A QUESTION OF SEDUCTION: THE CASE OF *MACMILLAN* v. *BROWNLEE*

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In a detailed account of the action for seduction involving a former premier of Alberta and his stenographer, the authors review the decisions of the courts from trial level to Privy Council. The common law and the effect of statute are discussed in an explanation and analysis of the law of seduction. By reviewing newspaper accounts of public reaction to the lawsuit, the authors are able to provide both an interesting perspective on Alberta's social history and also a glimpse at an important yet often neglected legal issue: the public's perception of the administration of justice.

I. INTRODUCTION

In the heat of the 1934 prairie summer some Albertans forgot the Depression. Instead, public attention focused upon the events in an Edmonton courtroom which newspapers across the United States, Europe and Canada all covered. Paris *Midi* described it as "L'un des procès les plus sensationnels qu'ait connus le Nouveau Monde vient de prendre fin momentonément."[1] London's *Daily Mail* noted that the affair created unprecedented emotion in Edmonton.[2] Local journalists, meanwhile, referred to it as the most sensational trial involving a public man in the history of the Canadian courts.[3] At stake, according to N.D. Maclean, was "the honour and decency of our women . . . the basis upon which our family life is erected, upon which our community life is erected, our religious life is based and on it depends the stability of the state."[4]

On Friday May 11, 1934, hearings began in the case of *Allan D. MacMillan and Vivian MacMillan* v. *John Edward Brownlee*[5] "with the good name of a young woman in the balance on one side and the reputation of the premier on the other . . . ".[6] Allan MacMillan and his daughter, Vivian, charged Premier Brownlee with seduction. According to the Statement of Claim filed in September of 1933, Brownlee "was attracted by the youth and innocence of the said Vivian MacMillan and then formed the intention of enticing her away from her father's home and seducing her."[7] In the Discovery, Miss MacMillan claimed to have met the Premier at Edson in 1930 and at Brownlee's suggestion, she considered a career in the provincial civil service. Subsequent testimony indicated that Vivian MacMillan was under the impression that Brownlee would secure this position for her and act as her guardian while she was away from home. In addition, she claimed that once she had assumed residency in Edmonton, Premier

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1. *Paris Midi*, 2 July 1934.
2. Cited in the *Midi* article *supra* n. 1.
3. *Edmonton Bulletin*, 25 June 1934, p. 1; 26 June 1934, p. 1; 3 July 1934, p. 4.
4. From Maclean's closing address to the jury, *Edmonton Bulletin*, 3 July 1934, p. 4.
5. [1940] 2 W.W.R. 455, [1940] A.C. 802, [1940] 3 All E.R. 384, [1940] 3 D.L.R. 355; *affg.* [1937] S.C.R. 318, 68 C.C.C. 7; *revg.* [1935] 1 W.W.R. 199, [1935] 1 D.L.R. 481; *affg.* [1934] 2 W.W.R. 511, 62 C.C.C. 159.
6. *Edmonton Bulletin*, 25 June 1934, p. 1.
7. *Edmonton Bulletin*, 22 September 1933, pp. 1, 3. The firm of Maclean, Short and Kane served notice of legal action against Brownlee on August 3 but the news did not reach the press until September 22, when a writ was entered in the Supreme Court of Alberta.

Brownlee invited her out and repeatedly seduced her in government automobiles, the Premier's office and the Brownlee home. This relationship apparently continued until the fall of 1932 when she met John Caldwell, a medical student, and fell in love. Caldwell allegedly proposed marriage to Vivian MacMillan, but Brownlee disallowed it. Consequently she chose court action to rid herself of the Premier's "hold" over her. Denying the validity of this testimony, Premier Brownlee claimed that most of these allegations had been "concocted".[8] Therefore, Brownlee filed a Counterclaim in which he accused Miss MacMillan and Mr. Caldwell of conspiracy to commit blackmail.

In the weeks that followed, crowds gathered daily around the Edmonton court house to catch glimpses of the litigants. Rumours circulated, many of which still persist, that Brownlee was the victim of a political plot and gross injustice.[9] Even Brownlee later claimed that he would expose this conspiracy staged by his political opponents. Aside from these intimations of political intrigue, the court proceedings contained the elements of a risqué melodrama. Brownlee was portrayed as an older, experienced urbanite leading an innocent country girl astray, while Mrs. Brownlee was viewed as a pathetic invalid, unable to satisfy her husband's lust.[10] Public fascination with the indiscretions of government officials is commonplace, but such misadventures took on a particular significance in the 1930's. Political leaders were identified as instigators of the economic woes and their indiscretions were considered characteristic of the immorality and corruption of those in power.

Alberta's historians have paid limited attention to the scandal. James McGregor's *A History of Alberta* states that, "The strait-laced populace, worrying about depressed conditions, had little mercy to spare for their premier or their representatives who had taken time off from attempting to ease the economic situation to partake of amorous activities."[11] McGregor simply assumes that Brownlee was guilty and makes no further mention of the affair, which is not surprising considering the nature of this whig, chamber of commerce interpretation of the province's past. More serious attention to the case is presented in John Irving's *The Social Credit Movement in Alberta*, where the author raises the pivotal question as to the scandal's role in the final demise of the United Farmers of Alberta. According to Irving, one can easily overestimate the effect of the affair on the rise of the Social Credit and its 1935 electoral victory. While the scandal weakened the U.F.A., Social Credit never exploited the issue. Instead Aberhart ran a positive campaign, without stressing the inadequacies of either the U.F.A. or its leaders.[12] Nevertheless, Irving adds that, "To the public, Aberhart's lofty moral principles and shining character stood in marked contrast to the denigrated U.F.A. leaders. No appraisal of the rise of the Social Credit movement can ignore the significance of the scandals .... The leaders of the U.F.A. might affirm again and again that the former premier was innocent of everything except poor judgment, that he had been framed by political foes (a widely

8. 25 June 1934, pp. 1, 5.
9. J.A. Irving, *The Social Credit Movement in Alberta* (1959) 96; J.J. Barr, *The Dynasty* (1974) 33.
10. *Edmonton Bulletin*, 26 June 1934, p. 1; *see also Edmonton Bulletin*, 3 July 1934, p. 3.
11. J.G. MacGregor, *A History of Alberta* (1972) 264.
12. J.A. Irving, *The Social Credit Movement in Alberta* (1959) 72.

current apology), that he was a victim of circumstances. The masses of the people would accept no apology, no defence, no justification."[13] Suddenly U.F.A. membership declined rapidly. Challenging some of these claims, John Barr's *The Dynasty* contains the most extensive treatment accorded the scandal to date. Barr details the various allegations and describes how the Alberta Liberal party printed thousands of pamphlets summarizing the most sensational testimony. However, Barr dismisses the contention that the incident contributed to the ruin of the U.F.A. In Barr's opinion, Aberhart had no need to exploit the scandal since the U.F.A. was already on its last legs. The Liberals who attempted to capitalize on the affair reaped no harvest at the 1935 polls.[14] Brownlee's continued participation in provincial public affairs also lends support to a de-emphasis of the scandal's importance. Implicit in Barr's account is a denial of any political conspiracy as such action would have been redundant, the U.F.A. already having lost much of its popular support. Yet *MacMillan* v. *Brownlee* deserves attention beyond its political ramifications since the case brought into focus many aspects of Alberta's social and legal history.

II. THE LAW OF SEDUCTION

First and foremost the case revealed much about the development of the law of seduction in Canada and its introduction into Alberta. The action of seduction had been recognized for centuries in English law. The basis of the action was the loss suffered by a master through the interference with his servant as a consequence of which her capacity to render service had been diminished. As stated in Smith's *Master and Servant*,[15] "To support this action it is necessary to show an actual or constructive relation of master and servant existing between the plaintiff and the person seduced at the time of seduction and a consequent loss of service."[16] As early at 1653, this was established in the case of *Norton* v. *Jason*. The *Norton* case was "an action upon the case of entring [sic] into the plaintiff's house and making an assault upon his daughter and getting a bastard child upon her . . . per quod servitium amisit."[17] The question raised was whether the action was not barred by the Statute of Limitation, it being after the period when an action of trespass which the daughter might have had and had not taken. Chief Justice Roll stated:[18]

> This action is an action brought for the damage done to the master, and though the servant will release the battery, yet the master may have an action for the damage caused him by the battery and although the daughter cannot have an action her father may, although not for entering into his house, because it was with his leave, nor for assaulting his daughter, and getting her with child, because this is a wrong particularly done to her, yet for the loss of her service caused by this, he may have an action. . . .

Under English law, it was not a question of damage caused to the girl seduced but the right of a master to recover damages resulting from the deprivation of his servant's services. In *Eager* v. *Grimwood* it was shown that while the defendant had had intercourse with a woman, this inter-

13. *Id.* at 96.
14. Barr, *supra* n. 8 at 35-36.
15. *Smith's Master and Servant* (8th ed. C.M. Knowles ed. 1931).
16. *Id.* at 110.
17. Sty. 398, 82 E.R. 809.
18. *Id.*

course had not caused conception and the subsequent loss of service.[19] Thus, it was held that there was no right of action against him. *Grinnel* v. *Wells* revealed that a plaintiff could not succeed without proving loss of service.[20] In delivering the judgment of the court, Chief Justice Tindal stated:[21]

> It has, therefore always been held that the loss of service must be alleged in the declaration, and that loss of service must be proved at the trial, or the plaintiff must fail. See *Bennett* v. *Alcott.* It is the invasion of the legal right of the master to the services of his servant, that gives him the right of action for beating his servant, and it is the invasion of the same legal right, and no other, which gives the father the right of action against the seducer of his daughter. . . . so that the original act is not cause of his action, and the consequent upon it, viz., the loss of the service, is the cause of his action.

Once the disability to serve was proven, other circumstances could also be taken into consideration in assessing damages. In *Terry* v. *Hutchinson*,[22] the jury awarded £150 and an appeal was launched on the ground that the girl was not shown to be in the service of the plaintiff, her father, at the time of the seduction and on the ground of excessive damages. The appeal was dismissed on both grounds, it being held that there was at least constructive service, which was sufficient. On the subject of damages Justice Blackburn reported:[23]

> I hold that now the jury are to consider the injury as done to the natural guardian, and that can be referred to that relation; I do not say that they ought to calculate the actual cost of the maintence of the grandchild, though they cannot well exclude that fact; but they may consider not only that the plaintiff has a daughter disgraced in the eyes of the neighbours, but that there is also a living memorial of the disgrace in a bastard grandchild. Considering this, are £150 too much. I cannot say they are.

