(d) whether or not one of the parties has formed an intention (as evidenced by acts of adultery or association with another person) to marry once the decree of dissolution becomes absolute.

The usual meaning of "reasonable" would apply. One very important aspect of this requirement is that it throws light on the meaning of the second requirement. If the first requirement refers to cohabitation only, and so does the third, then, *prima facie*, so would the second. If such is the case then it seems that the New South Wales Full Supreme Court erred in making "physical separation" essential or have given that term an artificial meaning.

E. How Does the Court Determine that the Parties are Living Separately and Apart?

Nagle, J. illustrates the American approach to this question as does Ian McCall's article. The American approach is to examine whether, in the eyes of the neighbours of the parties (that is, whether it is obvious to the community), the parties are no longer living as man and wife. Nagle, J. rejects this approach as inapplicable; McCall doubts its value. The Court, that is, the judge, in Australia is to be the adjudicator, and not the community in general. Problems of evidence are great enough already without accepting an "extra"-objective approach. The problem of deciding on the facts is to be tackled in the normal way.

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CRUELTY IN MATRIMONIAL CAUSES

GOLLINS v. *GOLLINS*
WILLIAMS v. *WILLIAMS*

I INTRODUCTION

On June 27th, 1963, the House of Lords handed down two decisions on matrimonial cruelty which apparently effected a momentous change in this area of the law. The first decision was that of *Gollins* v. *Gollins*.[1] The respondent was an incorrigibly and inexcusably lazy man and that was the root of the trouble. The parties were married in 1946 and had two daughters, born in 1947 and 1949. The husband originally owned a farm but it was unsuccessful and he sold it. He then bought a house on mortgage and transferred title to his wife who had lent him large sums to purchase it. To maintain the family the wife ran the house, the matrimonial home, as a guest house. In this pursuit the husband did little or nothing to aid, and further he refrained from obtaining paid employment. The evidence did not show that the husband had wished to hurt his wife or that he had been aggressively unkind to her. Creditors of the husband tried to make the wife pay, and she did pay, some of his debts. His refusal to try to help her, or to earn money, and the frequent demands made on her by his creditors worried her and made her ill. The result was that she was reduced from a normal, active and capable woman to a physical and mental state where she could no longer maintain herself and their children. On her complaint, justices inserted a non-cohabitation clause in a maintenance order on the ground of her husband's persistent cruelty. The husband appealed to

[1] (1964) A.C. 644.

the Divisional Court[2] who found in his favour, but on the wife's appeal to the Court of Appeal,[3] it (Willmer and Davies, L.JJ.; Harman, L.J. dissenting) restored the justices' order.

The House of Lords by a majority of three judges to two (Lords Reid, Evershed and Pearce; Lords Morris and Hodson dissenting) affirmed the decision of the Court of Appeal. The case raised fairly and squarely the question whether an intention to injure is an essential ingredient of matrimonial cruelty. The majority held that such an intention is not essential, though the presence of such intention, if it exists, is a material factor to be considered and may even be crucial.

The second decision was that of *Williams* v. *Williams*.[4] The respondent husband was a miner. During the first ten years of the marriage the husband's behaviour was not above reproach but he was never deliberately cruel to his wife. There was a history of insanity in his family and in 1954 he began to hear voices and to think that people were after him. He was admitted to hospital as a voluntary patient for three months and on his return home his wife said that his condition was worse. One night he thought that he heard people talking about him. He got up and dressed, and went out with a knife looking for the people who were tormenting him. His wife reported this and he was certified insane and taken back to hospital. It was found as a fact on medical evidence that from then until 1962 he was certifiably insane, and the evidence suggests that this was incurable. He frequently returned home, but he was restless and the voices began to say that his wife was a prostitute. Nevertheless in 1958 he was regarded as a voluntary patient, and in March, 1959, he discharged himself and went home. His wife did not want to have him but she said she could not prevent him from returning. For the next nine months he was at home and his conduct caused damage to his wife's health. This was caused by the voices which told him of the men in the loft and of his wife's persistent adultery. He persisted in accusing her; if she tried to get away, he would follow her around the house. Sometimes he would climb up into the loft to find the men.

