (1619), Cro. Jac. 538. See also Lippman, 'The Breakdown of Consortium', (1932) 30 *Columbia Law Review* 651. It is not clear whether the action lay in trespass or in case. Holdsworth, citing the above cases, says that the action was one of trespass (*History of English Law*, vol. viii, 430); Blackstone, citing the same cases, says that the action lay in case (*Commentaries*, vol. iii, 140).

was caused by a direct assault;[3] but subsequent cases have left no room for doubting that it now exists even where the injury to the wife results from the defendant's negligence.[4] The action was extended; in *Winsmore v. Greenbank*,[5] to cover the 'enticement' cases, where there is no injury to the wife, but only one to the husband.

The question whether a married woman had a similar right in respect of the loss of her husband's *consortium* was not raised until 1861.[6] In that year there were some inconclusive dicta on the matter in *Lynch v. Knight;*[7] but the case went off on the grounds of remoteness of damage. It was not until the nineteen-twenties that the question was again raised. Then, in *Gray v. Gee,*[8] Darling J. held that a married woman could succeed in an action for enticement against another woman. In 1932 his view received the approval of the Court of Appeal;[9] and it has recently received the approval of the House of Lords.[10] This approval was by way of *dictum;* meanwhile, the High Court, over the strong dissent of Isaacs J., had held that a wife could not succeed in an action of this type.[11] Bearing in mind the High Court's policy[12] of following English decisions on common law points where the common law is settled, it may be predicted, albeit with some hesitation, that if the question comes before it again, the Court will hold that a wife can sue for enticement.

An enticement action alleges as the ground for damages a direct and conscious interference with the marital relationship. It is thus essentially different from an action for loss of *consortium* which is based on a negligent injury to the spouse. Here the defendant is probably unaware of the existence of the relationship. Has the wife,

[3] *Commentaries,* vol. iii, 140.

[4] *Best v. Samuel Fox & Co. Ltd.* [1952] A.C. 716, 733, *per* Lord Goddard L.C.J.

[5] (1745), Willes 577. See Lippman, *op. cit.* note 1 above; Brown. 'The Action for Alienation of Affections', (1934) 82 *University of Pennsylvania Law Review* 472.

[6] The failure to raise the question before 1861 is partially explained by the fact that a married woman could not sue in tort without joining her husband as plaintiff; and he would certainly not have consented to bring an action for alienation of affections against his mistress. But this does not explain the lack of precedents for an action where the husband was not himself a wrongdoer. The wife's procedural disability was removed by the Married Women's Property Act. 1882. A widow was not subject to the same procedural difficulties, but was debarred from suing by the decision in *Baker v. Bolton* (1808) 1 Camp. 493 (approved by the House of Lords in *Commissioners for executing the office of Lord High Admiral of the United Kingdom v. Owners of Steamship Amerika,* [1917] A.C. 38).

[7] (1861) 9 H.L.Cas. 577.

[8] (1923) 23 T.L.R. 429.

[9] *Place v. Searle* [1932] 2 K.B. 497. See note, (1933) 5 *Cambridge Law Journal,* 112.

[10] *Best v. Samuel Fox & Co. Ltd.* [1952] A.C. 716.

[11] *Wright v. Cedzich* (1930) 43 C.L.R. 493. See notes, (1931) 9 *Canadian Bar Review,* 318; (1932) 48 *Law Quarterly Review,* 322.