No action for seduction before the twentieth century ever succeeded in an English court where there was not an illegitimate child born or conceived, with one possible exception. In *Manvell* v. *Thomson* an action was initiated by an uncle for the seduction of his niece.[24] It was shown, in the evidence of a surgeon, that "after she had been seduced and abandoned by the defendant, she was in a state of very great agitation, and continued so for some time: that she received medical attendance, and was obliged to be watched lest she do herself some injury."[25] The only objection taken by the defendant so far as the report showed was that the uncle was not in the relation of master to his niece and while the case does not appear to have been referred to in any subsequent English case, it was cited in *Smith's Master and Servant* on this point.[26] In *Readhead* v. *Midland Railway*, Justice Blackburn, speaking of the Carrington and Payne's English Nisi Prius Reports and another series of reports, stated, "These are, it is true, only Nisi Prius decisions, and neither reporter has such a character for intelligence and accuracy as to make it at all certain that the facts are correctly stated, or that the opinion of the judge was rightly understood."[27] Furthermore, at the foot of the report it was noted that the general evidence in cases of this description to prove loss of service is the

19. (1847) 16 L.J. Ex. 236.
20. (1844) 7 Man. & G. 1033, 135 E.R. 419.
21. *Id.* at 1041.
22. (1868) 3 Q.B.D. 599.
23. *Id.* at 603.
24. (1826) 2 C. & P. 303, 172 E.R. 137.
25. *Id.*.
26. *Supra* n. 16 at 10.
27. (1867) 2 Q.B.D. 412 at 437.

fact of the birth of a child and the sickness or the confinement which are attendant upon it; but in the present case, the party had no child and therefore the above was the only evidence given to support that part of the case.[28] In view of the almost uniform practice, it seems doubtful whether an action for seduction could have been maintained in England in the absence at least of pregnancy and perhaps of the birth of a child. Justice Holmes, in the case of *Barnes* v. *Fox*, noted that:[29]

> the cause of action does not arise from the mere sexual intercourse. If pregnancy does not follow, no action lies. The wrong is the diminished capacity to serve arising from the pregnancy. In most instances of seduction the girl continues after the seduction to live with the plaintiff, and to be in theory his servant just as she had been before; and it assumed that he loses her services during her confinement.

It is, therefore, apparent that under the laws of England if a woman was seduced by her master he could not be sued as no one else could be the plaintiff and a father could not maintain an action in such circumstances.

In Upper Canada, these omissions were overcome in the 1837 Act to Make the Remedy In Cases of Seduction More Effectual, and to Render the Fathers of Illegitimate Children Liable for their Support, by which the father or in case of his death, the mother, was given a right of action for the seduction of their daughter although she was in the service of someone else.[30] The right of the master to maintain the action was not absolutely taken away but was maintaintable[31]

> only if the father or mother be not resident in Upper Canada at the time of the birth of the child which may have been in consequence of such seduction, or being resident therein did not bring an action within six months from the birth of such child.

This final clause clearly restricted the right of a master to a case where an illegitimate child was born and seems to contemplate that fact as essential to the right of action for seduction. The statute did not give the seduced woman any right of action for the seduction, but in the second part of the act, provisions were added whereby if she took the necessary steps she could make the father of an illegitimate child liable for the child's maintenance. Still unresolved is the question of why such legislation would be passed in a colony when there was no similar legislation in the old country. Was seduction a problem in Upper Canada society? Were illegitimate children becoming a drain on the public treasury? Unfortunately, the debates and journals of the Legislative Assembly fail to provide an answer.

In the case of *L'Esperance* v. *Duchene*, before the court of Queen's Bench on appeal, an action was filed by the father for seduction of his daughter who at the time of the seduction was living with another family with whom she had been brought up since childhood.[32] The action was commenced in February and the illegitimate child was born in March. The objection which was taken and argued before the full Court was that the action was not maintainable before the birth of the child. Chief Justice Robinson, delivering the judgment of the majority, noted that:[33]

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28. *Supra* n. 24 at 137 f. *.
29. [1914] 2 I.R. 276 at 281.
30. Statutes of Upper Canada 1837, c. 8.
31. *Id.* *See also* R.B. Splane, *Social Welfare in Ontario 1791-1893* (1965) 219.
32. (1849) 7 U.C.Q.B. 146.
33. *Id.*

> It was denied on the trial, and the point has been strenuously argued on this rule, that any action can lie for seduction before the birth of the child. Few things, perhaps, could be less desirable than that parties should be encouraged to suppose that an action for seduction could be maintained upon the mere proof of carnal intercourse, not followed by the birth of a child, nor even by pregnancy. That is not necessary to be maintained, in order to support his verdict, for there is in the declaration the usual averment that the plaintiff's daughter became pregnant and was in consequence unable to perform necessary affairs and business of the plaintiff, her father and master.
>
> Our Statute does not, in my view of it, vary the terms of this question. It authorizes no new form of action, but deals with the action of seduction as already well known to be the law.

This case clearly established that an action would lie if pregnancy followed the intercourse and, by implication, held that without pregnancy, it would not.

The same point arose in *Westacott* v. *Powell* and was argued before seven judges comprising the combined Court of Appeal.[34] All of the judges agreed that the action would lie before the birth of the child and two judges were of the opinion that the Statute did away with the necessity of showing either active service or loss of service. "I think the legislation has expressly given to the parent," observed Justice Wilson, "a remedy against the seducer of a daughter for the act of seduction alone".[35] The other five judges took the contrary view, which became the judgment of the court, that there must be loss of service or its equivalent, as expressed by Justice Haggerty. He wrote, "I see no other course than to adopt the view . . . that no action lies unless the ability to serve be affected."[36] There was pregnancy in this case and he went on to add that:[37]

> I think that our statute has had the effect of establishing conclusively the relation of master and servant between the parent and a daughter said to be seduced; and that any wrong done to the servant, the effect of which is to render her less able, or unable to do her master's business, is a good cause of action. It is unnecessary to prove that she was in the actual service, or actually performed any service; the statute gives her that position, and if she be disabled from performing or doing service, the law assumes there was such service to be done, and will receive no proof to the contrary. It contents itself with proof of the disability or lessened ability to do the service . . .
>
> A father, I consider, acquires [sic] no right of action against a defendant merely for an illicit connexion with the daughter, not causing illness, etc. . . .
>
> I think the action is maintainable before the birth of a child, if proof be given of a pregnancy, proved to have caused illness or weakness, in any sensible degree affecting the ability of the servant to work for, or serve the master (*i.e.*, in nearly every case the parent.) If any injury or sickness followed the act of intercourse creating the same disability, the cause of action would be complete.
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> I cannot accede to the proposition stated thus, that connexion followed by pregnancy, gives a cause of action. Add to it the qualification above suggested, as to disability, and I think it is law.

After Confederation, the Ontario Court of Appeal dealt with this question in the case of *Harrison* v. *Prentice*.[38] The Statement of Claim alleged the loss of service but there was no evidence of pregnancy. The jury gave a verdict for the plaintiff, but only for the sum of $100. Subsequently the trial judge dismissed the action on the ground that no action would lie in the absence of pregnancy.[39] He apparently thought that this was the precedent to be taken from the judgment in *Westacott* v. *Powell* though he stated, "The decision was that the action lay before the birth of a child and . . . that the statute does not dispense with proof of pecuniary loss or damage. The fact was that pregnancy was proved so the question raised

34. (1864) 2 U.C.E. & A. 525.
35. *Id.* at 538.
36. *Id.* at 534.
37. *Id.* at 533.
38. (1897) 24 O.A.R. 677.
39. (1896) 28 O.R. 140.

here did not squarely arise."[40] If he had not thought that to be the effect of the *Westacott* case he would apparently have given judgment for the plaintiff, since he also noted:[41]

> If in the statute by "seduction" is meant simply carnal intercourse, although not followed by pregnancy, then this action is on the evidence maintainable, for evidence was given that there was such a disturbance of the system as in some slight degree might have created a disability to serve, for it would appear that under the statute whatever would render the girl less able to perform service would be evidence of damage, whether she was residing at home or with another.

The Court of Appeal dismissed the case not on the ground which the trial judge had given, but on the basis that it was necessary to prove actual damage and none was shown. All the report showed of the alleged loss of service or damage, apart from slight statements in the judgments, was that "Pregnancy did not result, and there was no sickness. The girl stated, however, that after the illicit intercourse she was tired and less able to perform her household duties."[42] Chief Justice Burton claimed:[43]

> The decision arrived at was that pregnancy was sufficient under the statute as well as at common law to sustain the action; but upon the construction of the statute the majority of the Court were unanimous in holding that the only effect was to render it unnecessary to establish the relations of master and servant where the action is brought by the parent, but to place the law in this country in all other respects on the same footing as it was in England where the action is brought by the father, and the daughter resides with him.

Justice Osler, with whom Justice Moss concurred, added that:[44]

> All that is proved is that the defendant had sexual intercourse with her. I think there was no evidence for illness proper to be submitted to the jury. In no respect does the case in this report come near that of *Manvell* v. *Thomson*, 2 C and P 303. It seems almost ludicrous to speak of the langour which the young woman says she experienced as an illness causing a disability to serve, etc. and on this ground only I affirm the judgment and dismiss the appeal.

These cases reveal considerable differences of judicial opinion regarding evidence of the act of service, the inability to perform service and the injuries required to sustain an action for seduction.

The North West Territories, Alberta's jurisdictional predecessor, adopted the Upper Canadian seduction statute during the second session of the territorial legislature in 1903.[45] Whereas this ordinance, like many others, was essentially a slavish copy of the Upper Canadian model, it did introduce a substantial change in the law since it provided a right of action to the seduced female. The Ordinance provided that:[46]

> Notwithstanding anything in this Ordinance an action for seduction may be maintained by an unmarried female who has been seduced, in her own name, in the same manner as an action for any other tort and in any such action she shall be entitled to such damages as may be awarded.

