The central issue in the case was whether the statement as to the mileage of the car was a contractual warranty, or a mere innocent misrepresentation.[29] After referring to the classic words of Hold, C.J.,[30] "An affirmation at the time of sale is a warranty, provided it appears on evidence to be so intended", and emphasising that intention is to be judged by the words and actions of the parties, not by their innermost thoughts,[31] Lord Denning, M.R., propounded a new test:

> . . . it seems to me that if a representation is made in the course of dealing for a contract for the very purpose of inducing the other party to act upon it, and actually inducing him to act upon it, by entering into the contract, that is prima facie ground for inferring that it was intended as a warranty. It is not necessary to speak of it as being collateral. Suffice it that it was intended to be acted upon and was in fact acted on. But the maker of the representation can rebut this inference if he can show that it really was an innocent misrepresentation, *in that he was in fact innocent of fault in making it*, and that it would not be reasonable in the circumstances for him to be bound by it.[32]

In the present case Smith had stated as facts, matters which he, as a dealer, was in a position to discover, without any attempt to check the accuracy of his statements. Accordingly, he was at fault, and the inference of warranty was not rebutted.

Although the result of the case is hardly surprising, its great interest lies in the fact that we now have, for the first time, a workable test to distinguish contractual warranties from other "affirmations at the time of sale". Intention, by itself, is a poor test, for it leaves the matter too much at large. Fault, on the other hand, is more easily determined; and by adopting the test of fault Lord Denning, M.R., has at the same time brought the contractual remedies for misrepresentation into line with the latest developments in the law of tort.

A. D. HUGHES*

DOMESTIC RELATIONS

A review of the cases decided in the last few years concerning domestic relations indicates a definite liberalizing trend, perhaps a more realistic approach to this branch of the law.[1] A recent case illustrating the trend is that of *Baert* v. *Baert and Sintag*,[2] a decision of the Manitoba Court of Appeal. (It is interesting to note that this case was considered of sufficient importance to be reported in the English "Current Law".)

The case was concerned with two points, which might be termed for convenience, as a point of practice and a point of law. The point of

29. The statement was incorrect, but there was no fraud.
30. Cited by Buller, J., in *Pasley* v. *Freeman* (1789), 3 T.R. 51, at p. 57, 100 E.R. 450, at p. 453.
31. Cf. *Oscar Chess* v. *Williams* [1957], 1. WLR 370, at p. 375.
32. [1965] 1 WLR 623, at pp. 627-628 (italics supplied).

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1. Several examples of this appears in the section dealing with Private International Law.
2. (1965) 52 W.W.R. 314.

practice concerned the interpretation of Rule 2 of the divorce rules of Manitoba. In the annotation to the rule,[3] it was stressed that "material facts explaining delay should be set out in the petition". In the case of *Baert* v. *Baert and Sintag*[4] the trial judge considered that the annotation made it mandatory that where there was delay in petitioning this *must* be explained in the petition and the action would fail if this were not done. Schultz, J. A., in the Court of Appeal, held that ". . . this court attaches *no importance* to the failure to state the reason for delay in launching the petition . . . there is no obligation on the petitioner under the Rules to set out the reason why the delay occurred."[5] He explained that the reasoning behind this annotation was erroneous and that the cause of the delay would be explained when the petition was heard.

The point of law concerned the courts discretion with regard to the bar of unreasonable delay. The judge at first instance had found that there had been "unreasonable delay with no credible excuse given", and had dismissed the petition. He exercised his discretion solely on the basis of the long delay which amounted to 23 years in this particular case. Schultz, J. A., pointed out his mistake. He emphasized that:

> . . . in the exercise of his discretion the trial judge must consider not only the matter of delay in launching the petition, but all the relevant circumstances, including the social welfare of all the parties concerned, particularly the position of any children affected; . . . he must consider also whether or not, on grounds of public policy, and in the interest of morality, the divorce should be granted, and that where there was no evidence of collusion and the petitioner neither acquiesced in nor condoned the adultery, a decree should ordinarily be granted.[6]