[12] Discussed below.

in such a case, a similar right of action to that which the common law concedes to a husband? This question came before the English courts for the first time in 1950. In *Best v. Samuel Fox & Co. Ltd.* the plaintiff claimed damages for loss of *consortium* resulting from a negligent injury to her husband; he had become impotent as a result of his injuries, and her claim was based on the loss of her right to enjoy sexual intercourse with him. The action was heard by Croom-Johnson J., and the claim dismissed.[13] The ground was that a wife had no right of action at common law for loss of *consortium* negligently caused. The defendants raised the point that even if a wife could sue for loss of *consortium,* she must prove a total loss thereof (permanent or temporary), and that Mrs Best had succeeded in proving only an impairment of her *consortium.* Croom-Johnson J. found no merit in this argument. Mrs Best appealed to the Court of Appeal, which upheld the decision.[14] Lord Asquith of Bishopstone and Cohen L.J. were of opinion that the husband's right of action for loss of *consortium* as a consequential result of the negligent injury of his wife was an anomaly, and that this anomaly should not be extended by allowing a similar right to a wife. Birkett L.J. dissented on this point. But all three judges agreed in holding that in any event there must be a total loss of *consortium.* As Lord Asquith of Bishopstone and Cohen L.J. were of opinion that the husband's right of action for loss of *consortium* as a consequential result of the negligent injury of his wife was an anomaly, and that this anomaly should not be extended by allowing a similar right to a wife. Birkett L.J. dissented on this point. But all three judges agreed in holding that in any event there must be a total loss of *consortium.* As Lord Asquith put it, *consortium* is 'one and indivisible', it is a concept which comprises a number of elements, and even the total loss of one element amounts to a mere impairment of the whole right.

Mrs Best appealed to the House of Lords, but was again unsuccessful.[15] Their Lordships upheld the decision on the ground that the anomalous action allowed to a husband should not be extended to a wife. But they also commented on the contention that there must be a total loss, not a mere impairment, of the *consortium.* In the view of Lord Goddard L.C.J., the husband, in order to succeed in an action of this kind, must prove a total loss of *consortium,* and can then only recover damages for the loss of that part of *consortium* that is called *servitium*—the right to the wife's services in

[13] [1950] 2 All E.R. 798. See Baker, 'Consortium and the Alleged Emancipation of the Married Woman', (1950) 2 *University of Western Australia Annual Law Review* 80; Cowen, 'Domestic Relations: Actions for Loss of Consortium', (1951) 25 *Australian Law Journal,* 390.

[14] [1951] 2 K.B. 639. See Cowen, *op. cit.,* note 12 above, *Addendum.*

[15] [1952] A.C. 716 See Cowen, 'Domestic Relations: Actions for Loss of Consortium', (1952) 26 *Australian Law Journal* 358; Fridman, 'Consortium as an "Interest" in Torts', (1954) 32 *Canadian Bar Review,* 1065; note, (1952) 68 *Law Quarterly Review,* 430; note, (1953) 16 *Modern Law Review,* 92, 221.

and about the household. Lord Porter also thought that a total loss of *consortium* must be proved. On the other hand, Lord Reid, with whom Lord Oaksey agreed, thought that an impairment of the *consortium* would ground an action, and that the destruction of the wife's capacity for sexual intercourse would constitute such an impairment. Lord Norton of Henryton preferred to reserve his opinion until the question should actually arise.

In the instant case the High Court was strongly pressed by the appellant with the argument that as Mr Hollier had not lost the society and comfort of his wife, the damages were wrongly awarded. Naturally enough, this argument was founded on the statements made in *Best v. Fox*. But the Court declined to accept it. They referred to the pleadings found in the older cases, and pointed out that in them a variety of terms, both Latin and English, was used, and that none of these terms had acquired a technical legal meaning. The appellant's argument rested on an assumption that the common law first gave a husband a right to the *consortium* of his wife and then allowed him to bring an action for an injury to the wife whereby he was deprived of that right. But the common law took no such abstract position. It merely allowed a husband to sue for the damage which he had suffered as a result of the injury to his wife, and required him to prove his loss; this he could only do by showing that he had been deprived, in his marital capacity, of some material temporal advantage capable of estimation in money. In the instant case it was clear that the husband had, as a result of the injuries suffered by his wife, sustained a grievous loss. The damages awarded by the trial judge might be considered somewhat large, but there was nothing in his judgment to show that in assessing them he had proceeded on a wrong principle.

