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been totally barred even if assumption of risk had not been applicable.[34] It made little difference which defense was applied. However, in the Wisconsin case of *Severson,* the parties were not equally at fault, so that contributory negligence would have been ineffective as a total bar.[35] Assumption of risk, being available, was therefore applied to achieve this result.

The doctrine of comparative negligence has been adopted in large part from a dissatisfaction with the harshness of contributory negligence which places upon one party the entire burden of a loss for which both are responsible.[36] Although this expansion of liability is worthwhile and progressive in many aspects, the doctrine does come into sharp conflict with the current trend to limit the liability of a host to a gratuitous guest in automobile cases. Because comparative negligence statutes and guest statutes are both of recent origin in the field of torts, it is not strange that this conflict has developed. It is in this area of conflict that the distinction between voluntary assumption of risk and contributory negligence has important practical consequences. The same policy underlying the enactment of guest statute legislation in Michigan, *i.e.,* to prevent recovery by a non-paying guest from his host,[37] is perhaps a strong reason why Wisconsin, even with a comparative negligence statute, adheres to the doctrine of assumption of risk in all its common law rigor.

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INSANITY AS A DEFENSE OR GROUND OF DIVORCE

Acts of outrageous conduct by a spouse who is mentally ill often bring about divorce proceedings by the injured partner. At one time in the history of divorce law in Pennsylvania, insanity was not a defense to acts that constituted a ground of divorce.[1] However, most American

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[34]105 N.W.2d at 403.

[35]In Wisconsin recovery under the comparative negligence statute is allowed unless the plaintiff's negligence is equal to or greater than the defendant's. See Campbell, Wisconsin's Comparative Negligence Law, 1932 Wis. L. Rev. 222, 227.

[36]Mole and Wilson, A Study of Comparative Negligence, 17 Cornell L.Q. 333, 604 (1932); Prosser, Comparative Negligence, 51 Mich. L. Rev. 465 (1953).

[37]Richards, supra note 15.

[1]Matchin v. Matchin, 6 Pa. 332, 47 Am. Dec. 466 (1847). In this case the wife acted under the impulse of nymphomania, but irrespective of the type, insanity was said not to be a bar to a divorce action on the ground of insanity. Chief Justice Gibson, who decided the Matchin case, had, in an earlier case, equated moral in-

courts, disregarding the intolerable plight of the sane spouse, follow the general rule that insanity as determined by the M'Naghten Rule,[2] *i.e.*, the right-wrong test, is a defense to a divorce action on any ground.[3] From time to time courts have attempted to break away from this traditional rule by adopting a different standard for determining insanity, in the belief that the test should be less stringent than in criminal cases. These courts are then faced with the difficult problem of defining the legal level of insanity necessary to excuse the defendant's conduct as a ground of divorce.

An example of such a venture to find a middle ground is found in the recent Pennsylvania case of *Manley v. Manley*[4] wherein the hus-

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sanity with the right-wrong test, see Commonwealth v. Mosler, 4 Pa. 264 (1846). Neither idea has stood the test of time. See Commonwealth v. Novak, 395 Pa. 199, 150 A.2d 102 (1959).

[2]This rule as to criminal responsibility was established in M'Naghten's Case, 10 Clark & F. 200, 8 Eng. Rep. 718 (1843). This right-wrong idea gradually crystallized into the present right-wrong test. See Perkins, Criminal Law 746-51 (1957). For discussion and evaluation of these tests and others, see generally id. at 746-76. In regard to raising the defense of insanity to criminal acts in Virginia, see Note, 18 Wash. & Lee L. Rev. 365 (1961).