The Court of Appeal went on to hold that the trial judge had erred in his finding. He had failed to take into account all the surrounding circumstances, as had been set out in the leading case of *Blunt* v. *Blunt*.[7] They continued that:

> All the evidence in the case indicates that the breakdown of the petitioner's marriage was, from the first, final and without hope of reconciliation. Slight as that evidence is, it shows that he was not the guilty party; that he assumed the responsibilities of bringing up the children when his wife deserted him; that there was no misconduct on his part, and that he did not condone the adultery or acquiesce in the misconduct of his wife. Accepting the finding of the learned judge that he should have learned earlier of the fact of his wife's adulterous relationship with the co-respondent, the only fault alleged is that the petitioner simply *stood by and did nothing* for a long period of time.[8]

and finally held that despite the very long delay, the surrounding circumstances were such that the appeal should be allowed and relief granted.

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3. (1955) 63 M.R. 5.
4. *Supra*, note 2.
5. *Id*, at p. 316.
6. *Id*. at p. 320.
7. [1943] 2 All E.R. 76 (H.L.).
8. *Supra*, note 2, at p. 315 (my italics).

The case of *Blunt* v. *Blunt*[9] was, of course, concerned with the discretionary bar of the petitioners adultery, but the House of Lords made it quite clear that the principles enunciated should be applied as nearly as possible to all the discretionary bars. Five points were to be considered:

(a) The position and interest of any children of the marriage.

(b) The interest of the party with whom the petitioner has been guilty of misconduct, with special regard to the prospect of their future marriage.

(c) The prospect of reconciliation.

(d) The interest of the petitioner, and his or her prospect of remarrying.

(e) The interest of the community at large, to be judged by maintaining a true balance between respect for the binding sanctity of marriage and the social considerations which make it contrary to public policy to insist on the maintenance of a union which has utterly broken down.

The latter is, of course, a very general clause covering the four previous points, but was included, presumably, to cover any contingencies not covered by the first four. These five points were recently considered in the case of *Bull* v. *Bull*[10] where the English divorce court dealt in greater detail with them setting out seventeen points now to be considered, but remaining basically within the bounds of the original five.

Once a discretion has been given to a trial judge the question arises as to whether an appellate court should be allowed to review the way in which he has exercised this discretion. In *Blunt* v. *Blunt*, Viscount Simon, L. C., stated that:

> If it can be shown that the court acted under a misapprehension of fact in that it either *gave weight to irrelevant or unproved matters or omitted to take into account matters that are relevant*, there would . . . be ground for an appeal. In such a case the exercise of discretion might be impeached, because the court's discretion will have been exercised on wrong or inadequate materials.[11]

Discussing the power of the Appeal Court, he cited with approval the words of Swinfen Eady, L. J., in *Holland* v. *Holland*[12] where he stated:

> The question for consideration by this court is whether his judgment is erroneous, and not whether we should have exercised the discretion in the same manner as the judge below did. There is no appeal from his discretion to our discretion . . .[13]

It seemed, therefore, that if the trial judge took all the appropriate circumstances into account it was not within the power of an appellate court to step in on appeal and substitute its own discretions for that of the trial judge. Just because, after weighing the facts as

9. *Supra*, note 7.
10. [1965] 1 All E.R. 1057.
11. *Supra*, note 7 at p. 79 (my Italics).
12. [1918] P. 273 (C.A.).
13. *Id*, at p. 280.

he had done, it would have decided the other way, was irrelevant. For a number of years this view was accepted and applied rigidly in England.