The learned Commissioner of Assizes had no difficulty in finding that the wife had made out her case of cruelty, unless the second limb of the M'Naghten rules applied.[5] He found, as a fact, that the respondent knew what he was doing in making the accusations but that he did not know that they were wrong in any sense of the word. Reluctantly he found himself bound by authority to hold that the second limb applied, so that the wife's petition was dismissed.

The Court of Appeal[6] (Willmer and Davies, L.JJ.; Donovan, L.J. dissenting) held that they were bound by that court's previous decision in *Palmer*[7] to hold that the M'Naghten rules applied and in particular to hold that the second limb applied as well as the first.

The composition of the House of Lords was the same as in *Gollins*[8] and they held by a majority of three to two (Lords Reid, Evershed and Pearce; Lords Hodson and Morris dissenting) that insanity, whether under the M'Naghten rules or not, is not necessarily a defence to a divorce suit on the ground of cruelty; but that insanity is a factor to be taken into consideration in determining whether in all the circumstances of the case the respondent's conduct is of such gravity that he has by his acts treated the petitioner with cruelty.[9]

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[2] (1962) 2 All E.R. 366. [3] (1964) P. 32. [4] (1964) A.C. 698.
[5] Unreported; but the facts of the case and the judgment are fully recited by Willmer, L.J. in the Court of Appeal: (1963) P. 212.
[6] (1963) P. 212. [7] (1955) P. 4. [8] *Op. cit.* n. 1. [9] *Op. cit.* n. 4.

II THE PRE-EXISTING LAW

(1) *Intent*

The law regarding the element of intention necessary to establish a case of matrimonial cruelty was, prior to *Gollins*,[10] in a state of great confusion. This confusion can be attributed to the unwillingness of the courts to define cruelty; the use of imprecise words and phrases in lieu thereof; the reliance on certain presumptions; and a misinterpretation of words used in English statutes on the subject.

Prior to the 1937 Matrimonial Causes Act (U.K.), the cases were primarily concerned with the type of acts which could amount to cruelty, that is, with the "factum". However after 1937, greater emphasis was placed on the requisite mental element. It is submitted that the reason for this change of attitude by the courts was the radical change effected by the Matrimonial Causes Act. Previously, cruelty was only a ground for a decree of judicial separation; however under the Matrimonial Causes Act it was made a ground for divorce. This appears to have given rise to fears that a divorce might be granted for mere trivialities or incompatibility and the courts sought to guard against this by looking for some guilty intent.

It should be noted that those judges who relied on the words "treated with cruelty" in s.2 of the Matrimonial Causes Act as connoting "intention" erred since the phrase is no more than a convenient description of a situation where there has been cruel treatment of which the respondent was the author. The only justification for introducing the element of "intention" was the change in the nature of the remedy effected by the Matrimonial Causes Act. Now the question arises as to precisely what was the element of "intention" required before 1963. There is no facile answer to this question, for the reasons given above. However we can distinguish three categories of cases.

The first is where there has been savage treatment. In the words of Sir William Scott (later Lord Stowell) in *Holden*:[11] "It is not necessary to inquire from what motive such treatment proceeds." In *Kelly*,[12] Lord Penzance followed this principle.

A deliberate course of conduct designed to hurt the other spouse falls into the second category. *Jamieson*[13] is authority for the proposition that if one spouse sets out to hurt the other and causes injury to health, then the means whereby that happens can hardly matter.