For the first time a legislature recognized the prejudicial effect of the prevailing law to the interests of the seduced female and attempted to provide further legal protection. During the *Brownlee* case, this legislation sparked a number of controversies. Did the legislators intend to change the nature of the action? Was the additional section simply an attempt to extend the action to another class of persons? Were the

40. *Id.* at 144.
41. *Id.* at 141.
42. *Supra* n. 38.
43. *Id.* at 681.
44. *Id.* at 684.
45. An Ordinance Respecting the Action for Seduction, Ordinances of N.W.T. 1903 (2nd sess.), c. 8.
46. *Id.* at s. 4.

legislators attempting to create a new tort? N.D. Maclean argued that the 1903 amendment intended[47]

> to get away from the technical difficulties of the old action of seduction, to get away from all shams etc. that it has been necessary to use in order that the law be justified and in effect as it stands to make the action of seduction on a woman's part a tort.

He went on to suggest that public attitudes had changed drastically between the implementation of the 1837 Act and the 1903 legislation, noting that:

> the whole reign of Victoria took place between the passing of the first part of the Statute and the last paragraph, . . . that there has been a very considerable change in the status of women and public opinion in that period . . . [and] there had been a growth of public feeling that it was wrong for young girls to be interfered with sexually. In the Criminal Court there were several Statutes passed during that period making the seduction of a young woman a criminal offence.

In Alberta and Saskatchewan where the woman seduced obtained the right to maintain an action in her own name, no case occurred prior to *MacMillan* v. *Brownlee* in which there had not been a pregnancy. In *Collard* v. *Armstrong* no question arose concerning the inability to serve or the nature of damages.[48] There was, however, a question as to the sufficiency of the Statement of Claim in which the loss of service was not alleged. Chief Justice Harvey argued that "As the woman could not lose her own services as her parent or master could, it must necessarily follow that when the action is brought by her as in the present case there can be no question of loss of service."[49]

Justice Beck, in the case of *Gibson* v. *Rabey*, expressed the opinion that:[50]

> The section of the ordinance already quoted, though awkwardly drafted, inasmuch as in giving the woman a right of action it does away with the whole idea of service and loss to a master, by the clearest necessary intendment constitutes the seduction, not mere seduction but seduction followed by damages consequent upon the seduction, the cause of the action. For I think that damage was the 'gist' of the action in the case, and at all events the ordinance itself, I think, makes it the gist of an action by the woman seduced. It was contended that, in an action by a woman for her own seduction, the word should be interpreted as it appears to be very generally by the American authorities to involve an enticing by the defendant. This history of the action shews that so long as the action was based on loss of service, seduction was ultimately taken to mean no more than having carnal intercourse with. The reason, however, was that damage by way of loss of service was the gist of the action and consent by the servant was no answer to action by the master. . . . Now that the woman herself is enabled to be the plaintiff, I think her action is subject to a like defence, that is, if she be the tempter or even if she deliberately consents from lasciviousness or even from the strength of mere natural passion, provided her consent has not been brought about by enticement of the defendent, she cannot recover . . . . I think, however, that in the absence of evidence of loose behavior on the part of the woman, the presumption is that there was enticement on the part of the defendant in cases of this sort and that the burden of showing that the plaintiff cannot succeed on the ground that she was at least equally morally guilty is on the defendant.

Although it does not appear from the report, it seems that in this case pregnancy supervened and although Beck stated that damage is the gist of action, no question arose as to the nature of the damages necessary to sustain the action.

In *Tetz* v. *Tetz*, Beck J.A. delivered the judgment of the Appellate Division of the Alberta Supreme Court and summarized the *Rabey* decision as establishing that:[51]

47. *Edmonton Journal*, 14 January 1934, p. 18.
48. (1913) 6 Alta. L.R. 187, 4 W.W.R. 879.
49. *Id.* at 188.
50. (1916) 9 Alta. L.R. 409 at 414-415.
51. (1922) 18 Alta. L.R. 364 at 365-366.

it would be a *defence* to an action for seduction if it were shown, (1) That the woman was the tempter, or (2) Even if she deliberately *consented* from lasciviousness or even from the strength of mere natural passion, *provided* her *consent* had not been brought about by the enticement of the defendant. To this I added that, in my opinion, in the absence of evidence of loose behaviour on the part of the woman, the presumption is that there was enticement on the part of the man and that the burden of showing that the plaintiff could not succeed on the ground that she was at least equally morally guilty is on the defendant.

Obviously, the seduced woman's right to action significantly altered the issues and considerations in these cases. According to Beck J., the right to recover damages now depended upon the plaintiff's "relative moral guilt", the "natural moral passion" of the seduced girl and the degree of enticement. Such determining factors were previously irrelevant. Now questions arose which differed substantially from the original basis of the action. Emphasis shifted from the loss of service to the master or parent to the damages arising from the act of seduction itself.

III. THE CASE IN THE COURTS

A. *The Trial*

The course of the *MacMillan* v. *Brownlee* trial revolved around a number of critical issues. First was the question of enticement. How did the Premier convince Vivian MacMillan to submit? To what extent did she actively resist his advances? According to Miss MacMillan, she discovered that Brownlee "was leading a lonely, unhappy life and that it was her duty to yield herself to his desires . . . a sacred duty to the public and to the wife of the Premier to submit, lest he throw up the reins of office and send his wife to her death as a victim of child-bed agony."[52] Three times a week for three years Vivian allegedly carried out her sacred public duty. Yet at one point in the proceedings she contradicted this rationale when she claimed that Brownlee had told her "how wonderful it would be to retire from public life and devote himself to me".[53] Similarly, the risks incurred by Mrs. Brownlee if she engaged in sexual activities with her husband raised suspicions. Brownlee's counsel, A.L. Smith, pointed this out when Miss MacMillan recalled obtaining birth-control pills from the Premier. "You say," Smith said, "that these pills kept you from becoming pregnant. You say that you were induced to have intercourse with Mr. Brownlee because of his fears lest his wife become pregnant, and it would kill her. Why if he could give these pills to you to keep you from becoming pregnant could he not give them to his wife to keep her from becoming pregnant?" Vivian replied, "It is peculiar, but true."[54]

Miss MacMillan also suggested that Brownlee "seemed to be in love" with her, that he "had used love-pleadings, but finally had recourse to force to gain his desire with her, and that while she had refused her consent, she had been affected by his argument . . . ".[55] Furthermore, it was suggested that Vivian's conduct could be attributed to a sense of gratitude since the Premier had secured a job for her. "Didn't it surprise you," asked N.D. Maclean, "that when hundreds of experienced stenographers were out of work, you were hired?"[56] Apparently it came

52. *Edmonton Bulletin*, 26 June 1934, p. 1. *See also Calgary Herald*, 26 June 1934, pp. 1, 2, and 11.
53. *Edmonton Bulletin*, 26 June 1934, p. 2.
54. *Edmonton Bulletin*, 27 June 1934, p. 14.
55. *Edmonton Bulletin*, 26 June 1934, p. 2.
56. *Calgary Herald*, 29 June 1934, p. 1.

as no surprise that she was hired despite her inexperience since Brownlee was to arrange the details. Subsequent testimony verified that her appointment was indeed the result of patronage, but not from the expected source. Mrs. Brownlee, rather than Mr. Brownlee, admitted using her influence to secure Vivian's position.[57]

When questioned about her degree of involvement in the sexual activity, Vivian repeatedly stated that she was a reluctant and unwilling participant. During the initial cross-examination, the defense counsel often came back to the question of whether she had enjoyed "connection" with Brownlee. "It was always physically painful", she replied.[58] Each sexual act, three times a week for three years, had caused her pain. She also indicated that Brownlee had used force and fell into rages when she proved reluctant to submit. In the later stages of their affair, Vivian felt that "a combination of fear and influence" sustained her involvement.[59] The use of force and her unwillingness to submit served to cloud the basis of the action. A.L. Smith pointed out that "If intercourse was secured by force, then it is not seduction. But something more serious."[60] Miss MacMillan also portrayed Brownlee as a Svengali who had her "under some kind of spell".[61] Nevertheless, in 1932 she had left Edmonton to visit her parents. A.L. Smith asked her why she had not stayed at home if she wanted to end the affair. She replied, "I liked my work in Edmonton. If I stayed at home I should have been idle. People would have said that I was a quitter."[62] When she returned to Edmonton she was determined to resist the Premier but upon their first encounter she resumed her "connection with the man with his wife lying down upstairs."[63] Public duty, influence, fear, a spell — what prompted Vivian MacMillan to submit?

The motive for "concocting" these tales was simply monetary according to Brownlee. The defense counsel claimed that a number of witnesses had conversations with Caldwell which proved that "Caldwell was the directing head of the enterprise. That he was financially interested in obtaining money from the Premier through the unfortunate girl."[64] In response, N.D. Maclean asked the jury, "Can you imagine any girl raised as she has been raised doing this horrible thing for some dirty dollars?"[65] Moreover, Brownlee denied that his wife was an invalid, that he had agreed to act as Vivian's guardian, that he promised her a job, that he gave her birth control pills and that he had engaged in the numerous acts of seduction.

Another issue of particular significance was the attempt to establish the exact times and places where the alleged seductions had taken place. According to Vivian MacMillan's testimony, many of the seductions occurred along highways west of Edmonton where Brownlee took her. When the weather became inclement, the affair shifted to the Premier's

57. *Calgary Herald*, 30 June 1934, p. 10. *See also Calgary Herald*, 29 June 1934, p. 1.
58. *Edmonton Bulletin*, 26 June 1934, p. 6.
59. *Id.* at 1.
60. *Edmonton Bulletin*, 30 June 1934, p. 1.
61. *Calgary Herald*, 26 June 1934, p. 1.
62. *Edmonton Bulletin*, 27 June 1934, p. 14.
63. *Id.*.
64. *Edmonton Bulletin*, 28 June 1934, p. 5.
65. *Edmonton Journal*, 3 July 1934, p. 9.

office. Finally, she claimed that the relationship continued in the Brownlee home on occasions both when Mrs. Brownlee was absent and present in the house. Miss MacMillan described in detail the signal of flushing toilets and running water to co-ordinate and disguise their movements in the house. She contended that the "Premier would turn on the bathroom taps and flush the toilet as a signal for her to come out of her room and proceed in a form of lock step into his room for a nightly assignation."[66] Brownlee's attorney raised a number of doubts concerning these claims. First, it was obvious that Miss MacMillan was confused as to the type of automobile Brownlee used. Next, Smith brought forth an array of provincial janitors and secretaries who, despite the alleged longevity of the affair, had never seen Vivian in the Premier's office. Then counsel for the defense emphasized the small size of the Brownlee home. Noting how the floors and mattresses squeaked, how Mrs. Brownlee was a particularly light sleeper, and how John Brownlee shared his bedroom with his eldest son, Smith asked, "Do you know any better way to disturb a sleeping household than by flushing the toilet and running the taps?"[67] One incident in particular strained Smith's sense of credulity. "On one occasion she says, the boy stirred, and what did Brownlee do? He turned on the light with his own boy opposite him, and him in bed with this woman not his wife. . . ."[68] Finally, Smith produced diaries outlining the movements of the Premier in 1933 which indicated that Brownlee was absent on a number of dates when the plaintiff claimed to have had a rendezvous with him.

