Ross, J. found on the facts that the initiation of the suit was the result not of the money payment but of the petitioner's realization that a reconciliation with the wife was impossible. This being the true inducement leading to the institution of the suit, it is not collusive merely to accept certain moneys on account of costs.

The propositions formulated by Ross, J.[52] are not inconsistent with the proposition in *Churchward* v. *Churchward*,[53] though they do not cover all collusive arrangements. Ross, J. states that the true test of collusion is whether the agreement has any "tendency to pervert the course of justice".[54] It is submitted, however, that although such agreements will always be found to be collusive, yet there are other agreements which the courts may decide do not have this effect, but which will nevertheless be collusive within the *Churchward* v. *Churchward*[55] meaning, in that they constitute the sole motivating force which leads to the institution of the suit, or they provide for its conduct in the manner that has been described above.

In all events, the court is bound to investigate all agreements and arrangements made in relation to the suit, and it seems that the onus is on the petitioner to satisfy the court, on the balance of probabilities, that the suit is brought, not as a result of the concerted action of the parties, but in accordance with the petitioner's own independent decision.

D. ROFE, B.A., Case Editor — Fourth Year Student.

INSANITY AS A DEFENCE TO MARITAL CRUELTY

SWAN v. *SWAN*

The English Courts in recent years have differed as to the existence of the defence of insanity to the matrimonial offence of cruelty. In a recent decision of the Court of Appeal in *Swan* v. *Swan*[1] this question is discussed, but not necessarily settled.

The wife presented a petition for divorce on the ground of cruelty. The Commissioner found the husband had been guilty of cruelty up to and including August 1947, but that such cruelty had been condoned. As to cruelty subsequent to that date, he found that at the time of the commission of the cruel acts, the husband did not know what he was doing, or that what he was doing was wrong. Accordingly he dismissed the petition. The Court of Appeal granted the decree on the ground that the wife's conduct prior to 1947, did not amount to condonation. Contained in the judgments is a discussion of three controversial questions relating to the law of cruelty. Firstly, whether or not an intention to do the cruel act is an essential ingredient of the offence; secondly, whether or not insanity is a defence to cruelty; thirdly, if insanity is a defence to cruelty, what is its scope.

(1) Is Intention an Essential Element of Cruelty.

It was once thought that a malicious motive was an essential element in cruelty. But the Court of Appeal in *Squire* v. *Squire*[2] decided that it was not necessary in cruelty suits to prove that the conduct proceeded from malignity. It also held that in determining whether a party intended to be cruel, the Courts should have regard to the principle that a man is presumed to intend the natural and probable consequences of his acts.

Asquith, L.J. in *White* v. *White*[3] illustrated the first point decided in *Squire* v. *Squire*[4] as follows: A hits B and injures him. In a cruelty suit it is only necessary to show he intended to hit B; it is not necessary to prove an

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52 (1953) S.A.S.R., at 152.
53 (1895) P.7
54 (1953) S.A.S.R., at 152.
55 (1895) P.7.
1 (1953) 3 W.L.R. 591.
2 (1949) P. 51.
3 (1950) P. 39.
4 (1949) P.51.

intention to injure.

Denning, L.J. in *Kaslefsky* v. *Kaslefsky*[5] and in other cases has also interpreted *Squire* v. *Squire*.[6] His view is that to prove cruelty it must be shown either that the respondent intended to injure the petitioner, or there must be conduct which is in some way aimed at the petitioner by the respondent. He defines "conduct aimed at the other party" as actions or words actually or physically directed at one party by the other, even though there is no desire to injure him or inflict misery on him. For example, the conduct may consist of a display of temperament, emotion or perversion, whereby the one gives vent to his or her feelings, not intending to injure the other, but making that other the object or butt at whose expense that emotion is relieved.

It is submitted that the above view is substantially the same as that of Asquith, L.J. The respondent intends to make petitioner the butt at whose expense the emotion is relieved, but he does not intend to injure him.

Denning, L.J. considers that the proposition that a man is presumed to intend the natural and probable consequences of his acts, is not a conclusive presumption that must be drawn, but an inference that may be drawn. If, having regard to all the facts of a case, it is not reasonable to infer that a party intended the natural consequences of his acts, it is not a correct inference and should not be drawn.

