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.)

and did not include any general damages for loss of the comfort of her society.

The majority regarded the respondent, not as suing under the section, but as merely relying upon it to establish commission of a tortious act against his wife. If he could establish that and show that as a result of that tortious act he suffered loss of the consortium of his wife, that was sufficient to enable him to maintain his action.

It was then to the question of whether the causing of nervous shock to the wife in the circumstances set out in the section was a tortious act, that the Court first directed its attention. The majority found little difficulty in holding that there had been a tort against the wife. But Owen, J. held that no duty to her, in the sense in which the term is understood in relation to actions in tort, had been broken. The statute merely provided her with a right to compensation in certain circumstances. It is submitted that the majority decision was correct. The decision in *Koop* v. *Bebb*,[6] which unfortunately does not appear to have been cited to the Court, offers a precise analogy on this point.

In *Koop* v. *Bebb*[7] the High Court, when dealing with the Compensation to Relatives Act, 1897,[8] said that it was enacted to fill a lacuna in the common law of tort, and that an action brought under it was an action in tort. The Law Reform (Miscellaneous Provisions) Act, 1944[9] is in the same category as the Compensation to Relatives Act,[10] being enacted to fill the lacuna in the common law of tort disclosed by the decision in *Chester* v. *Municipal Council of Waverley*.[11]

The Court, once having decided that the act of causing nervous shock was a tortious act, concluded that the respondent was entitled to maintain his action for loss of consortium. But the Court interpreted consortium in a limited sense, for although the claims for medical expenses and domestic expenses succeeded, the claim for general damages for loss of the comfort of the society of the wife was disallowed.

In disallowing such claim, considerable regard was paid by the Court to the views expressed by Lord Porter and Lord Goddard in *Best* v. *Samuel Fox*.[12] In that case Lord Porter said:

> Today the damages which a husband receives for injury to his wife are commonly measured by his expenses, whether for medical treatment of the wife or in payment of household services which her injuries prevent her performing, and little, if any, attention is paid to a loss of consortium which involves other considerations beyond those two;[13]

Lord Goddard said:

> A husband nowadays constantly claims and recovers for medical and domestic expenses to which he has been put owing to an injury to his wife. As to the first, I think his claim really lies in his legal obligation to provide proper maintenance and comfort, including medical and surgical aid, for his wife, and the fact that a wrong does cause that obligation to be incurred is regarded as giving him a right to recover, while the latter is truly a remnant, and perhaps the last, of his right to sue for the loss of servitium, for, to use Lord Wensleydale's words, it is to the protection of such material interests that the law attends rather than mental pain or anxiety.[14]

In view of these statements and the holding in *Smee* v. *Tibbetts*[15] it might very well be asked just what an action for loss of consortium actually comprises at

---

[5] Salmond, *The Law of Torts* (10 ed. 1945) 366.
[6] (1950-51) 84 C.L.R. 629.
[7] *Ibid.*
[8] Act No. 31, 1897 — Act No. 33, 1953 (N.S.W.).
[9] No. 28 of 1944.
[10] Act No. 31, 1897 — Act No. 33, 1953 (N.S.W.).
[11] (1939) 62 C.L.R. 1.
[12] (1952) A.C. 716.
[13] *Id.*, at 728.
[14] *Id.*, at 733.
[15] (1953) 53 S.R. (N.S.W.) 391.

the present day.

The action *per quod consortium amisit* had an origin in antiquated law which regarded the husband as having a proprietary interest in his wife. She was regarded as being in his possession in much the same way as any of his other goods and chattels. Naturally, any wrongful act resulting in injury to that property was actionable at the suit of the owner.

Consortium, in its embryo stages, was then the property which a husband had in his wife. However, the passage of time wrought a change and along with other mediaeval notions, the view that a husband had a right of property in his wife, was buried. Consequently, the basis of the action, the interference, direct or consequential, to property, disappeared. But the action itself, embedded in authority, survived its notional justification and a husband still brought the action wherein he claimed that as a result of the wrongful act of the defendant, he had lost the comfort, society and services of his wife.