The above two categories can be regarded as the two obvious cases and pose no real problems. However, difficulties arise in regard to the third category, which may be described as conduct which must take its colour from the state of mind. Here the authorities are not at all in agreement. Inconsistencies and anomalies pervade this area of the law. The judgment of Denning, L.J. in *Kaslefsky*[14] is a valuable and illuminating one; however, too much attention has been paid in later cases to the form of the words used there rather than to an analysis of what lay behind the form. The general proposition made by Denning, L.J. was that the conduct must be "in some way aimed by one person at the other". This was a re-statement of the view he expressed in *Westall*.[15] Denning, L.J. distinguished, and it is submitted, rightly so, between conduct having a "direct" impact on the petitioner (for example, blows, nagging) and conduct having an "indirect" impact (for example, drunkenness, gambling, crime). In the former case, "aimed at", he said, meant "action or words actually or physically directed"[16] at the spouse; and he continued "it

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[10] *Op. cit.* n. 1.
[11] (1810) 1 Hag. Con. 453 at 458.
[12] (1870) L.R. 2 P. & D. 59.
[13] (1952) A.C. 525.
[14] (1951) P. 38.
[15] (1949) 65 T.L.R. 337.
[16] *Op. cit.* n. 14 at 46.

may be cruelty, even though there is no desire to injure the other or to inflict misery upon him".[17] It is submitted that what Denning, L.J. means here is merely that there be an intent to do the act complained of.

In regard to conduct having an "indirect" impact, there must be "in some . . . part an intention to injure the other or to inflict misery on him or her";[18] but he goes on to say:

> Such an intention may readily be inferred from the fact that it is the natural consequence of his conduct especially when the one spouse knows, or it has already been brought to his notice, what the consequences will be, and nevertheless he does it, careless and indifferent whether it distresses the other spouse or not.[19]

Denning, L.J. cannot be postulating that a specific intent to injure is essential because an intent inferred from actual knowledge or the knowledge of a reasonable man is not the same thing.

Further, there is authority that something less than a specific intent will suffice where the alleged cruelty consists of conduct having an indirect effect. In *Waters*,[20] a wife complained that her husband was boorish, taciturn, uncooperative and unclean. In the Divisional Court Lord Merriman, P. stated that there is cruelty where a husband is ". . . unwarrantably indifferent as to the consequences . . ."[21] to his wife of his conduct. A substantially similar statement was made by the Court of Appeal in *Windeatt* (No. 2).[22] There, a wife based her allegation of cruelty almost entirely on her husband's persistent association with another woman. Willmer, L.J., in a judgment with which the other members of the Court of Appeal concurred, stated that a course of conduct ". . . if it is intentionally pursued with a callous indifference to the feelings of the other spouse . . ."[23] amounted to cruelty.

What, if any, contribution have the other cases made towards ascertaining the requisite element of intention in this third category? Some of them have not thrown much light on the issue; rather they have served only to confuse it. Such a case is *Horton*,[24] where Bucknill, J. spoke of "wilful and unjustifiable acts".[25] The test of the behaviour which the spouse "bargains to endure for better, for worse" in *Buchler*,[26] is a further example. *Eastland*[27] did not contribute anything since it merely followed and applied the "aiming at" test without analysing the concepts involved.

On the other hand, there is a line of authorities going back as far as 1919 which support the proposition that a specific intent to injure was not an essential element in establishing a case of matrimonial cruelty prior to 1963. The first of these cases is *Hadden*, where Shearman, J. said: "I do not question he had no intention of being cruel, but his intentional acts amounted to cruelty".[28] In *Squire*,[29] Tucker, L.J. expressly approved of the statement of Shearman, J.; and Evershed, L.J.[30] joined with Tucker, L.J.[31] in the view that it was unnecessary to prove any spiteful or malignant intention. Lord Reid in *King* stated: "It has long been recognised that a malevolent intention while not essential is a most important element where it exists".[32] Lastly, in *Jamieson*[33] opinions were expressed by members of the House of Lords which support the proposition stated above. Thus, Lord Merriman, P. said: "I must