In the original claim, Vivian sought $10,000 for damages resulting from the affair. Her father, the male plaintiff, sought an additional $10,000. Miss MacMillan attributed loss of weight and various nervous breakdowns to the pills Brownlee had provided, to the severe pain of each sexual act and to the fact she was a "victim of forcible assault upon her resistance."[69] Medical experts disagreed upon the cause of her "nervous condition", one claiming that it was the result of constipation, irritable colon and an appendix condition. Since there was a measure of doubt as to the connection between her medical problem and alleged sexual activities, N.D. Maclean skilfully expanded the basis upon which damage should be assessed. He asked the jury to consider not only physical injury, but psychological trauma. "You can give damage", he told the jury, "for dishonour, the loss of the girl's name, for her loss of a chance of a happy life."[70]

Much of the court's time was also spent establishing the moral character of the litigants and their families. John Edward Brownlee was presented as a stuanch Methodist and Master Mason, "a man who comes from humble parentage and has by his own efforts raised himself."[71] Vivian MacMillan, meanwhile, appeared as a girl who "didn't go around with boys" and taught Sunday School.[72] Her mother was a strong Baptist

66. *Edmonton Bulletin*, 27 June 1934, p. 14. *See also Edmonton Bulletin*, 26 June 1934, p. 1.
67. *Calgary Herald*, 29 June 1934, p. 10; *Edmonton Bulletin*, 27 June 1934, p. 15.
68. *Edmonton Journal*, 3 July 1934, p. 8.
69. *Edmonton Bulletin*, 26 June 1934, p. 1, 6; *Calgary Herald*, 28 June 1934, pp. 24-25. *See also Edmonton Bulletin*, 28 June 1934, p. 5.
70. *Edmonton Bulletin*, 3 July 1934, p. 5.
71. *Edmonton Journal*, 3 July 1934, p. 9.
72. *Calgary Herald*, 25 June 1934, p. 1.

who played the organ in church, taught Sunday school and presided over missionary organizations. John Caldwell, Vivian's fiancé and alleged co-conspirator, was the son of an Edmonton United church minister. All of them appeared to have been pillars of the community and models of respectability.

Surprisingly, just before presenting his closing statements, Brownlee's counsel announced that the Counterclaim against John Caldwell and Vivian MacMillan would not be pursued. A.L. Smith told the court:[73]

> You have a clear issue of whether there was a seduction or whether there was not a seduction. With the counterclaim gone, there is no suggestion now that Mr. Brownlee is seeking money. What he is seeking is that which is of the highest value to any man, the vindication of his honour .... We prefer to go to the jury on the clear-cut issue of whether there was seduction or not, without complicating it with any conspiracy case.

On the following day Brownlee announced his intention to resign effective immediately. Yet the trial was not over. Had Brownlee given up? Surely the public must have interpreted these actions as admissions of guilt.

N.D. Maclean had succeeded in proving that Vivian MacMillan's job was secured through the Brownlee family, that Premier Brownlee had called on her privately and that Vivian had been a frequent visitor to the Brownlee home. But this was the extent of the corroborated, undisputed evidence. Reversing the time-honoured appeal to reasonable behaviour, Maclean argued that "the very fantasticness of the story as evidence of its truth . . . Truth is stranger than fiction . . . If she were making up a story, if she were deliberately concocting a tale, do you not think that it would sound more feasible than this story she has told?" He added, "I would rather think, gentlemen, that on determining the truth of a story, small discrepancies would rather favor the truth than falsehood."[74] Maclean offered the six jurors a new definition of "truth". Discrepancies in testimony now provided evidence of "truth" and the more "fantastic" or "incredible" the behaviour, the more likely it was to be plausible.

Without the astonishing claims of his counterpart, A.L. Smith's closing address noted that in such a civil suit, the onus of proof rested with the plaintiff, not the defendant. Invoking a plea to a higher morality, Smith concluded[75]

> that I believe as I stand, that I believe as I believe in the God that made me, and made us all, that you will do nothing but stand for fair play, and that you will stand only for decent treatment for people in low or in high places, and that never by any stab in the back, as this thing is, and must be, and always will be that no six decent men under these circumstances will ever allow him to be dragged down by measures such as these.

Instructions to the jurors from Mr. Justice Ives included the legal definition of seduction as[76]

> inducement or persuasion . . . by deception or bribe or flattery, any artifice that brings about consent. If force is used, but also accompanied by persuasion and she is seduced thereby, the evidence of force does not necessarily carry. If by force alone, itself, it would not be seduction.

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73. *Calgary Herald*, 30 June 1934, p. 1; *Edmonton Journal*, 3 July 1934, p. 8; *Edmonton Bulletin*, 30 June 1934, p. 1. The conspiracy case became extremely complicated when it was revealed that detectives employed by Brownlee attempted to enter Caldwell's home and gave $400.00 to Caldwell's father. Immediately after Smith advised the court of his decision regarding the counterclaim, MacLean moved for its dismissal. Subsequently Justice Ives dismissed the counterclaim.

74. *Edmonton Journal*, 3 July 1934, p. 9; *Edmonton Bulletin*, 3 July 1934, p. 5.

75. *Edmonton Journal*, extra edition, 30 June 1934, p. 10; 3 July 1934, p. 9.

76. *Edmonton Bulletin*, 3 July 1934, p. 4.

Thus it was clearly established that the presence of force did not prevent an action of seduction. Furthermore, Ives J. noted that since this was indeed a civil action, the jury could accept the evidence of the female plaintiff without her story being corroborated in any way by any other evidence. Nonetheless, Ives J. certainly felt that reasonable doubt did exist. He advised the jurors to ask themselves:[77]

> How consistent is the conduct that they allege with that conduct which you would expect the average reasonable man of ordinary habits of mind . . . Do not find a verdict upon possibilities . . . considering the conspicuous position occupied by this defendant, it is astounding to my mind that no one has been found who, in any way, had suspected anything other than a very proper relationship. Even going into such a public place as the legislative building, is it reasonable to suppose that some one about those buildings would in time have some thought about this frequency, particularly, of these two particular people being seen together? Undoubtedly it is astonishing that over a period of three years no one, either the wife of the defendant or the maid in the house, over a period of three years of frequent visiting to that house ever saw or heard anything that in ay way gave them ground for a suspicious thought. It may be possible, but is it probable?

Mr. Justice Ives also informed the jurors that they would be required to answer three questions. First, did the defendant seduce the plaintiff? If they answered "No", further questions would not be required. However, if they did find that seduction had occurred, they would be required to answer when. Finally, there was the matter of damages. Did she suffer any damages? Mr. Justice Ives warned:[78]

> If no damage followed seduction, the action is not maintained, without it the action is not maintained. You are entitled to assume that if there was a seduction, the father has felt humiliation and has lost some services of his daughter and you are entitled to assess, if you find seduction, and damage as you think will fairly compensate him. You may go beyond that and inflict exemplary damage, an expression of your opinion that misconduct was such that it deserves punishment. You are entitled to assume that the female plaintiff may suffer at the hands of society and, if you find that her illness was brought about by improprieties with this defendant, that is ground for damage and you may assess to her such compensation as, in your opinion, will meet those items.

The jury unanimously found in favor of the MacMillans, awarding Vivian $10,000 and her father $5,000. Reporters disagreed as to the public reaction. "An outburst of cheering by crowds that filled the courthouse corridors", stated the *Edmonton Bulletin*.[79] The London *Daily Mail*, meanwhile, reported that "When the verdict was given, stupor existed, then cries of indignation rose from all sides."[80] Nonetheless, Vivian MacMillan cried for joy and expressed hope that her sacrifices "maybe . . . saved hundreds of other girls who will come in from the country and find themselves up against a similar proposition". As she left the court she added, "I'm not going to be a stenographer again, that's certain. One experience like that is enough."[81] But the case was far from over.

M.M. Porter, for the defense, immediately objected to the jury's findings. Porter moved that the judgment be dismissed on grounds that there was no evidence of enticement and that neither the girl nor her father had suffered loss or damage. Enticement, Porter claimed, involved the breach of contract between a man and a servant or breach of an implied contract between parent and child by representation of a third party. The evidence had shown that Vivian MacMillan had come to Edmonton not only with her parents consent but at their expense and in her mother's

77. *Id.* at 5.

78. *Id.* at 4.

79. *Edmonton Journal*, 3 July 1934, p. 1.

80. As reported in *Paris Midi*, 2 July 1934. *Midi* claimed that the crowd was sympathetic to the Premier, not the MacMillans.

81. *Edmonton Bulletin*, 3 July 1934, p. 4.

company. Thus, Porter maintained that no verdict founded on enticement could stand. Furthermore, he subscribed to the interpretation that mere seduction in itself had never been a cause of action. The affair had become a matter of habit, which involved no loss of service to her parents. Porter asserted that it was still necessary to prove loss of service and in this case "there is no evidence that she was unable to carry on for herself or would have been unable to carry on for her parent . . . ".[82] Concerning the action of the girl herself, Porter cited Justice Beck's ruling that "damage was the gist of action" and therefore the action could not be sustained.

One wry journalist commented that "Someone should have warned the MacMillans to be aware of the Ives of July."[83] Acting Chief Justice Ives had reserved judgment, disagreeing with the jury's award of damages. After a short period of deliberation, Ives J. reversed the damages. Case costs of some $500.00 were now assessed against the plaintiffs. In Mr. Justice Ives' opinion, the plaintiffs had failed to establish that injuries had resulted from seduction or that the ability to render service had been interfered with.[84] Mr. Justice Ives did not challenge the jury's right to determine if seduction had occurred, he simply felt that damages were not justified in this case.