With the growth of the action of negligence, the action *per quod* became more and more an anachronism. Of course, where there was a deliberate and intentional interference with the legal right of the husband to his wife's society and services, the action was justified. But where the action was brought for a loss of consortium based on a negligent injury to the wife by a defendant with no knowledge of the relationship of husband and wife, the action created an injustice and rendered a defendant liable for injury which he could not reasonably foresee.[16]

Such an action could not go for ever unchallenged and in *Lynch* v. *Knight*[17] is found an attack made from the highest level. There the plaintiff wife sued the defendant for slander and sought to recover as damages the loss of consortium of her husband which she claimed to have suffered as a result of the alleged slander. She failed to recover for the reason that the House of Lords held that such damage was too remote a consequence of the wrongful act.

But the case of *Lynch* v. *Knight*[18] is a significant milestone in the path trod by consortium, for it was the first in which a wife claimed to be entitled to consortium, and it also marks the emergence of a tendency, which is to gather strength in later years, to restrict the action for loss of consortium. Lord Wensleydale in that case denied that a wife had any right to consortium as recognised by law, and that denial was based on the view that he took on what consortium was. Referring to consortium, he said:

> I agree with Baron Fitzgerald that the benefit which the husband has in the consortium of the wife, is of a different character from that which the wife has in the consortium of her husband. The relation of the husband to the wife is in most respects entirely dissimilar from that of the master to the servant, yet in one respect it has a similar character. The assistance of the wife in the conduct of the household of the husband and in the education of his children, resembles the services of a hired domestic tutor or governess; it is of material value, capable of being estimated in money; and the loss of it may form the proper subject of an action . . . It is to the protection of such material interests, that the law chiefly attends.[19]

Consequently he was of the opinion a wife had no right to consortium and Lord Brougham was rather inclined to agree that such an action would not lie.

This suggests that consortium and servitium are, in the eyes of the law, well-nigh synonymous, and this found concrete expression in the case of *Wright* v. *Cedzich*.[20] In that case the High Court of Australia denied that the

---

[16] This note follows the current assumptions. The question could be raised whether, except in a merely constructive sense, it is correct to say that a defendant cannot forsee that an adult victim of his negligence may be married.

[17] (1861) 9 H.L.C. 577.

[18] *Ibid.*

[19] *Id.*, at 598.

[20] (1929-1930) 43 C.L.R. 493.

plaintiff wife had any right to bring an action for loss of consortium suffered as the result of the defendant enticing away her husband. Knox, C.J. and Gavan Duffy, J. agreed with Lord Wensleydale's view of consortium and said that a husband's right was "capable of being estimated in money, while the right of the wife is no more than a right to the comfort of the husband's society and attention."[21] Moreover, they said, the husband's action only arose out of the interference to the dominion he exercised over the wife, and since the wife had never had any such dominion, she could never have had any such cause of action. Rich and Starke, JJ. said that the action for loss of consortium was based on the interference with a proprietary interest of the husband in his wife. The wife never had any corresponding right and consequently could have no corresponding right of action.

The Court, it should be noted, although it denied that the wife had any right to consortium, did not deny that she had a legal right to the society, comfort, protection and maintenance of her husband. What they denied was that this was consortium, which, they said, was a right peculiar to the husband with an anomalous base identical with that enabling a master to recover for injury to his servant. Again the tendency to restrict the action for loss of consortium both to the husband and, in itself, to a claim for loss of services, must be observed.

However, *Wright* v. *Cedzich*,[22] insofar as it lays down that a wife is not entitled to bring an action for enticement whereby she lost the society, comfort, protection and maintenance of her husband, has had some doubt cast upon it by the strong approval given that right of action by the majority in *Best* v. *Samuel Fox*.[23] But on the other hand, the views expressed in *Wright* v. *Cedzich*[24] as to the meaning of consortium, may well turn out to be the correct interpretation of the term in the context of actions by a husband for injury to his wife. Some of the views expressed in *Best* v. *Samuel Fox*[25] support this.

In *Best* v. *Samuel Fox*[26] the plaintiff's husband was injured as a result of the defendant's negligence and in consequence was unable to perform the sexual act, though he retained the sexual urge. The plaintiff then brought an action against the defendant for the injury she had thereby suffered to her consortium. In the Court of Appeal she failed for the reason that it was held that no action lies for an impairment to, distinct from a loss of, consortium. On appeal, the House of Lords held she failed for the reason that a wife is not entitled to bring an action for loss of consortium based on a negligent injury to her husband.