[3]The cases cited herein refer only to grounds of absolute divorce and several illustrate very close questions of fact in regard to insanity as a defense to the respective grounds. Cox v. Cox, 268 Ala. 572, 109 So. 2d 703 (1959) (abandonment); Wray v. Wray, 19 Ala. 522 (1851) (adultery); Myers v. Myers, 266 Ark. 632, 294 S.W.2d 67 (1956) (indignities); Trethewey v. Trethewey, 115 So. 2d 712 (Fla. Dist. Ct. App. 1959) (extreme cruelty); Carlson v. Calrson, 308 Ill. App. 675, 32 N.E.2d 365 (1941) (extreme cruelty); Bouska v. Bouska, 249 Iowa 281, 86 N.W.2d 884 (1957) (inhuman treatment); Pile v. Pile, 94 Ky. 308, 22 S.W. 215 (1893) (desertion); Hadley v. Hadley, 144 Me. 127, 65 A.2d 8 (1949) (cruel and abusive treatment); Bowersock v. Bowersock, 210 Md. 427, 123 A.2d 909 (1956) (desertion); Rice v. Rice, 332 Mass. 489, 125 N.E.2d 787 (1955) (cruelty); Broadstreet v. Broadstreet, 7 Mass. 474 (1811) (adultery); Fansler v. Fansler, 344 Mich. 569, 75 N.W.2d 1 (1956) (cruelty); Gardner v. Gardner, 239 Mch. 306, 214 N.W. 133 (1927) (extreme cruelty); Kunz v. Kunz, 171 Minn. 258, 213 N.W. 906 (1927) (cruelty and inhuman treatment); Walker v. Walker, 140 Miss. 340, 105 So. 753 (1925) (desertion); Niedergerke v. Niedergerke, 271 S.W.2d 204 (Mo. Ct. App. 1954) (indignities); Schieck v. Schieck, 5 Neb. Unof. 142, 97 N.W. 474 (1903) (adultery); Storrs v. Storrs, 68 N.H. 118, 34 Atl. 672 (1894) (desertion); Bailey v. Bailey, 115 N.J. Eq. 565, 171 Atl. 797 (1934) (adultery); Youmans v. Youmans, 3 N.J. Misc. 576, 129 Atl. 122 (1925) (extreme cruelty); Laudo v. Laudo, 188 App. Div. 699, 177 N.Y. Supp. 396 (1919) (adultery); Heim v. Heim, 35 Ohio App. 408, 172 N.E. 451 (1930) (extreme cruelty); Nelson v. Nelson, 350 P.2d 702 (Ore. 1960) (cruel and inhuman treatment); Schwarzkopf v. Schwarzkopf, 176 Pa. Super. 441, 107 A.2d 610 (1954) (indignities); Benjeski v. Benjeski, 150 Pa. Super 57, 27 A.2d 266 (1942) (indignities and cruel and inhuman treatment); Fomby v. Fomby, 329 S.W.2d 111 (Tex. Civ. App. 1959) (adultery); Cobb v. Cobb, 19 Wash. 2d 697, 143 P.2d 856 (1943) (cruelty and indignities). For a general analysis see Annot., 19 A.L.R.2d 144 (1951).

[4]193 Pa. Super. 252, 164 A.2d 113 (1960).

band sued for an absolute divorce[5] on the grounds of adultery and indignities.[6] The master in chancery recommended the granting of a divorce on both grounds since the medical history of the wife did show insanity at the time the alleged acts were committed.[7] The trial court concluded that the indignities should be excused, because the wife was mentally ill, but granted a divorce on the ground of adultery as insanity had not been established as a defense to that charge. The wife appealed.[8]

The Superior Court of Pennsylvania in this instance was presented with a question that has vexed the courts of that state since 1847 when the Pennsylvania Supreme Court decided *Matchin v. Matchin*,[9] holding that insanity was not a defense to divorce on the ground of adultery.[10] That decision was apparently based on the moral seriousness of the charge, and the idea that the innocent husband might be forced to accept the offspring resulting from such immoral conduct. This rule was subjected to a great deal of criticism by courts of other jurisdictions,[11] and it was virtually distinguished out of existence by later Pennsylvania cases, which held insanity was a sufficient defense to

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[5]"Divorce is the legal separation of husband and wife by the judgment of a court. There are two kinds: (a) It may dissolve the marriage, in which case it is called a divorce 'a viniculo matrimonii.) [This is synonymous with the term absolute divorce.] (b) It may suspend the effect of the marriage only in so far as cohabitation is concerned, in which case it is called a divorce 'a mensa et thoro,' or judicial separation. [Commonly called a divorce from bed and board not herein considered.]" Madden, Persons & Domestic Relations § 82 (1931).