Edmontonians were incensed over the Ives' decision in the *Brownlee* case. The ruling of the court was popularly interpreted in the simplest fashion as a violation of civil liberties. In one editorial it was noted that "No resident of Alberta can afford to have these rights suppressed or see them lost through default when they have been challenged."[85] Articles entitled "Is a Jury a Jury" or the "Origins of Trial by Jury" became regular features in the weeks that followed. Public resentment was translated into action when the Edmonton Civil Liberties Protection Association initiated a series of protest meetings. George D. Koe, president of the association, announced that:[86]

> This is an attack on the liberty of the subject and it strikes at the very roots of justice and equality for all under the law. British justice has been founded on trial by jury and trial by one's peers and if a jury decides a question of fact as this jury did, what right under British law or any law has a judge to over-rule them? If this is allowed to go without protest how far can a poor man go? How can he get justice? We might as well go back to Star chambers and Kangaroo courts, go back to the time of Charles I. This decision has set the clock back 300 years. It is astounding and almost unbelieveable.

Similar views were expressed by Mrs. E.C. Timbre, secretary of the association, who stated, "We cannot stand for this. It has gone too far. We are not a lot of browbeaten peasants . . :".[87] The Liberty League claimed public indignation had "lighted a fire that will blaze across Canada."[88] While some newspapers outside Edmonton, particularly the Winnipeg Free Press, supported the movement, the fire of indignation did not blaze southward. To no one's surprise, the Calgary Civil Liberties League protested against the stand taken by their Edmonton chapter.[89] One editorial in the *Calgary Herald* went as far as proposing the termination of all jury

82. *Edmonton Journal*, 3 July 1934, p. 8.
83. *Edmonton Bulletin*, 4 July 1934, p. 2.
84. *Edmonton Journal*, 4 July 1934, p. 1.
85. *Edmonton Bulletin*, 4 July 1934, p. 3.
86. *Edmonton Bulletin*, 4 July 1934, p. 3.
87. *Id.*.
88. *Id.*.
89. *Calgary Herald*, 6 July 1934, p. 15.

trials.[90] But Calgarians did express fears concerning the effects of the Ives decision. "This incident had done nothing", noted the *Calgary Herald*, "to enhance respect for or dignity in our courts so much to be desired in these times when for one cause or another so little of the first is shown and so little of the latter is manifested."[91]

Moreover, although Calgarians were reserved in their discontent for the legal process, they shared with other Albertans an assumption that Brownlee was indeed guilty. The *Calgary Herald* observed that "the people of Alberta . . . are ashamed of the dirt through which the province has been dragged, ashamed of the leaders . . ., ashamed of the stench which the action of prominent men among them have created in the nostrils of the public",[92] whereas the *Edmonton Bulletin* noted that:[93]

> The scandal-sickened people of this province are entitled to immediate disassociation of their public affairs from court investigation into amorous adventure of philandering minister . . . The members who are politically responsible for the humiliation with which the people of Alberta have been delayed are in no way qualified to assume a right to further dictate or participate in the conduct of public affairs.

When it was disclosed that the MacMillans would not be able to raise further funds for an appeal, the *Edmonton Bulletin* launched an appeal for public support. Thousands of dollars, a significant comment of public concern during the Depression, were donated by various groups and individuals, often anonymously. Under *nommes de plume* such as "Magna Carta", "Edmonton Militant Suffragette", "Justice and Humanity", "A Person for Justice", and the "Spirit of Simon de Montfort", these donations apeared daily on the front page of the *Bulletin*.

Amid their appeals for funds and their attacks on Justice Ives, the *Edmonton Bulletin* was the sole newspaper advocating a change in the seduction law. One editorial noted:[94]

> Mr. Justice Ives is of the opinion that the loss of a girl's virtue by seduction is of no value . . . . If Mr. Justice Ives is right that the law permits such a deplorable travesty of justice then it is time that such laws be radically changed forthwith.

For the first time, a suggestion was made that Ives J. may be correct and that the object of concern should not be the judicial process but the law itself.

In the smaller centers, similar criticism of the Ives decision surfaced as did the presumption of Brownlee's guilt, but these attitudes were tempered by a 'live and let live' attitude. "It does not matter today whether Mr. Brownlee is innocent or guilty", wrote the *Vegreville Observer*, "the sooner the case is consigned to the limbo of forgotten things, the better off we will all be."[95] The *Observer* saw nothing but harm coming from U.F.A. efforts to affirm their confidence in Brownlee.

The public outcry over the Ives judgment obscured and ignored the fact that it had been accepted practise in the courts of Alberta and England for a judge to enter a judgment contrary to the jury verdict under appropriate circumstances. English decisions had established that while it was proper for a judge to take the conclusions of the jury into con-

90. *Id.* at 4.
91. *Id.*
92. *Calgary Herald*, 7 July 1934, p. 4.
93. *Edmonton Bulletin*, 3 July 1934, p. 2.
94. *Edmonton Bulletin*, 4 July 1934, p. 1.
95. 8 August 1934, p. 2.

sideration, the final pronouncement as to whether any evidence supported the findings of the jury belonged to the judge.[96] This conclusion was reached by the Alberta Supreme Court in the 1920 case of *Donley* v. *Edmonton, Dunvegan and British Columbia Railway Company et. al.*[97] In that case, Mr. Justice Beck noted that the responsibility of a trial judge to enter judgment at the conclusion of a trial obliged him "to enter such judgment for or against the several parties as the law applied to the facts, whether those facts were established by admissions, by the findings of the jury or by the unquestioned evidence, called for."[98] In light of this decision it was ironic that N.D. Maclean challenged Ives J., arguing that the "Court cannot render a verdict contrary to the decision of the jury",[99] since Maclean was the solicitor who convinced Mr. Justice Beck to follow such a course in the *Donley* case.

Although listening to the verdict of a jury and then deciding whether there was any evidence to support the verdict seems to have been a questionable practice, such an approach had been sanctioned by the Courts of Appeal in Alberta and England. The English Court of Appeal, demonstrating a degree of confidence in the jurors' competence, explained that in most cases in which all of the evidence was in support of one party, a jury would deliver a verdict in support of that party, and that would be the end of the matter. Thus, there would be no need for the judge to exercise his perogative.[100] Only in those unusual cases where the verdict of the jury remained at variance with the established evidence would the judge have to intervene.

B. *The Appeals*

Upon the MacMillans' appeal to the Appellate Division, Chief Justice Harvey ruled that:[101]

> Under our system of jury trials while the jury is the sole judge of the facts all questions of law must be decided by the Judge and it has always been a question of law whether there is any legal evidence, that is, whether if the facts of which evidence is given are all true they constitute such a case as in law will support a verdict for the plaintiff.

Chief Justice Harvey went on to compare the role of a trial judge vis à vis a jury to that of an appeal Court vis à vis a lower Court. Quoting from the leading example of the latter, the *Metropolitan Railway Company* v. *Wright*, Harvey C.J. repeated the words of the Chief Justice of the English Court of Appeal who had stated that:[102]

> it is not enough that the judge, who tried the case might have come to a different conclusion on the evidence than the jury, or that the judges in the Court where the trial is moved for might have come to a different conclusion, but there must be such a preponderance of evidence, assuming there is evidence on both sides to go to a jury, as to make it unreasonable, and almost perverse, that the jury when instructed and assisted properly by the judge should return such a verdict.

Wright was then appealed to the House of Lords where Lord Herschell stated that "the case was unquestionably within the province of a jury; and . . . the verdict ought not to be disturbed unless it is one which a jury

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96. *Peters* v. *Perry* (1894) 10 T.L.R. 366.
97. [1920] 2 W.W.R. 664.
98. *Id.* at 666.
99. *Edmonton Journal*, Extra edition, 30 June 1934, p. 1. This edition is not dated.
100. *Skeate* v. *Slaters* [1914] 2 K.B. 429 at 434.
101. *MacMillan and MacMillan* v. *Brownlee* [1935] 1 W.W.R. 199 at 201.
102. (1886) 11 A.C. 152 at 153.

viewing the whole of the evidence reasonably, could not properly find."[103]

Accepting the proposition that it was proper for a judge to enter a judgment contrary to a jury verdict in appropriate cases, the Alberta Court of Appeal faced the question of whether the MacMillan appeal was just such a case. A majority of the Court agreed that indeed it was.

Implicit, and at times explicit in the leading opinion for the majority, Chief Justice Harvey doubted the veracity of Vivian MacMillan's testimony. Harvey concluded that:[104]

> In the first place apart from the daughter's own evidence there is not a tittle of evidence that she is not still a virgin.... Her whole story is quite unsupported by other evidence in all material respects and in many of its details is of such an improbable, not to say incredible, character, that it seems almost impossible, that any reasonable person could believe it in its entirety. There is also apparent in her cross-examination a readiness to admit that she may be mistaken as regards very positive and definite statements previously made when by questions it appears that there may be independent evidence to show that she is wrong. There are also other inconsistencies in her evidence. She states that this intercourse throughout its whole course was distasteful and painful to her and that she only endured it because of the defendant's influence over her. She admits that that influence was effective only when she was in his presence yet after the relationship had existed for nearly two years and she had been at home during an illness for several weeks and her parents urged her to remain at home and not return to Edmonton, she, against their wishes, returned and could have had no other expectation than that the former relationship which she says existed would be resumed. Also on one occasion later when her mother was with her and she received a telephone call from the defendant she left her mother for what she knew would be an act of intercourse which she says was so repulsive to her. Then for several months after she had told a young medical student, who had proposed marriage to her, of her relationship with the defendant she continued that relationship without change. And also for several weeks after she had been taken by this young man to the solicitor, who subsequently brought and conducted the action, and had made a sworn statement continued. This was in the summer of 1933 and the defendant admitted that he had looked on her very much as a member of his family and frequently took her for a drive in the evening. These drives continued for some weeks after the interview with the solicitor and she says that intercourse took place during these drives except on the last one which was arranged over the telephone. When the defendant arrived with his car to pick her up on this last occasion the young man, the medical student referred to, and the solicitor, apparently having learned in some way of the projected drive, were stationed in a motor car near the place where she joined the defendant trailed the defendant throughout the drive. She says that she did not know for some time that she was being followed. It looks much more as though it was a deliberate attempt with her connivance if not more to trap the defendant in some compromising situation and it is difficult otherwise to explain her continued relations with the defendant and her family without change after she had consulted a solicitor.... While a jury has of course a right to believe and accept a part of a witness' testimony, while not prepared to accept it all, yet it must be apparent to any reasonable person that it is most unsafe to place reliance on any important portion of the evidence of a witness whose general story is of such improbable character as not to seem worthy of belief, especially when it is denied as emphatically as it was in this case. We have ... the emphatic opinion of the trial Judge who had the same opportunity of estimating the value of the evidence as the jury had, that the verdict was quite wrong, and he so expressed it to the jury when the verdict was given. From a careful reading of the evidence I have formed an opinion wholly in accord with his.