The Court's decision appears to be eminently sound. If the views of the appellant had found favour, the admitted right of a husband to sue for loss of *consortium* would have been so cut down as to be largely valueless. The Court, it is submitted, put the matter on a realistic footing when it recognized that a husband has a valuable asset in the aid and comfort which the society of his wife (not merely her services in the house) affords him. At the same time, the Court was clearly aware of the need to discourage fantastic claims – for example, in respect of mental distress occasioned to him by the contemplation of the wife's suffering. This need is met by insisting that the husband's damages must be confined to material or temporal loss capable of estimation in money. In so holding, the Court noted that the common law was similarly interpreted in the United States.[16]

[16] Citing *Birmingham Southern Railway Co. v. Lintner*, 109 Am. St. Rep. 40 (Alabama, 1904); *Furnish v. Missouri Pacific Railway Co.*, 22 Am. St. Rep. 800 (Missouri, 1890). But cf. *Cassidy v. Constantine*, 168 N.E. 169 (Massachusetts, 1929); and see note (1930) 43 *Harvard Law Review*, 661.

One further point is worth noting. It would seem clear that the Court of Appeal gave two *rationes decidendi* for their decision in *Best v. Fox*, one of them being that no action lies in respect of an interference with *consortium* unless that interference results in a total loss thereof. Hence if the matter again comes before the Court of Appeal, they will almost certainly regard this point as concluded by authority in that Court, even though the House of Lords left the matter open.[17] In the past, the High Court has suggested that it will follow clear decisions of the Court of Appeal, even though it disagrees with them, in order to achieve a consistent interpretation of the common law throughout the British Comonwealth;[18] but more recent decisions have shown a departure from this rigid position.[19] The instant decision is in harmony with the recent trend, and may perhaps indicate that the Court is modifying its views. It may be that the true position of the Court is that it will follow the English interpretation of the common law only if it regards that interpretation as being settled. This would be consistent with its attitude, as expressed in *Piro v. W. Foster & Co. Ltd.*[20] towards decisions of the House of Lords.

P. BRETT

[17] Cf. *Denman v. Brise* [1949] 1 K.B. 22, 26-8, *per* Tucker L.J.

[18] See *Sexton v. Horton* (1926) 38 C.L.R. 240; *Waghorn v. Waghorn* (1942) 65 C.L.R. 289; *Wright v. Wright* (1948), 77 C.L.R. 191; *Powell v. Powell* (1948) 77 C.L.R. 521. See also Cowen, 'Binding Effect of English Decisions upon Australian Courts', (1944) 60 *Law Quarterly Review*, 378; Parsons, 'English Precedents in Australian Courts', (1949) 1 *University of Western Australia Annual Law Review*, 211; Stone, 'A Government of Laws and Yet of Men: Being a Survey of Half a Century of the Australian Commerce Power' (1950) 25 *New York University Law Review* 51, 459-60 (reprinted (1950) 1 *University of Western Australia Annual Law Review*, 461, 468-9).

[19] *Koop v. Bebb* (1951) 84 C.L.R. 629; *Watts v. Watts* (1953) 89 C.L.R. 200.

[20] (1943) 68 C.L.R. 313.

CHARITABLE TRUSTS — GIFT OF INCOME IN PERPETUITY

Re Williams[1]

A testator gave the residue of his estate to trustees upon trust to pay the income arising therefrom to the Bendigo Base Hospital for ever. The plaintiff hospital took out an originating summons which included the question whether this gift passed the corpus of the property to the hospital. It was held that it did not. The terms of the will excluded the operation of the rule that a perpetual gift of income passes the corpus of the gift.

In 1841 the case of *Saunders v. Vautier*[2] decided that if a delayed gift of corpus was made to an individual, the individual could claim

[1] *Re Williams (Deceased), Bendigo and Northern District Base Hospital of Bendigo v. Attorney-General* [1955] A.L.R. 255. Supreme Court of Victoria; Dean J.

[2] (1841) 4 Beav. 115.