In the Manitoba case of *Staples* v. *Staples and Heatherington*,[14] however, Williams, C. J. Q. B. did not consider this view correct. He did not accept that this necessarily followed for *Blunt* v. *Blunt*, and even if it did, *Blunt* v. *Blunt* didn't apply in Manitoba. He stated:

> . . . I can see nothing in *Blunt* v. *Blunt*, if it is binding on any Canadian appellate courts, which I doubt, to prevent such courts from reviewing the discretion of the trial judge and coming to a different conclusion.[15]

And later:

> . . . the decision of that trial judge cannot be said to be an "unfettered" discretion; in my opinion it should be subject to the review by an appellate court.[16]

It is quite clear that Williams, C. J. Q. B., considered the appeal court was quite at liberty to weigh up the facts in its own way and openly substitute its discretion for that of the trial judge. This problem did not arise of course in *Baert* v. *Baert* as the trial judge *had not* looked at all the surrounding circumstances, but it has arisen in several English decisions.

As mentioned earlier, for a number of years the English appellate courts adhered rigidly to the strict interpretation of *Blunt* v. *Blunt*. In recent years, however, they have attempted, although still adhering to the general principles of *Blunt* v. *Blunt*, to substitute their own discretion for that of the trial judge.

They have achieved this, ironically enough, by a wide interpretation of the very expressions in *Blunt* v. *Blunt* which had earlier bound them. They state, for example, that the trial judge *failed to give sufficient consideration* to a particular fact, or *failed to give sufficient weight* to a particular fact, or perhaps he *gave undue weight* to a particular fact. This, they argue, is not questioning his discretion, but the principles in which he exercised it. This type of argument was used in the case of *B.* v. *D.*[17] concerning the discretionary bar of adultery. The parties were married in 1957. In 1959 the husband left the wife, who subsequently committed adultery and arranged for the husband to find her with the co-respondent. The husband then left her for good and she began living with the co-respondent and had two children by him. The husband began living with another woman.

The wife petitioned for divorce on the ground of the husband's adultery. He did not defend. She asked the court to exercise its discretion with regard to her adultery and grant a divorce, stating that

14. (1959) 24 W.W.R. 577.
15. *Id*, at p. 582.
16. *Ibid*.
17. (1965) 109 S.J. 154 (C.A.).

she wished to marry the co-respondent and legitimize their offspring. The judge at first instance held, after considering all the circumstances, that it was not the type of situation where the court should exercise its discretion.

On appeal, Lord Denning, M. R., held that, "the court would not interfere with the discretion of the judge unless he had gone wrong." In this case the judge did not give *sufficient weight* to the considerations set out in *Blunt* v. *Blunt.*

Salmon, L. J., stressed that it was a very important point that the woman and children were living with the co-respondent and would continue to do so if the divorce was refused. *Sufficient consideration* had not been given to this factor by the trial judge.

It seems, therefore, that the position is the same now in England and Canada, England having reached this point by what might be described as the *back door*, whereas Canada, certainly Manitoba, walked boldly in the *front door.*

My personal feeling, however, is that it is undesirable that an appellate court should have power to review the discretion of the trial judge. He is, after all, the person who sees the demeanour of the witnesses, and of the parties, and has all the evidence given before him. He is, surely, in a much better position to exercise such a discretion in the spirit of *Blunt* v. *Blunt.* The appellate court should only interfere where the judge has disregarded completely the principle on which the discretion is based. Such a case would be *Baert* v. *Baert and Sintag.*

S. J. SKELLY*

TORTS

The law of torts is badly out of step with the times.

Recognizing this, English Courts have been remarkably creative in the last few years. In 1956, in *British Transfer Commission* v. *Gourley*,[1] the House of Lords held that the effect of income tax should be taken into account in calculating damages for lost earnings. This was the beginning of a series of decisions[2] which will probably result in the complete abolition of the rule that *res inter alios acts* are disregarded in damage awards.[3] In 1961 the principles of remoteness of damage in tort were revolutionized by the Privy Council decision in *The Wagon Mound*[4] to the effect that a negligent defendant is only responsible for

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1. [1956] A.C. 185.
2. For example, see *Browning* v. *War Office* [1963] 2 W.L.R. 52 (C.A.). and *Parsons* v. *B.N.M. Laboratories* [1964] 1 Q.B. 95 (C.A.).
3. See McGregor, *Compensation Versus Punishment in Damages Awards,* (1965) 28 M.L.R. 629.
4. [1961] 1 All E.R. 404.