Chief Justice Harvey referred to two other factors which had led him to conclude that the jury's verdict was not related to the evidence presented in the case. In light of the fact that there was no publicity attached to her relationship with the Premier other than that which her lawsuit caused, Harvey C.J. felt that the damages were unduly large.[105]

However, the Chief Justice made it clear that he was not considering the question of whether the damages were so excessive to justify setting aside the verdict solely on that ground.[106] He also referred to the highly inflammatory press coverage of the trial and expressed concern that the

103. *Id.* at 154.

104. *Supra* n. 101 at 207-209.

105. *Id.* at 209.

106. *Id.* at 209-210.

jury may have seen or heard these reports. Regarding "the general nature of the evidence and the circumstances referred to", Harvey C.J. concluded that "there was not a fair trial and that no judgment founded on the verdict could be allowed or if given could be permitted to stand".[107]

Next, Chief Justice Harvey turned to the question of whether a new trial should be ordered or the action should be dismissed. Reviewing the case law concerning seduction, Harvey C.J. maintained that the action should be dismissed. He supported the decision of Justice Ives that neither plaintiff could sustain an action without proof of some legally recognizable damages and that neither plaintiff had presented such evidence to the jury.[108]

The words "damages which the law will recognize" were significant because previous cases established that in order to recover damages as a result of seduction, damage of a particular kind had to be established. In his analysis of these cases, Harvey C.J. accepted the premise that the basis of action is "the loss by a master through the interference with his servant as a consequence of which her capacity to render service has been diminished."[109] Thus a father may recover damages if his daughter was seduced, but only if his daughter also was his servant, and he may recover only *qua* master and not *qua* parent. Chief Justice Harvey pointed out that once loss of service has been established, damages were not restricted to compensation for loss of service, but may extend to cover humiliation and disgrace.[110] Yet Harvey C.J. stood firm on the principle that loss of service was still the grounds of such an action.

Chief Justice Harvey then addressed the question concerning the type of damage necessary to establish loss of service. Only one case, of doubtful authority, could be cited in which an action for seduction ever succeeded in which there had not been the birth or at least the conception of an illegitimate child.[111] Harvey went so far as to conclude that, "It seems doubtful whether in view of the almost if not quite uniform practice an action for seduction could be maintained in England in the absence at least of pregnancy and perhaps the birth of a child."[112]

Obviously, the MacMillans' action was brought not at common law, but rather under the Alberta Seduction Act. Thus it became necessary to consider the effects of this legislation on the common law tradition. Since the provisions of the Alberta act relating to a parent's action were identical to the Upper Canada legislation of 1837, the Chief Justice followed the customary practice of Alberta Courts in construing statutes taken from another jurisdiction in accordance with the authorized construction given to the statute in the other jurisdiction.[113] Counsel for the MacMillans agreed that the decision of the Ontario courts should be applied to Mr. MacMillan's action.[114]

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107. *Id.* at 210.
108. *Id.*
109. *Id.*
110. *Id.* at 212-213.
111. *Id.* at 213.
112. *Id.* at 214.
113. *Id.* at 215-216.
114. *Id.* at 216.

Chief Justice Harvey considered and quoted at length from the Ontario rulings in *L'Esperance* v. *Duchene*, *Westacott* v. *Powell* and *Harrison* v. *Prentice*.[115] According to Chief Justice Harvey's interpretation, at the time of its adoption into Alberta, the Ontario law clearly stated that a father could not succeed unless he could establish that his daughter's ability to serve had been injuriously affected.[116]

Vivian MacMillan's action, however, was brought under section five of the Alberta Seduction Act. Reviewing the pertinent Alberta and Saskatchewan decisions which stated, in *obiter*, that it was still necessary for a seduced woman to establish her loss of ability to serve, the Chief Justice noted that although the views expressed in the two preceeding cases were only in the way of *dicta* and were not binding, he would hesitate to make a decision contrary to them unless he felt very strongly that they were wrong. On the contrary, they appealed to Harvey C.J.A. as distinctly right.[117]

Chief Justice Harvey added that section five should be construed in a manner similar to other legislative alterations; that while it allowed a right of action which had not previously existed, it did not change the essential nature of the action.[118] He interpreted the phrase "in the same manner as an action for any other tort" as relevant to procedure not substance.[119] Some difficulty arose with the reference to "any other tort" since there were two types of torts: the vast majority, in which pecuniary or other damage was necessary to ground an action and a small class of torts which gave rise to a cause of action without damage. Vivian MacMillan's action, according to Harvey C.J.A., fell within the first group. Chief Justice Harvey stated:[120]

> In my opinion, the proper view is that the Legislature intended no change in the nature of the action but only specified another class of person who could maintain it. The same rule then must be applied in this case to the action of the father and that of the daughter and for either to succeed there must be evidence proper to be submitted to the jury of damage 'sufficiently substantial to be worthy the attention of the Courts'.

The Chief Justice reviewed the evidence presented by Vivian MacMillan and concluded that even if one believed that her relationship with John Brownlee caused her as much pain and distress as she had alledged, there was insufficient evidence of damages to go to the jury and that the action had been properly dismissed.[121]

Justices Mitchell and Ford wrote short concurring opinions. Mr. Justice Mitchell pointed out that N.D. Maclean had conceded that the common law rules relating to the loss of service applied to Mr. MacMillan's action and Mitchell J.A. argued that, indeed, there was no evidence to support a verdict in favor of Mr. MacMillan.[122] Concerning the interpretation that section five swept away all of the common law rules and gave Vivian a cause of action, Mitchell stated:[123]

115. *Supra* notes 32 through 43 regarding *L'Esperance* v. *Duchene*, *Westacott* v. *Powell*, and *Harrison* v. *Prentice*.
116. *Supra* n. 101 at 220.
117. *Id.* at 221.
118. *Id.* at 221-222.
119. *Id.* at 222.
120. *Id.*.
121. *Id.* at 223.
122. *Id.* at 231.
123. *Id.* at 230-231.

> In my opinion so definite a change in the right liabilities could never have been intended, nor do I think any such meaning can be read into the language of the section. Prior to the enactment of this statute not only damage, but a specified and restricted class of damage, must necessarily have been proved in order to succeed. The law relating to seduction was developed upon this principle largely a fiction but evidently for a purpose, and in the view I take of the section there is nothing to indicate that it was intended to depart from this principle, even by implication. In this respect I see no inconsistency in the application of this principle, whether it be the action of the master, parent or the female in her own name, for in the last-mentioned case, where the question of service may not actually arise, evidence of any interference with her ability to serve can and should, I think, properly be taken into consideration.

Apparently, Justice Mitchell also remained skeptical about Vivian MacMillan's testimony, since he concurred with Harvey C.J.A. that much of the plaintiff's evidence seemed highly improbable.[124] He indicated, however, that the jury's findings regarding the occurence of seduction, should not be set aside.[125] Nevertheless, he supported Mr. Justice Ives' dismissal of the action since there was no evidence of damage resulting from seduction.[126] Likewise, Justice Ford accepted both the jury's decision that seduction had taken place and the Ives dismissal.[127]

Justices Lunney and Clarke, meanwhile, dissented on the ground that section five gave Vivian MacMillan a cause of action irrespective of the common law rules regarding loss of service. Justice Lunney emphasized that initial phrase of section five, the words "Notwithstanding anything in this Act." He argued that this clarified the fact that an unmarried woman who had been seduced had a cause of action in tort arising out of the seduction itself.[128] Justice Lunney could see no reason to raise the question of loss of service, since a woman could not lose her own service.[129] Justice Clarke agreed, noting that "the mere fact of seduction gives her a right of action *per se*, and there is no reason for importing the fiction of loss of service as in the case of the father's action."[130] Justice Clarke went further in his view of possible damages. He would not have restricted Vivian MacMillan's right to damages caused simply by sexual intercourse, but would have allowed her nominal damages in any event due to her loss of chastity.[131]

Yet both Clarke and Lunney JJ.A. agreed that Mr. MacMillan's appeal should be dismissed, with Mr. Justice Lunney observing that:[132]

> The action of the male plaintiff, in my opinion, rests on different grounds. There was no loss of service proved and I do not think that there was evidence of enticement on the part of the defendant. The authorities are clearly to the effect that either of these factors is essential to his success.

Unable to convince a single member of the Alberta Court of Appeal that his appeal should be allowed, Mr. MacMillan abandoned his case. But his daughter appealed to the Supreme Court of Canada, which in October, 1936, heard argument restricted to the issue of the effect of section five upon the common law relating to seduction. The ruling of the Supreme

124. *Id.* at 231.
125. *Id.*.
126. *Id.*.
127. *Id.* at 232.
128. *Id.* at 235-236.
129. *Id.* at 236.
130. *Id.* at 228.
131. *Id.*.
132. *Id.* at 236.

Court was issued on May 1, 1937, and that Court, in a four to one decision, allowed the appeal.[133]

The majority opinion of the Supreme Court was delivered by Chief Justice Duff. He reviewed the Alberta decisions of *Gibson* v. *Rabey* and *Tetz* v. *Tetz* which together established that certain factors determined the application of section five and were irrelevant at common law. Chief Justice Duff repeated Justice Beck's emphasis that a woman could not recover under section five if she were the tempter or if her consent to intercourse were caused by lasciviousness, natural passion or some factor other than enticement by the defendant.[134] In particular, Duff C.J. focused attention on the fact that the Alberta decision raised issues and defences which were inapplicable to common law actions brought by a master or a parent.[135] Chief Justice Duff concluded that section five gave rise to a new cause of action which was not to be encumbered by any of the common law considerations:[136]

> section five should be construed according to the ordinary meaning of the words and that damage of the special character mentioned — damage actually or presumptively entailing some loss of service or some disability for service — is not the gist of the action under that section.