[6]"Grounds for divorce from bond of matrimony. When a marriage has been heretofore or shall hereafter be contracted, it shall be lawful for the innocent and injured spouse to obtain a divorce from the bond of matrimony, whenever it shall be judged, in the manner hereinafter provided, that the other spouse: ...

(c) Shall have committed adultery; or...

(f) Shall have offered such indignities to the person of the injured and innocent spouse, as to render his or her condition intolerable and life burdensome...." Pa. Stat. Ann. tit 23 § 10 (1935).

[7]193 Pa. Super. 252, 164 A.2d 113-16 (1960). The wife had been under care in two institutions but never adjudged insane. Records of her care and condition were not made available by the doctors who testified in her behalf. It is interesting to note that one of the doctors had never seen the defendant wife and the other based his testimony on only three visits. For this and other reasons most of this evidence was excluded, but the superior court stated that even if this evidence had been admitted it was not sufficient to establish the defense.

[8]Manley v. Manley, 47 Pa. D. & C.2d 164 (Del. Co. 1950).

[9]6 Pa. 332, 47 Am. Dec. 466 (1847).

[10]Id. at 336, 47 Am. Dec. at 467.

[11]Wray v. Wray, 19 Ala. 522 (1851); Storrs v. Storrs, 68 N. H. 118, 34 Atl. 672 (1894); Hill v. Hill, 27 N.J. Eq. 214 (1876); Nichols v. Nichols, 31 Vt. 328, 73 Am. Dec. 352 (1858).

charges of less serious moral conduct than adultery.[12] In upholding the trial court's finding of fact that the wife was not legally insane at the time adultery was committed, the superior court affirmed the granting of the divorce on that ground.

Refusing to follow even the last vestiges of the *Matchin* case,[13] the court said it would recognize insanity as a compelte defense to divorce on the ground of adultery when the party so afflicted was unable to understand the nature and the consequences of her acts or to distinguish between right and wrong.[14] This right-wrong test, the rule in criminal cases in Pennsylvania,[15] is the one most frequently adopted by other states recognizing insanity as a defense to a divorce suit.[16]

While the court adopted the general rule that insanity may be a defense to divorce on the ground of adultery, it used a less stringent standard than the traditional right-wrong test to determine whether a spouse's disability is a defense to acts of less serious moral conduct than adultery. This is shown by the superior court's affirmance of the trial court's decision that the wife's mental illness excused her from the indignities charge *"on the theory that such conduct lacks the spirit of hate, estrangement and malevolence which is the heart of the charge of indignities."*[17] This court seems to balance the moral seriousness of the conduct against the degree of mental incapacity proved in order to determine whether insanity has been established as a defense.

Though the balancing process is contrary to the weight of authority, the Pennsylvania court in the *Manley* case is not the only court suggesting this approach. The Ohio case of *Nelson v. Nelson*[18] took a similar view:

> "The rule in criminal cases, (where insanity is claimed as a defense), that to be relieved of criminal responsibility for crim-

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[12]The Pennsylvania decisions have been handed down by the superior court only, since the supreme court has not spoken on this question in many years. See Carle v. Carle, 192 Pa. Super. 490, 162 A.2d 38 (1960); Braun v. Braun, 186 Pa. Super. 260, 142 A.2d 361 (1958); Barnes v. Barnes, 181 Pa. Super. 427, 124 A.2d 646 (1956); Schwarzkopf v. Schwarzkopf, 176 Pa. Super. 441, 107 A.2d 610 (1954); Benjeski v. Benjeski, 150 Pa. Super. 57, 27 A.2d 266 (1942).

[13]Save adultery, all other cases of absolute divorce had permitted insanity to stand as a defense to the wrongful conduct when the requirements of the right-wrong test had been met. See note 12 supra.