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[17] *Ibid.*
[18] *Id.*
[19] *Id.*
[20] (1956) P. 344.
[21] *Id.* at 359.
[22] (1962) 2 W.L.R. 1056.
[23] *Id.* at 1062.
[24] (1940) P. 187.
[25] *Id.* at 193.
[26] (1947) P. 25 at 45 *per* Asquith, L.J.
[27] (1954) P. 403.
[28] *The Times*, Dec. 5, 1919.
[29] (1949) P. 51.
[30] *Id.* at 61.
[31] *Id.* at 58.
[32] (1953) A.C. 124 at 145.
[33] (1952) A.C. 525.

not be taken to suggest that . . . it is essential to impute to the wrongdoer a wilful intention to injure the aggrieved spouse in order to establish a charge of cruelty";[34] and Lord Normand stated that in mental cruelty the "guilty spouse must either intend to hurt the victim or at least be unwarrantably indifferent as to the consequences to the victim".[35] Lord Tucker put the matter this way:

> . . . the intention of the offending spouse and the offender's knowledge of the actual or probable effect of his conduct on the other's health . . . are all matters which may be decisive in determining which side of the line a particular act or course of conduct lies.[36]

In conclusion, then, it is submitted that the only mental element required for cruelty of the "direct" variety is an intent to do the act complained of. In regard to conduct having an "indirect" impact the respondent must have intended to do the act complained of and either known or ought to have known that an injurious effect on the petitioner was likely.

(2) *Insanity*

The question here is how far, if at all, was the mental illness or disorder of a respondent relevant, if his conduct was otherwise such as would justify a finding of cruelty. In view of the conclusions above concerning the requisite mental element it should follow that nothing short of the first limb of the M'Naghten rules would suffice as a defence.

An examination of the authorities prior to 1937 reveals that the "protection" theory prevails. This theory, especially applicable to petitioner-wives, had as its basis the protection of the innocent party by releasing him or her from the duty to cohabit. As was noted above, the early cases on cruelty were more concerned with the "factum" than the "animus" and this reflects in the courts' attitude to insanity. On occasions there is a hint that a degree of mania may be a defence, but this never crystallises in a successful defence on that ground.

After 1937, various cases discussed the question whether insanity under the M'Naghten rules was a defence to a cruelty petition but it is notable that until the Court of Appeal decision in *Williams*[37] there had been no case in which a decree had actually been refused on the ground of insanity.

In *Astle*,[38] Henn Collins, J. found that the respondent did not know the nature and quality of his acts and that those acts could not be held to be cruelty. However a decree was granted on another ground. *Astle*[39] was criticised *obiter* by Tucker, L.J. in *Squire*,[40] where the view that cruelty be malignant or intended was rejected. In *White*,[41] the Court of Appeal by a majority held that mere insanity as such was no defence to a charge of cruelty. The respondent's insanity in this case did not come within the M'Naghten rules. Bucknill, L.J. felt that the M'Naghten rules were a defence, but did not say so conclusively.[42] However, Denning, L.J. said that insanity was never a defence and that the M'Naghten rules did not apply to divorce.[43] Pearce, J. in *Lissack*[44] followed Denning, L.J. and held that insanity is no defence. In *Swan*,[45] the Court of Appeal (Hodson, Somervell and Jenkins, L.JJ.) were unanimous that the first limb of the M'Naghten rules always constituted a defence. However, a decree was granted because a previous act

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[34] *Id.* at 540.
[35] *Id.* at 535.
[36] *Id.* at 550
[37] *Op. cit.* n. 4.
[38] (1939) P. 415.
[39] *Ibid.*
[40] *Op. cit.* n. 29 at 58.
[41] (1950) P. 39.
[42] *Id.* at 51.
[43] *Id.* at 56-60.
[44] (1951) P. 1.
[45] (1953) P. 258.

of cruelty had not been condoned. Finally, in *Palmer*,[46] the facts of which are similar to *Williams*, the husband had insane delusions that his wife had been unfaithful. In *obiter*, opinions were expressed that the second limb of the M'Naghten rules constituted a defence although it was found as a fact that the respondent did not come within the rules.