The major dominant in both decisions was that the husband's action for loss of consortium based on negligent injury to his wife was an anomaly which was rather to be restricted than extended. On this point there was complete agreement and the House of Lords was unanimous in holding that the wife had no such cause of action. But, on the question of whether an action lay for impairment to consortium, there was dissension. Lords Reid and Oaksey were emphatic that an action lay for an impairment to consortium of the nature suffered in the case before them, while Lords Porter and Goddard were of the opinion that such an action would not lie. The point is of the utmost importance, for it is really the different meaning attributed to consortium in the eyes of the law which forms the basis of each view.

Lord Reid, with whom Lord Oaksey agreed, took the view that consortium was conjugal society and included all the rights and duties going to make up the marital relationship. He said that it could not be doubted that an action for loss of consortium had always lain where services had been merely impaired,

---

[21] *Id.*, at 500.
[22] (1929-1930) 43 C.L.R. 493.
[23] (1951) 2 K.B. 639; (1952) A.C. 716.
[24] (1929-1930) 43 C.L.R. 493.
[25] (1951) 2 K.B. 639; (1952) A.C. 716.
[26] *Ibid.*

but not lost, and consequently, he was of the opinion that where there was a serious impairment to the society, an action would also lie. However, it would seem that while it might well be argued that an action will lie where services have been impaired, that argument does not support the proposition that an action will lie where society has been impaired. For if it is only "servitium" which is protected by the action for loss of consortium in this context, it is natural enough that an action should lie for partial loss of the one, but not partial loss of the other. Even a *total* loss of society would not ground an action.

Lords Porter and Goddard, on the other hand, were in agreement with the Court of Appeal that no action lies for an impairment to consortium. The real basis of their denial of such an action is to be found in the view they take as to the meaning of consortium. Lord Goddard, after saying no action lay for impairment to consortium, said: "In truth I think the only loss that the law can recognise is the loss of that part of the consortium that is called servitium, the loss of services."[27] Lord Porter said that at the present day damages for loss of consortium were confined to medical and domestic expenses "and little, if any, attention is paid to a loss of consortium which involves other considerations beyond those two".[28]

Briefly then, the views of Lords Porter and Goddard may be expressed thus: No action for loss of consortium lies for an impairment to society and, indeed, no action lies for its loss, for today consortium and servitium are synonymous in the eyes of the law. This is the view adopted in *Smee* v. *Tibbetts*.[29]
B. HILL, Case Editor —Fourth Year Student.

NATURE OF BANKRUPTCY REGISTRAR'S POWERS
THE QUEEN v. *DAVISON*

In 1929 s. 24 (1) (a) of the Bankruptcy Act, 1924-1950 (Cwlth.)[1] was amended to provide that the Registrar in Bankruptcy may exercise in addition to the powers, duties and functions which the Court under the provisions of the Act may direct or authorise him to exercise, the power to hear debtors' petitions and to make sequestration orders thereon, or to give leave to withdraw the petitions. Although Dixon and Rich, JJ. in *Bond* v. *George A. Bond & Co.*[2] expressed serious doubt as to the validity of this section, it remained unchallenged until recent case of *The Queen* v. *Davison*.[3]

It came before the High Court as a special case stated by the Judge of the Federal Court of Bankruptcy pursuant to sub-section (3) of s.20 of the Bankruptcy Act, 1924-1950. It appeared that the debtor had presented a petition for the sequestration of his estate, stating therein that he was unable to pay his debts. On the same day an order for sequestration was made by the Deputy Registrar (exercising the powers of the Registrar under sub-s.(6) of s.12 of the Act). At the hearing of a compulsory application made by the debtor pursuant to s.119 of the Act[4] for an order of discharge, the Judge ordered and directed that the debtor be charged with certain offences under the Act[5] and he tried summarily. The fact that the debtor was a bankrupt formed an essential element in each of the offences charged. It was contended on behalf of the debtor that he was not a bankrupt because the order for sequestration was void

[27] (1952) A.C., at 733.
[28] *Id.*, at 728.
[29] (1953) 53 S.R. (N.S.W.) 391.
[1] No. 37, 1924 — No. 80, 1950.
[2] (1930) 44 C.L.R. 11, 20-21.
[3] Unreported when this note was written. Decision of 10th Sept., 1954. Since reported in (1954) 28 *A.L.J.* 285.
[4] *Id.*
[5] *Id.*