[14]193 Pa. Super. 252, 164 A.2d 113, 120 (1960).

[15]Commonwealth v. Lockard, 325 Pa. 56, 188 Atl. 755 (1937). The irresistible impulse test has been rejected in Pennsylvania. For an interesting discussion of the problem see Commonwealth v. Mosler, 4 Pa. 264 (1846).

[16]See note 3 supra.

[17]Manley v. Manley, 193 Pa. Super. 252, 164 A.2d 113, 120 (1960).

[18]108 Ohio App. 365, 154 N.E.2d 653 (1958).

> inal acts, the defendant must not have been able to distinguish between right and wrong would have no application where one party to the marital relation becomes mentally ill by reason of which his conduct becomes abnormal."[19]

The degree of insanity, something less than the criminal test, that the Ohio court recognizes as a bar to divorce is unclear from the opinion.[20] Lord Justice Denning dissented in part in the English case of *White v. White*[21] which held that the right-wrong test should be used as the test of insanity as a defense to divorce on all grounds, irrespective of the moral gravity of the offense.[22] He stated that he thought the test in divorce actions should be less strict than that applied in criminal actions, emphasizing the sane spouse's knowledge of the other's mentally deficient condition during the period when the wrongful conduct occurred.[23] Thus where one spouse seeks divorce on the ground of cruelty, the defense of insanity might be a bar to divorce if the conduct were not criminal, while not sufficient to excuse if the conduct were criminal. The *Manley* case seems to have arrived at substantially the same conclusion.

An earlier superior court decision, *Benjeski v. Benjeski*,[24] not overruled by the *Manley* case, was in accord with the majority American view that "the law does not undertake to distinguish among the various degrees of control short of insanity, and select those which prevent a divorce and those which do not."[25] This majority view spares the courts the problem of making difficult distinctions in the tests to apply to divorce grounds of less moral consequences than adultery. The Supreme Court of Pennsylvania has not spoken on the questions presented by the *Manley* case in some years, and the decisions of the lower courts remain in irreconcilable conflict.[26] A further complica-

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[19]Id. at 657.

[20]The court only states that it is upholding the factual determination of the trial court and cites no authority from which one could arrive at the basis of the less stringent standard suggested by the Ohio court. See Heim v. Heim, 35 Ohio App. 108, 172 N.E. 451 (1930).

[21][1950] P. 39, 19 A.L.R.2d 130 (1951).

[22]Id. at 52, 19 A.L.R.2d at 139.

[23]Id. at 60, 19 A.L.R.2d at 143-44. See Annot., 19 A.L.R.2d 144 (1951), for a general discussion of insanity as bar to divorce.

[24]150 Pa. Super. 57, 27 A.2d 266 (1942).

[25]27 A.2d at 267 (other quotes deleted). The quotation is attributed to Kruse v. Kruse, 179 Md. 657, 22 A.2d 475 (1941), but the report of the Kruse case does not contain such a quotation. The dates are suggestive that the court in Benjeski was using the advance sheet report, which was changed by the time the final volume was put in print. The Kruse case involved insanity as a defense to a divorce a mensa et thoro on the ground of constructive desertion.

[26]Compare Manley v. Manley 193 Pa. Super. 252, 164 A.2d 113, with Benjeski v. Benjeski, 150 Pa. Super. 57, 27 A.2d 266 (1942).

tion underlying the *Manley* rule is that Pennsylvania does not grant divorces on the ground of incurable insanity.[27] The innocent sane party has no legal way to terminate the marital relationship, factually destroyed, with the insane spouse. To alleviate the difficult position of the sane spouse, several states have passed statutes making incurable insanity a ground of divorce.[28] The terms of these acts regarding the procedure to prove incurable insanity vary from state to state. The length of time the spouse must be incurably insane also varies, the average being three to five years.[29]

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[27]At one time Pennsylvania had a statute allowing a divorce on the ground of incurable insanity. See note 20 U. Pitt. L. Rev. 641 (1959).

[28]At the present time 29 states have such statutes in one form or the other; these are cited in note 29 infra.