III *GOLLINS* AND *WILLIAMS*

It is notable that all five judges in *Gollins*[47] agreed that cruelty is a question of fact and degree and that it is undesirable to try to formulate a comprehensive definition of what amounts to cruel conduct. This reluctance to advance any definition of cruelty is traditional in this area of the law.

Of the majority judges, Lord Reid epitomised the principle in these words, "If the conduct complained of and its consequences are so bad that the petitioner must have a remedy, then it does not matter what was the state of the respondent's mind".[48] Lord Evershed expressed his concurrence with the views of Lord Reid and he went on to say that the question is whether the conduct of the party was cruel "according to the ordinary sense of that word".[49] Lord Pearce formulated a test of unendurable conduct:

> when reprehensible conduct or departure from the normal standards of conjugal kindness causes injury to health or apprehension of it, it is, I think, cruelty if a reasonable person, after taking due account of the temperament and all the other circumstances would consider that the conduct complained of is such that this spouse should not be called on to endure it.[50]

In rejecting an intention to injure as a necessary element in cruelty, all three judges forming the majority rejected the "aiming at" test laid down by Denning, L.J. in *Kaslefsky*.[51] The judges agreed that the test was workable only if patched by the presumption that a man intends the natural and probable consequences of his acts. Indeed, they thought, that this area of the law had been confused by the introduction of the concept of "presumed intent". Lord Pearce voiced a most cogent objection to the concept:

> Not infrequently acts which any reasonable person would regard as cruel acts, or which any reasonable person would have known to be hurtful and to be injuring the health of the victim, are done by a respondent who is so bigoted, or obtuse, or insensitive, or self-centred that he or she did not in fact realise that these acts were cruel or injurious or intend that they should be.[52]

He points out that if proof of intention is insisted upon in such cases, then the court cannot honestly give relief. The practice of the courts has been to regard the presumption as irrebuttable, thereby only paying lip-service to its insistence on intention.

Both Lords Morris and Hodson felt that an intent to injure is an essential ingredient in cruelty. Lord Morris distinguished conduct having a direct, and that having an indirect, impact on the spouse, and concluded that the mental element has been satisfied if there has been either an intent to injure or persistence in conduct with knowledge of its effects; and, further, that the intent or knowledge could be presumed if a reasonable man must have known the consequences of his conduct. Both judges, in particular Lord Hodson, after

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[46] *Op. cit.* n. 7.
[47] *Op. cit.* n. 1.
[48] *Op. cit.* n. 1 at 666-7.
[49] *Op. cit.* n. 1 at 670.
[50] *Op. cit.* n. 1 at 695.
[51] *Op. cit.* n. 14.
[52] *Op. cit.* n. 1 at 692.

a careful examination of the facts, found that the husband's conduct was not serious enough to amount to cruelty.

The decision in *Williams*[53] is very much interrelated with that reached in *Gollins*.[54] For, having finally swept away the notion that an intention to injure is necessary to establish cruelty, it followed that a spouse's mental illness or disorder could not be of great significance. Accordingly, the majority held that insanity is not necessarily a defence to cruelty, but that, like temperament, it is one factor to be taken into account in deciding whether a course of conduct amounts to cruelty.

None of the five judges was prepared to adopt the M'Naghten rules as a comprehensive test of insanity in the field of divorce. The main objection was that their application led to capricious results because of the illogical distinction between insanity caused by disease of the mind and insanity which is not so caused.

Lords Morris and Hodson, having already decided in *Gollins*[55] that an intention to injure is essential in cruelty, both considered that insanity should negative a charge of cruelty. However neither of them wished to be bound by any set form of words, although they considered the M'Naghten rules helpful.