Swan v. *Swan*[7] does not take the matter further. Hodson, L.J. states[8] "apart from authority I should have thought it a contradiction in terms to describe as cruel the conduct of a person who does not know what he is doing." He seems to be saying that the respondent is not cruel if he does not know he is doing the act which is alleged to be cruel. Thus his view is consistent with that of Denning and Asquith, L.JJ.

The present position appears to be as follows. Firstly, malignity is not an essential ingredient in cruelty. Secondly, in the absence of a malignant intention, the respondent must intend to do the act alleged to be cruel, or intend to make the petitioner the object of his emotional outburst. Thirdly, according to Denning, L.J. — and his view has not yet been disputed — the principle that a man is presumed to intend the natural and probable consequences of his acts is not an inference that must be drawn in cruelty suits, but may be rebutted if the circumstances justify it.

(2) Is Insanity a Defence to Cruelty.

Prior to the decision in *Swan* v. *Swan*[9], there was a clear division of opinion as to whether or not insanity was a defence to cruelty. The basic assumption of the school of thought which regarded insanity as no answer, was that the sole purpose of the Matrimonial Causes Jurisdiction in cruelty suits was the protection of innocent victims. If that assumption is valid, the mental state of respondent at the material time is of no consequence. The opposing view is that while the protection of the victim may be the main criterion, it is not the sole criterion, and the element of punishment for a wrong done is a material factor. It is not just to punish an insane person.

What do the authorities say? In *Hanbury* v. *Hanbury*,[10] a decision of the Court of Appeal, Lord Esher propounded the following proposition: "Whenever a person did an act which was either a criminal or a culpable act, which act if done by a person with a perfect mind would make him civilly or criminally responsible to the law, if the disease of the mind of the person doing the act was not so great as to make him unable to understand the nature and consequences of the act which he was doing, that was an act for which he could be civilly or criminally responsible to the law."[11] In that case, however, insanity failed as a

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[5] (1951) P. 38.
[6] (1949) P. 51.
[7] (1953) 3 W.L.R. 591.
[8] *Id.*, at 594.
[9] (1953) 3 W.L.R. 591.
[10] (1892 8 T.L.R. 559.
[11] *Id.*, at 560.

defence.

In *Astle* v. *Astle*[12] the Court considered that insanity was a defence to cruelty. The facts were that the husband committed a series of violent acts on his wife in 1927 and was certified insane. In March 1931, during a period of liberty, he uttered threats of violence to his wife and family. It was held that the wife was entitled to a decree on the ground of cruelty for acts committed in 1931, but not for acts committed in 1927, because he was insane at the time the latter acts were committed.

In *White* v. *White*[13] the Court of Appeal discussed the question at length. The Court was unanimous as to the failure of the respondent's mental condition to negative cruelty. Asquith and Bucknell, L.JJ. said that insanity would be a defence in some circumstances, but the respondent's state of mind would not excuse him in this case. Denning, L.J. thought insanity was never a defence to cruelty except in one class of situation.

The two conflicting views are contained in the judgments of Asquith and Denning, L.JJ. The former stated that if insanity was not a defence, the logical conclusion would be that no state of mind on the part of the respondent is relevant in cruelty suits. Such a view was rebutted by the decision and reasoning in *Squire* v. *Squire*.[14] In addition, the statute uses the words "treated with cruelty." It appears impossible to treat a person with cruelty without knowing what you are doing.

Denning, L.J. considered that the effect of insanity should be regarded differently in the civil courts from the criminal courts. Firstly, the object of the civil courts was to award compensation to the party aggrieved, not to punish the wrong-doer. Secondly, in the law of contract and torts insanity is not a defence unless at the time of making or commission respectively, the plaintiff knew his adversary was insane. An exception to the above rule exists in the case of a tort in which a specific intent is an essential ingredient. In such a case insanity may be a good defence. By analogy, since the divorce law is civil law, the object of the rules should be to award relief to the victim, not to punish the wrong-doer. Cruelty is not a matrimonial offence in which a specific intent must be proved. Therefore, the state of mind of the respondent is immaterial in cruelty suits. Therefore insanity is no defence, unless the petitioner knew at the time of the commission of the cruel act that the respondent was insane.