To illustrate how decisions may vary depending upon whether a jurisdiction has this type of statute, the following provides an interesting comparison. Virginia does not have such a statute, but in fact has a statute which denies insanity as a defense to divorce on the ground of desertion, where the insanity occurs within one year after the desertion commenced. Va. Code Ann. § 20-93 (Repl. Vol. 1960). There have been no appellate decisions on this point in Virginia. Alabama and North Carolina, which have statutes permitting the granting of a divorce on the ground of incurable insanity, have denied divorces in this situation. See Cox v. Cox, 268 Ala. 383, 109 So. 2d 703 (1959) (abandonment); Kendall v. Kendall, 268 Ala. 572, 106 So. 2d 653 (1958) (abandonment); Moody v. Moody, 117 S.E.2d 724 (N.C. 1961) (separation).

[29]This refers only to absolute divorce sections and to the length of time of incurable insanity on the part of the defendant spouse required to bring the action. In most states the statute provides for support of the insane spouse, but some states leave this to the discretion of the court, and in still others there is another general statute dealing with the subject of support.

Ala. Code tit. 34, § 20(7) (Recomp. 1958) (5 successive years); Alaska Comp. Laws Ann. § 56-5-7(8) (1949) (3 years prior to the action); Ark. Stat. Ann. § 34-1202(8) (Supp. 1959) (3 years prior to suit); Cal. Civ. Code §§ 92(7), 108 (1954) (3 years confinement immediately preceding the action); Colo. Rev. Stat. Ann. § 46-1-1 (1953) (5 years adjudged insane prior to the action); Conn. Gen. Stat. § 46-19 (Rev. 1958), § 46-13 (Supp. 1959) (an accummulated period totaling 5 years within the period of 6 years next preceding the date of the complaint in such action); Del. Code Ann. tit. 13, § 1522(10) (Supp. 1960) (recurrent mentally ill person under supervision or care of an institution for mental diseases a period of 5 years); Ga. Code Ann. § 30-102(11) (1952) (confined in an institution 3 years immediately preceding the commencement of the action); Hawaii Rev. Laws § 324-20(d) (1955) (3 years next preceding the action); Idaho Code Ann. § 32-603(7). § 32-801 (Supp. 1959) (3 years continued period of insanity).

Ind. Ann. Stat. § 3-1201(8) (Repl. Vol. 1946) (insanity, confined for a period of at least 5 years); Kan. Gen. Stat. Ann. § 60-1501(11) (Supp. 1959) (5 years insane, confined in an institution); Ky. Rev. Stat. § 403.020(5) (a-d) (Supp. 1961) (confined in institution for 5 successive years prior to the filing of petition for divorce); Md. Ann. Code art. 16 § 26 (1957) (3 years confined in asylum prior to filing bill of complaint); Minn. Stat. Ann. § 518-06 (Supp. 1960) (confined in institution for at least 3 years prior to the action); Miss. Code Ann. § 2735(12) (Recomp. 1957) (3 years confinement immediately preceding the commencement of the action); Neb. Rev. Stat. § 42-301(7) (Repl. Vol. 1960) (confined for 5 years immediately preceding

One of the most liberal of these stautes was enacted in the state of Washington in 1949, the pertinent section reading as follows:

> "In all cases where the defendant, at the time of the commencement of the action, is suffering from chronic mania or dementia, established by competent medical testimony to have existed for two years prior to the filing of the complaint, *such insanity shall be the sole and exclusive ground upon which the court, may in its discretion, grant a divorce.*"[30]

This type of statute was adopted to protect the incompetent spouse from being divorced on grounds other than insanity, when in fact the ground of divorce was related to mental illness.[31] The Supreme Court of Washington however, has interpreted the statute to mean that where the insanity of the defendant has not existed as long as two years prior to the *filing of the action,* the defense of insanity is not available under any circumstances.[32] Therefore, if wife *W* is sane at the time of the action, but she was insane for a two year period at the time the alleged conduct occurred, she may plead the previous insanity as a defense. However, if *W* is insane at the commencement of the action, but has not been insane for two years she cannot plead insanity as a defense.[33] Although this interpretation appears inconsistent with the purposes of the legislature, the theory behind such a statute is sound.