On the question of the sufficiency of damage, Duff C.J. was brief and to the point. He simply stated that "Neither have we any doubt that there was sufficient evidence of damage to support the action".[137] Chief Justice Duff refused to dismiss the jury's verdict as unwarranted or to order a new trial. He stated that the verdict had to stand unless the Court felt that it was one which no jury acting judicially could give. The Court was unwilling to reach this conclusion.[138] Similarly, the Supreme Court would not characterize the damages awarded to Vivian MacMillan as excessive and directed that judgment be entered in the amount originally awarded by the jury.[139]

In a concurring opinion, Justice Kerwin took a more grammatical approach. Referring to the clause of section five that provided for "*an* action for seduction", rather than "*the* action of seduction", Kerwin J. thought that the use of the word "an" as opposed to "the" meant that the section provided for an entirely new action.[140] Likewise, the use of the words "such damages" as opposed to "the damages" implied to him that the damages to be awarded were not "the" ones determined by reference to the best for loss of service, but rather "such" damages as appeared justified to a jury.[141]

Concerning Chief Justice Harvey's interpretation of the words "in the same manner as an action for any other tort," Justice Kerwin respectfully disagreed, stating:[142]

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133. *MacMillan* v. *Brownlee* [1937] S.C.R. 318.
134. *Supra* n. 51 at 365-366 and *supra* n. 50 at 414-415.
135. *Supra* n. 133 at 327.
136. *Id.*
137. *Id.*
138. *Id.* at 328.
139. *Id.*
140. *Id.*
141. *Id.* at 329.
142. *Id.*

> it seems to me rather that they are part of the substantive provisions dealing with the right of action thereby given and lend weight to the argument that the unmarried female may maintain a new action and not the old action of seduction.

The sole dissenting opinion among the justices of the Supreme Court of Canada came from Justice Davis who observed that the decision of the majority had the effect of establishing a cause of action for fornication *per se*.[143] In his view, section five was being taken out of context. Instead, the section "ought to be interpreted, not as an isolated piece of legislation to be given a new meaning and significance, but as part of an entire statute dealing with the same subject-matter."[144] Section four stated that any person who would have been entitled at common law to maintain an action for the seduction of an unmarried female could do so[145]

> if the father or mother is not resident in Alberta at the time of the birth of the child which is born in consequence of the seduction or being resident therein does not bring an action for the seduction within six months from the birth of the child.

Thus, Davis J. concluded that a cause of action required the birth of an illegitimate child.[146] In addition, if this were the case for masters and parents, it should be the same for the seduced female. He noted that:[147]

> It is a safe rule of statutory interpretation to assume, in the absence of an expressed intention to the contrary, that a Legislature when it uses the same words in different sections of the same statute, particularly a very short statute, uses the words in the same sense throughout the statute. . . . If the legislature had intended that the words in section 5 should mean something different from what they mean in the other sections, the Legislature could have said so. Of course, where the right of action is given to the unmarried female herself there is necessarily excluded the relation of master and servant as an essential in the cause of action and with it the necessity for proof of loss of service; but the substance of the statutory cause of action, the birth of a child or at least the condition of pregnancy, remains.

Forseeing the objection that the words "Notwithstanding anything in this Act" undermined the proposition that section five was to be read as an integral part of the Seduction Act, Davis J. interpreted these words as meaning "notwithstanding that the action for seduction may be maintained by the several classes of persons referred to in the preceding sections, the unmarried female may herself maintain the action. . . ."[148]

Mr. Justice Davis reached the same conclusion as Chief Justice Harvey that "in the same manner as an action for any other tort" was a procedural rather than a substantive distinction.[149]

The ruling of the Canadian Supreme Court forced John Brownlee to carry the appeal further. In June, 1940, a decade after Vivian MacMillan arrived in Edmonton, the Privy Council decided to reject John Brownlee's appeal and finally terminated proceedings in the case.[150] The decision delivered by Lord Thankerton proceeded from the assumpton that section five was an attempt to correct a centuries-old omission which had left a seduced woman without redress.[151] As such, their Lordships could see no reason to concern themselves with any of the considerations

143. *Id.* at 330.
144. *Id.* at 331.
145. *Id.* at 332.
146. *Id.*.
147. *Id.* at 333.
148. *Id.*.
149. *Id.*.
150. *Brownlee* v. *MacMillan* [1940] A.C. 802.
151. *Id.* at 810.

affecting the common law action arising from seduction.[152] Six years of litigation surrounding *MacMillan* v. *Brownlee* had ended with a simple ruling.

IV. ANALYSIS AND CONCLUSIONS

Considering the various decisions delivered throughout the course of litigation, there was little dispute over two propositions. First, most observers agreed with Lord Thankerton's assessment that "The action for seduction as known to English law has itself had an unsatisfactory development. . . ."[153] One commentator was even more candid, noting that "Among the least respectable products of the common law, the action for seduction, has never been distinguished by logic or clarity."[154] The second proposition was that at common law neither Vivian MacMillan nor her father could have maintained an action against John Brownlee. From the seventeenth to the twentieth century, common law cases established clearly that a seduced woman could not maintain an action arising out of her own seduction.

As far as Mr. MacMillan was concerned, the cases provided that a parent could only sue *qua* master and not *qua* parent.[155] Thus a father could not recover any financial loss suffered through the maintenance of his daughter during her pregnancy if there was no allegation of loss of service arising out of the pregnancy.[156] Similarly, since the common law was loath to admit that an individual could be in the service of two masters at the same time, it was virtually impossible for a father to maintain an action for the seduction of his daughter if she was in the employ of a third party at the time of her seduction.[157] This remained true if she were discharged when she became unable to work as a result of her pregnancy.[158] Even when the common law conceded that a woman could simultaneously be the servant of her father and her employer, the instances in which a father could recover damages were restricted to those whereby his daughter lived at home and still provided household services while at the same time employed by a third party.[159] Thus at common law Mr. MacMillan could not maintain an action. A more difficult question concerns the effects of Alberta's Seduction Act upon the father's right to maintain an action.

The proposition that the legislative enactment did not remove father's obligation to prove his daughter's loss of ability to serve was clearly settled at the time of *MacMillan* v. *Brownlee*, not only by the Ontario deci-

152. *Id.* at 810-811.

153. *Id.* at 809.

154. E. Joliffe, (1935) 13 *Can. Bar Rev.* 331.

155. *Bennett* v. *Allcott* (1787) 2 Term Rep. 166, 100 E.R. 90 at 91.

156. *Grinnell* v. *Wells* (1844) 7 Man. & G. 1033, 135 E.R. 419 at 423.

157. *Dean* v. *Peel* (1804) 5 East 45, 102 E.R. 986; *Blaymire* v. *Haley* (1840) 6 M. & W. 55, 151 E.R. 319.

158. *Postlethwaite* v. *Parkes* (1776) 3 Burr. 1878, 97 E.R. 1147.

159. *Rist* v. *Faux* (1863) 4 B. & S. 409, 122 E.R. 513. *See also Ogden* v. *Lancashire* (1866) 15 W.R. 158, which indicates that it was not possible to recover if the daughter was only allowed to return home at the leave of the employer, since she was then for all practical purposes in the employ of her master at all times. *See also Thompson* v. *Ross* (1858) 5 H. & N. 16, 157 E.R. 1082 and *Whitbourne* v. *Williams* [1901] 2 K.B. 722.

sion cited by Chief Justice Harvey, but also in other cases from Ontario.[160] However, the somewhat anomalous effect of this interpretation did not escape criticism. In *Lake and Wife* v. *Bemiss*, Chief Justice Macauley argued that:[161]

> [the statute] inconsistently requires proof that such seduction led to consequences that would have established loss of service in an action founded on the relation of master and servant, although neither the relation of master and servant, nor the loss of service in fact is to be proved. . . .

In effect, the legislative changes added the hypothetical requirement that even though a daughter was not required to prove that she served her father, it had to be established that she could, if required, serve him to the traditional fictions surrounding the action for seduction. However, it is impossible to escape the conclusion that the Court's interpretation of this legislation was correct. Traditionally, a master or a parent had to establish service and interference with service to maintain an action. Failing to remove these proofs and instead facilitating their establishment, the Alberta statute specifically retained the issue of service as the touchstone of the action. It is equally clear that the evidence presented at the *MacMillan* v. *Brownlee* trial fell woefully short of the standard required to establish loss of service.

Vivian MacMillan's basis for action was far from clear-cut. Ironically, it is possible to accept the interpretation placed on the critical sections of the Alberta Seduction Act by the various judges who would have dismissed her action and still conclude that her action should not have been dismissed. Initially, the interpretation of Justice Davis of the Supreme Court of Canada on the words "Notwithstanding anything in this Act" was reasonable. Similarly, the conclusion of Harvey and Davis JJ. that the phrase "in the same manner" refers to procedure rather than substance is difficult to question. The word "manner" has been defined in a number of different ways, but generally as referring to "mode" or "method", words which imply a process or a procedure rather than a matter of substantive law.[162]

The words "as an action for any other tort" are more troublesome. As Chief Justice Harvey indicated, most torts require proof of damage and only a small number allow recovery without loss. But it may be argued that an action for seduction is analogous to special cases such as trespass and libel where a jury is entitled to take all of circumstances of the defendant's action into consideration, and not just the injury to the plaintiff.[163] This is particularly significant if Vivian MacMillan's allegations regarding John Brownlee's behaviour are accepted. Damages beyond compensatory ones have traditionally been awarded in cases where a defendant acts in a violent and abusive manner.[164] On this point, it is instructive to consider the ruling in an eighteenth century seduction case, that "Actions of this tort are brought for example's sake; and although the plaintiff's

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160. *Biggs* v. *Burnham* (1843) 1 U.C.Q.B. 106 at 108 and *Kimball* v. *Smith* (1847) 5 U.C.Q.B. 32 at 34.

161. (1854) 4 U.C.C.P. 430.

162. *The Encyclopedia of Words and Phrases — Legal Maxims — Canada 1825 to 1978* (3rd ed. G.D. Sanagan ed. 1978) 18. *See also Stroud's Judicial Dictionary of Words and Phrases* (4th ed. J.S. James ed. 1973) 1616, and *Acraman* v. *Herniman* (1851) 16 Q.B. 1003 at 1004, and also *Berry* v. *Donovan* (1893) 21 O.A.R. 14 at 29.