IV CONCLUSION

What then is the effect of *Gollins*[56] and *Williams*[57] on the law regarding matrimonial cruelty? It may be thought that the two cases have effected a most significant change in this area of the law. However, it is submitted that it never has been the law that a specific intent to injure was essential. (See II above.) What the two cases did was to clarify the law regarding the mental element in cruelty. As was pointed out above, the law had been confused by imprecise phrases like "aiming at", and by the concept of "presumed intent" introduced in an effort to make certain conduct fit the label "intentional", that is, motivated by an intent to injure. Now, the House of Lords has unequivocally laid down that an intent by one spouse to injure the other is not an essential element of cruelty as a matrimonial offence.

As stated before, no definition of cruel conduct was formulated by the judges. All five agreed it is a question of fact and degree. Lord Reid said conduct was cruel when the conduct of one spouse was so bad that the other must have a remedy; Lord Evershed thought that cruelty must be given its ordinary meaning; and Lord Pearce spoke of unendurable conduct. Now, it is submitted that these formulations, without more, are somewhat vague and it is conceivable that the courts may experience some difficulties in exercising this ostensibly wide discretion.

However, there have long been two safeguards against giving relief to cases founded upon mere trivialities or incompatibility. The first is that conduct, in order to constitute cruelty in the legal sense, must be such as to cause danger to life, limb or health, bodily or mental, or to give rise to a reasonable apprehension of such danger (*Russell*).[58] The second is that to support a finding of cruelty the matter must be "grave and weighty" (*Evans*).[59] The House of Lords in *Gollins*, especially Lord Pearce,[60] was most careful to emphasize these two safeguards, and, provided that they continue to be

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[53] *Op. cit.* n. 4.
[54] *Op. cit.* n. 1.
[55] *Ibid.*
[56] *Id.*
[57] *Op. cit.* n. 4.
[58] (1897) A.C. 395.
[59] (1790) 1 Hag. Con. 35 at 37 *per* Sir William Scott (later Lord Stowell).
[60] *Op. cit.* n. 1 at 686-7.

recognized, it seems that the courts do not have too great a discretion in determining what amounts to cruel conduct. In any event, it seems proper that the courts should have a certain amount of discretion since the catalogue of cruelty, like the catalogue of negligence, is never closed.

A review of recent Australian cases is apposite in considering how this discretion has been and will be exercised in the future, bearing in mind the two safeguards mentioned above. It should be noted at the outset that s.28(d) of the Matrimonial Causes Act (Commonwealth) provides that there must have been cruelty ". . . during a period of not less than one year, habitually. . . ." This provision, in itself, is some limitation upon the discretion.

La Rovere,[61] decided prior to *Gollins*[62] and *Williams*,[63] is a striking case. There the wife alleged that her husband had beaten and kicked her. The Tasmanian Full Court conceded that such behaviour amounted to cruel conduct, but because the wife failed to adduce sufficient evidence of the effect of the beatings upon her health, she could not succeed in proving cruelty because of *Russell*.[64] The significance of the case is that it illustrates the extremes to which a court is prepared to go in insisting upon proof of injury to health.

In *Paton*,[65] the respondent-husband was excessively taciturn, lacking in affection towards his wife, humiliated her before her friends and gave her insufficient house-keeping money, thereby forcing her to work. Selby, J. held that this did not amount to cruelty. His Honour pointed out that their Lordships in *Gollins*[66] ". . . were at pains to avoid giving the impression that the floodgates had been opened so as to allow any form of conduct distasteful to a spouse to be branded as cruelty".[67] These remarks were approved by Begg, J. in *Marks*.[68] This, then, reflects a determined effort by the New South Wales Supreme Court to keep the discretion within reasonable bounds.

On the other hand, *Walker*,[69] a Western Australian case decided by Hale, J., is, it is submitted, an example of too wide a use of the discretion. There the husband was bad-tempered, made excessive sexual demands and was occasionally violent; the violence amounted only to isolated single blows. His Honour found that the husband's behaviour amounted to cruel conduct. He stated, ". . . the respondent's conduct over a long period exceeded what the petitioner could be expected to tolerate".[70] It should be pointed out, however, that some reliance was placed on the fact that the wife had an inherent nervous disposition, which meant that the husband's behaviour had a more grave effect on her.