Denning, L.J.'s use of authority is not as convincing as his argument from principle alone. For example, he relies on the remarks of Lord Stowell in *Kirkman* v. *Kirkman*,[15] "in cruelty cases if safety is endangered by violent or disorderly affections of the mind, it is the same in its effect, as if it proceeded from malignity." It is not fair to equate disorderly affections with insanity and deduce that insanity is immaterial in this matter.

The Divisional Court in *Lissack* v. *Lissack*[16] supported Denning, L.J. and held that insanity was not a defence to a charge of cruelty on the ground that the Court's duty to interfere is intended to protect the victim for the future.

In favour of Denning, L.J.'s opinion is the fact that in no case has insanity succeeded as a defence to cruelty. The Master of Rolls in *Hanbury* v. *Hanbury*[17] and the majority of the Court of Appeal in *White* v. *White*[18] stated, insanity was a defence sometimes, but not in the case before them, hence their remarks as to the present question are *obiter*. In *Astle* v. *Astle*[19] the decree was granted on the basis of the 1931 cruelty. The earlier insanity of the respondent could not alter the decision. Therefore the Judge's opinion on insanity is also *obiter*.

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12 (1939) P. 415.
13 (1950) P. 39.
14 (1949) P. 51.
15 (1807) 1 Hag. Con. 409.
16 (1951) P. 1.
17 (1892) 8 T.L.R. 559.
18 (1950) P. 39.
19 (1939) P. 415.

In *Swan* v. *Swan*[20] the three members of the Court considered that insanity was a defence. It is submitted that the opinions there expressed on the question of insanity were *obiter dicta*. The decree was made on the ground of cruelty prior to 1947. It was unnecessary to consider the subsequent acts in respect of which the defence of insanity was relevant. Nevertheless, Hodson and Somervell, L.JJ. strongly asserted that insanity was a good defence and that *Lissack* v. *Lissack*[21] was wrongly decided insofar as it was inconsistent with that proposition. Hodson, L.J. in supporting his contention stated that to regard protection as the sole object of the divorce law is inconsistent with the language of the statute and the decisions of the ecclesiastical courts. He made the convincing point that a mere decree is not an infallible protection against an insane spouse. The only sure safeguard is incarceration.

The effect of *Swan* v. *Swan*[22] seems to be that the English Courts will treat insanity as a defence to cruelty. The doubt occasioned by Denning, L.J.'s judgment in *White* v. *White*[23] and the decision in *Lissack* v. *Lissack*[24] has been removed.

(3) The Scope of Insanity as a Defence to Cruelty.

While the majority of the members of the Court of Appeal regard insanity as a defence, there are numerous opinions as to the type or degree of mental disease which will excuse a cruel respondent. Most of the controversy has centred around the question whether or not the McNaghten test is the criterion.

Briefly, the McNaghten test is: Did the respondent at the material time know what he was doing, and, if he did, did he know it was wrong? Asquith and Bucknell, L.JJ. in *White* v. *White*[25], Lord Esher in *Hanbury* v. *Hanbury*[26] and Henn Collins, J. in *Astle* v. *Astle*[27] and *Kellogg* v. *Kellogg*[28] thought that the McNaghten rules were the correct test. Pearce, J. in *Lissack* v. *Lissack*[29] said: "If I am wrong and insanity is a defence, only the first limb of the McNaghten rules are applicable." That is if the respondent knows what he is doing, he is guilty of cruelty, although he thinks he is doing no wrong. In *Morriss* v. *Marsden*[30], a case of assault, Stable, J. held that the fact the defendant did not know he was doing wrong, did not assist him, if he knew the nature and quality of his act. He expressed the view that insanity would be a defence to trespass, if the defendant did not know what he was doing. The case is significant in this discussion because trespass, like cruelty, is a matter in which a specific intent is not required.

Denning, L.J. said if insanity is to be a defence, the McNaghten rules are inappropriate on two grounds. Firstly, because it has been shown to be an unscientific test; secondly, because it is undesirable to introduce a criminal test into the civil code. He formulated a test of his own, namely, was the conduct committed under an impulse which by reason of mental disease he was in substance unable to resist.