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the action); Nev. Rev. Stat. § 125.010(8) (1960) (insanity existing 2 years prior to action); N.M. Stat. Ann. § 22-7-7 (1953) (insanity existing 5 years preceding the filing of a complaint); N.C. Gen. Stat. § 50-5(g) (Supp. 1960) (5 years living apart because of incurable insanity); N.D. Code Ann. § 14-0503(7) (1960) (5 years in confinement); Okla. Stat. tit. 12, § 1271(12) (Supp. 1959) (insanity for a period of 5 years, confined in an institution); Ore. Rev. Stat. § 107.030 (1959) (adjudged mentally ill by a competent court of jurisdiction for 3 years prior to the action); S.D. Code § 14.0703(7) (1939) (5 years insanity, confinement by a court of record or commission); Tex. Rev. Civ. Stat. art. 4629(6) (1960) adjudged insane and confined to public or private asylum for a period of 5 years next preceding the commencement of the action); Utah Code Ann. § 30-3-1(9) (Supp. 1959) (duly adjudged insane for 5 years); Vt. Stat. tit. 15, §§ 551(g), 631-37 (1958) (confined in mental institution for 5 years); Wash. Rev. Code § 26.08.020(10) (1959) (2 years insanity prior to the filing of the action); Wyo. Stat. Ann. § 20-39 (1957) (insane for at least 2 years preceding the acton).

[30]Wash. Rev. Code § 26.08.020(10) (1959). (Emphasis added.) It has been intimated in one decision that the insanity must be of an incurable nature in order to sue successfully for divorce on that ground; Cobb v. Cobb, 19 Wash. 2d 697, 143 P.2d 856 (1943). For similar statutes see Nev. Rev. Stat. § 125.010(8) (1960); Wyo. Comp. Stat. Ann. § 20-39 (1957).

[31]Note, 24 Wash. L. Rev. 123, 124 (1949). See also, 23 Wash. L. Rev. 307, 321 (1948).

[32]Rieke, The Divorce Act of 1949—One Decade Later, 35 Wash. L. Rev. 16, 20 (1960). See especially, id. at 20, note 33.

[33]Ibid.

The rule followed prior to the passage of the statute had recognized insanity as a defense to a divorce action.[34] Thus if the earlier rule and the statute were considered together, the intent of the legislature would be carried out. For example, assume husband *H* sues wife *W* for divorce on the ground of cruelty and *W* answers affirmatively relying on insanity as a defense: if the period of insanity is of less than two years duration, the court will allow insanity to stand as a defense and dismiss the action. But when the insanity has existed for more than two years, the affirmative allegation of insanity by wife will bring the statute into operation and the court will grant a divorce on the ground of insanity. Thus *H* would have a way of being released from the marriage, and *W* would get proper support and not be labeled the party at fault.

The several techniques used to dispose of the problem of insanity in divorce proceedings lead to the inescapable conclusion that no single one is satisfactory. Notwithstanding, the following provides a workable solution: (1) the right-wrong test should be applied to all grounds of divorce when the defense of insanity is alleged. This would insure more uniformity in lower court rulings by eliminating different and confusing formulas regarding the degree of insanity necessary to excuse the conduct on each separate ground. (2) The adoption of a statute similar to Washington's permitting a divorce when the defendant spouse has been insane for the two year period prior to the *filing of an action.* Such a statute makes insanity the exclusive ground for divorce even though the conduct charged apparently constitutes another ground for divorce, thus preventing the defendant from being branded a wrongdoer in the eyes of society for a course of conduct the person was unable to comprehend. (3) Insanity of less than two years duration before the *filing of the action* should be a defense on any ground.

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[34]Shaw v. Shaw, 148 Wash. 622, 269 Pac. 804 (1928). Cf., Wolfe v. Wolfe, 42 Wash. 2d 298, 258 P.2d 1211 (1953).