Driscoll,[71] is an interesting case and should perhaps be mentioned in passing. In that case the parties were mentally incompatible with the result that whatever was said or done became hurtful to the other, although quite unintentionally so. Selby, J. followed *Gollins*[72] and found that both parties were guilty of cruelty.

Notwithstanding the rather vague terms used by the House of Lords in formulating what amounts to cruel conduct, it would seem that there is no great danger that the courts, now that the requirement of an intention to injure has been unequivocally swept away, will abuse the discretion entrusted

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[61] (1962) 4 Fed. L.R. 1.
[62] *Op. cit.* n. 1.
[63] *Op. cit.* n. 4.
[64] *Op. cit.* n. 58.
[65] (1964) Arg. L.R. 240.
[66] *Op. cit.* n. 1.
[67] *Op. cit.* n. 65 at 243.
[68] (1965) Arg. L.R. 241 at 242.
[69] (1964) Arg. L.R. 715.
[70] *Id.* at 718; compare Lord Pearce's test of "unendurable conduct", *supra* n. 50.
[71] (1964) Arg. L.R. 444.
[72] *Op. cit.* n. 1.

to them in deciding the question. And this is so because of the two traditional safeguards, namely, the requirement in *Evans*[73] that the misconduct be "grave and weighty" and that there must be "injury to health" under the principle in *Russell*,[74] to which the courts are bound to give effect.

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LIABILITY IN NEGLIGENCE FOR STATEMENT

HEDLEY BYRNE & CO. LTD. v. *HELLER & PARTNERS LTD.*[1]

> Mr. Foster for the respondents has given your Lordships three reasons why the appellants should not recover. The first is founded upon a general statement of the law which, if true, is of immense effect. Its hypothesis is that there is no general duty not to make careless statements. No one challenges that hypothesis. There is no duty to be careful in speech as there is a duty to be honest in speech. Nor indeed is there any general duty to be careful in action. The duty is limited to those who can establish some relationship of proximity such as was found to exist in *Donoghue* v. *Stevenson*.[2] A plaintiff cannot therefore recover for financial loss caused by a careless statement unless he can show that the maker of the statement was under a special duty to him to be careful. Mr. Foster submits that this special duty must be brought under one of three categories. It must be contractual; or it must be fiduciary; or it must arise from the relationship of proximity and the financial loss must flow from physical damage done to the person or the property of the plaintiff. The law is now settled, Mr. Foster submits, and these three categories are exhaustive. It was so decided in *Candler* v. *Crane, Christmas & Co.*[3] and that decision, Mr. Foster submits, is right in principle and in accordance with earlier authorities.[4]

This extract from the judgment of Lord Devlin sets out the issues involved in *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.*[5] The facts of the case were:

The appellants were advertising agents, who had placed substantial forward advertising orders for a company on terms by which they, the appellants, were personally liable for the cost of the orders. They asked their bankers to enquire into the company's financial stability, and their bankers made enquiries of the respondents who were the company's bankers. The respondents gave favourable references but stipulated that these were "without responsibility". In reliance on these references the appellants placed orders which resulted in a loss of £17,000. They brought an action against the respondents for damages for negligence.

Both the trial judge, McNair, J., and the House of Lords found for the

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[73] *Op. cit.* n. 59.
[74] *Op. cit.* n. 58.
[1] (1963) 3 W.L.R. 101.
[2] (1932) A.C. 562.
[3] (1951) 2 K.B. 164.
[4] *Op. cit.* n. 1 at 134 *per* Lord Devlin.
[5] (1963) 3 W.L.R. 101; (1963) 2 All E.R. 575; (1964) A.C. 465.