Swan v. *Swan*[31] does not clarify the above position, and may merely add to the confusion. Hodson, L.J. favours the McNaghten rules. Somervell and Jenkins, L.JJ. consider the second limb inappropriate. The former seemed to say that *Squire* v. *Squire*[32] and *Kaslefsky* v. *Kaslefsky*[33] decided in effect that knowledge of the wrongful act is sufficient in cruelty suits, it being not necessary to prove the intent to injure. Therefore, the fact that the respondent did not know he was doing wrong, though he knew what he was doing, would not be a good defence. He diffidently suggested that the test of insanity might be: Did the respondent know what he was doing, or if he did, did he know the acts were being directed

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[20] (1953) 3 W.L.R. 591.
[21] (1951) P. 1.
[22] (1953) 3 W.L.R. 591.
[23] (1950) P. 39.
[24] (1951) P. 1.
[25] (1950) P.39.
[26] (1892) 8 T.L.R. 559.
[27] (1939) P. 415.
[28] (1939) 3 All E.R. 912.
[29] (1950) P. 1.
[30] (1952) 1 All E.R. 925.
[31] (1953) 3 W.L.R. 591.
[32] (1949) P. 51.
[33] (1951) P. 38.

against the petitioner? He admits the difficulty of finding facts to illustrate that test.

Four different criteria have thus been suggested, all have been *obiter*, and it is difficult to predict which test will be adopted in the future.

Summary:

It seems clear that intention to injure is not an essential element in cruelty, but there must be intention to do the act, which injures, whether it be of physical violence or emotion outburst. Although there is no binding authority on the matter, all the judges of the Court of Appeal who have discussed it (except Denning, L.J.) regard insanity as a defence to cruelty. The reasoning in *Swan* v. *Swan* reinforces at least this view.

In effect, the necessary ingredient of intention in cruelty is present if the respondent knows what he is doing. There seems to be no good reason for not selecting the same test in determining what degree of mental disease will excuse a cruel respondent. It is therefore submitted that on principle and subject to the doubts in the authorities above discussed that the appropriate criterion of insanity in cruelty suits is: Did the respondent at the time of the commission of the cruel act know what he was doing? If he did, then his mental disease will be of no avail to him as an answer to cruelty. If he did not know this, insanity will be a successful defence to cruelty.

P. FLANNERY, Case Editor — Fourth Year Student.

SERVITIUM AND *CONSORTIUM*
SMEE v. *TIBBETTS*

The prevalence of litigation arising out of street accidents in New South Wales makes any case which deals with the extent of a defendant's liability in such circumstances a case of the first practical importance. The recent case of *Smee* v. *Tibbetts*[1] has additional interest in that it is the first case in which the Full Court of the Supreme Court of New South Wales has had to deal with the implications of the House of Lords decision in *Best* v. *Samuel Fox & Co. Ltd.*[2] in relation to conditions here.

In *Smee* v. *Tibbetts*[3] the appellant, by negligently driving his vehicle, caused the death of the respondent's daughter. The respondent's wife, on learning of the death of her daughter, suffered nervous shock in respect of which she later recovered damages from the appellant under s.4(1) of the Law Reform (Miscellaneous Provisions) Act, 1944.[4] The respondent then brought an action for loss of consortium, seeking to recover in respect of the period of his wife's illness, expenses incurred by him for medical treatment, earnings lost by him whilst remaining away from his employment to look after her, and general damages for loss of the comfort of her society. His claim was based on the general principle that any tortious act committed against the wife is actionable at the suit of her husband, if he can prove that he was thereby deprived for any period of her society or services.[5]

The jury found a verdict for him for expenses incurred and an amount for general damages for loss of consortium. The present appeal was lodged.

It was held (by Street, C.J. and Clancy, J., Owen, J. dissenting):

(i) that the appellant had, by virtue of s.4(1), committed a tortious act against the respondent's wife involving the respondent in expense, and he was, therefore, entitled to maintain his action; but

(ii) that his damages were limited to medical expenses and lost earnings

[3a] (1953) 3 W.L.R. 591.
[1] (1953) 53 S.R. (N.S.W.) 391.
[2] (1952) A.C. 716.
[3] (1953) 53 S.R. (N.S.W.) 391.
[4] No. 28 of 1944 (N.S.W.)