163. *Mayne's Treatise on Damages* (9th ed. C. Phillipson ed. 1920) 432.

164. *Id. See also Merest* v. *Harvey* (1814) 5 Taunt. 442, 128 E.R. 761.

loss in this case may not really amount to the value of 20 shillings, yet the jury had done right in awarding liberal damages."[165]

Chief Justice Harvey's observation could also be addressed in another way. The decision of Chief Justice Duff made it clear that he did not view the damages as having been awarded in the absence of damage, but rather upon the presentation of sufficient proof of damage to the jury.[166]

Looking at the action as a whole, a compelling argument could be made for refusing to apply the common law rules to Vivian MacMillan's action. Her action was for seduction, and her cause of action was given by statute. The traditional common law action, while arising out of seduction, was not for seduction. It was for loss of service and seduction was merely an incident of this cause of action.[167] Thus a new tort was created, and an action taken under section five was to be decided in accordance with the provisions of the statute, not the common law rules applicable to a separate tort.

One final question requires consideration, that of whether or not pregnancy was necessary to establish damage. The judges who favored dismissal repeatedly referred to the absence of reported decisions granting recovery without pregnancy.[168] Only one case was cited in which pregnancy was not required but several others should be noted.[169] In one nineteenth century case the Court of Exchequer found for the plaintiff when there had been no pregnancy but rather an illness caused by distress, although the action was eventually dismissed on another ground.[170] Similarly, the Ontario Court of Common Pleas stated in *obiter* in 1894 that if seduction were proved, pregnancy would not have been necessary to establish damage.[171] Finally, an Irish decision of 1917 concluded that the "Birth of a child during the service is the usual proof of loss, but it is not the only proof. . . . Sexual intercourse may cause illness and inability to serve."[172] More significantly, even if pregnancy was necessary at common law or in an action by a parent under statute, and it was far from certain that it was, it did not follow that Vivian MacMillan had to prove pregnancy. Section five allowed the award of such damages as were proved, and the jury awarded such damages as were proved to them.

The *Brownlee* case also raised the issue of freedom of the press since during the course of the trial the *Edmonton Bulletin* was charged with contempt. Contradictory references to the press were made by A.L. Smith. On the other hand he noted that "any lawsuit of this nature receives the full and hateful publicity, hateful to both parties, that this lawsuit has received throughout the length and breadth of this country . . . it is not often that a lawsuit is given such painful publicity as this case."[173] On the other, Smith also indicated that "rarely . . . [has] a

165. *Tullidge* v. *Wade* (1769) 3 Wils. 18, 95 E.R. 909.
166. *Supra* n. 133 at 327.
167. *Supra* n. 150 at 809.
168. *Supra* n. 101 at 214 (*per* Harvey C.J.A.) and *supra* n. 133 at 332 (*per* Davis J.).
169. *Manvell* v. *Thomson* (1826) 2 C. & P. 303, 172 E.R. 137.
170. *Boyle* v. *Brandon* (1845) 13 M. & W. 738, 153 E.R. 310.
171. *Cole* v. *Hubble* (1894) 26 O.R. 279 at 281.
172. *Dent* v. *Maguire* [1917] 2 I.R. 59 at 65.
173. *Edmonton Journal*, extra edition, 30 June 1934, p. 10. This edition is not dated.

lawsuit . . . received such full and capable publicity all over the country as this one has."[174] As the testimony became public record, most provincial dailies printed the evidence *verbatim.* Only the *Edmonton Bulletin* dramatized the case.

Through embellishment and sensationalism, J.S. Cowper of the *Bulletin* transformed the proceedings into "yellow journalism." Vivian's account of the Premier "leading a lonely, unhappy life" became "she pictured . . . [the] Premier as a love-torn sex crazed victim of passion and jealousy . . . flying into a passion of rage when she attempted to deny him or free herself from the tangled web of lust."[175] Their road-side assignations were referred to as "sex-orgies" in the *Bulletin.*[176] And Cowper took particular pleasure in describing the government vehicle involved as the Studebaker "with the wide rear seat."[177] Reporting the alleged sexual activities in the Brownlee home, Cowper noted "there [Brownlee] had defiled his wife's sanctum with his lawless desire."[178]

A.L. Smith brought these "highly colored" stories to the attention of the court and expressed the opinion that they went "far and beyond any privilege which is extended to a newspaper in a fair and accurate report of a trial."[179] "There is no question whatsoever," commented Justice Ives, "that what has been brought to my attention tends to prejudice the interest of a litigant in pending litigation."[180] Justice Ives was particularly concerned since such material was not censored from a civil jury. Consequently, Charles E. Campbell, publisher of the *Bulletin,* and J.S. Cowper, newswriter, were found guilty of contempt. Campbell was fined $300.00 or ten days hard labour while Cowper was fined $100.00 or three days hard labour. *Bulletin* reporters were also excluded from further hearings in the *Brownlee* case.

Mr. Justice Ives' judgment in the contempt proceedings was rendered summarily, without the presentation of the objectionable materials. Therefore the *Bulletin* appealed:[181]

> In view of the grave importance to the freedom of the press and the liberty of the subject involved in the action of Mr. Justice Ives in sentencing the publisher and a member of the staff of the Edmonton Bulletin on Wednesday last, without giving any particulars of the alleged contempt and his action in arbitrarily denying counsel for Charles E. Campbell and J.S. Cowper time to read the material in the case and prepare a submission, it has been decided to carry an appeal against the conviction to a high court. . . .

The appeal that followed focused upon the question of whether this contempt fell under indictment or summary procedure since it could be tried under criminal code provisions either for contempt or judicial obstruction.[182] The appeal failed and for the most part commentators agreed that the *Bulletin* had gone too far. Darcy Marsh told readers of the *Canadian*

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174. *Edmonton Bulletin,* 30 June 1934, p. 1. This apparent contradiction may simply be another example of the *Bulletin's* ineptitude whereby they quoted Smith incorrectly. However, since no transcripts are available, it is possible that Smith made both statements.
175. *Edmonton Bulletin,* 26 June 1934, p. 1.
176. *Edmonton Bulletin,* 27 June 1934, p. 14.
177. *Edmonton Bulletin,* 26 June 1934, p. 1.
178. *Id.*.
179. *Calgary Herald,* 27 June 1934, p. 1.
180. [1934] 3 W.W.R. 593 at 606.
181. *Edmonton Bulletin,* 27 June 1934, p. 14.
182. *Supra* n. 179 at 593-616.

Forum that "The newspapers have been filled with the sort of detail which the pornographic mind loves to turn to its own base purposes."[183] Despite the *Forum's* staunch support for civil liberties, Marsh argued that everyone would be better off if the case had not been reported at all. Echoing the sentiments of some rural newspapers, Marsh added that:[184]

> The existence of a mistress in a man's life is a simple if reprehensible fact, but certain sections of the press of this country made of it a strange tale of monstrosity as if there had never been such an association between a public man and a woman. . . .

The *Brownlee* case also challenges one of the most compelling, characterizations of Alberta as a moralistic, fundamentalist biblebelt. To some this stereotype has become the core of Alberta's social heritage — a landscape covered with bible schools, temperance societies, out-dated "blue laws" and evangelical preachers. Obviously, this notion contains a great degree of truth when one considers the successive religious underpinnings of the province's major political movements. Both the leadership and membership of the United Farmers displayed strong moral convictions. Henry Wise Wood, its chief organizer, equated agrarian cooperation with the realization of the Kingdom of Heaven on earth.[185] Social Credit's ties to religion and morality through the Prophetic Bible Institute of William Aberhart or E.C. Manning's "Back to the Bible Hour" have been documented extensively.[186] Further evidence of Alberta's moralistic foundation is provided in W.E. Mann's, *Sect, Cult and Church in Alberta.* Though it would certainly be false to suggest that a single case provides a basis upon which to overthrow this conventional portrait of Alberta as a puritan stronghold, it may be equally erroneous to think of Alberta as a higly moralistic society. If a puritanical attitude toward sex existed, one would have expected far more editorial comment directed toward the current sexual mores rather than judicial process or the fact that Brownlee was a public official. Perhaps the Cowper contempt case silenced commentators. Many Albertans may have simply felt that the evidence was inconclusive. Nevertheless, they failed to exhibit any concern over the infringement of their moral standards. Such a conclusion supports the findings of James Gray who suggested that the incidence of moral offences was far greater in the early settlement period than had been previously assumed.[187] Further studies of morality and popular attitudes toward sex are conspicuous by their absence. Yet the *Brownlee* case was not an isolated example of a prominent public figure involved in sexual misadventures. Albertans were also privy to the "sensational story of divorce" involving another member of the Brownlee cabinet,

183. D. Marsh, "Nell Tolls the Curfew" 14 (1934) *Can. For.* 426.

184. *Id.*

185. R. Allen, "The Social Gospel as the Religion of the Agrarian Revolt" in *The West and the Nation* (1976 C. Berger and R. Cook ed.) 179-180.

186. *See* for example, J.A. Irving *supra* n. 9, J.J. Barr *supra* n. 9, and C.B. MacPherson, *Democracy in Alberta* (1953).

187. *See* Gray's *Booze* (1972) and *Red Lights on the Prairies* (1971).

Minister of Public Works O.L. McPherson.[188] Since the McPherson affair preceded the Brownlee scandal, it certainly may have influenced the public reaction. Furthermore, not only does the McPherson case lend credence to a reappraisal of morality but it suggests that seduction and extra-marital affairs may have been the result of difficult divorce proceedings and the adverse press associated with divorce hearings. The measurement of morality is, however, a difficult procedure and further research will be necessary in order to draw any definite conclusions concerning Alberta in the 1930's. Finally, it must not be overlooked that section five of the Alberta Seduction Act was a unique attempt to legislate morality that went far beyond many other jurisdictions. In itself, this statute may support the popular image of moralistic Alberta.

In conclusion, the *MacMillan* v. *Brownlee* case cast light upon many aspects of Alberta's history, including the development of the law of seduction, public attitudes towards the bench, judicial procedures, the role of the press, popular morality and the political culture of the 1930's. The case stands out as one of the most significant in the province's short history.

188. *Edmonton Bulletin*, 18 September 1933, pp. 1-2, and *Edmonton Bulletin*, 21 September 1933, pp. 1, 3. Legal proceedings in the MacPherson divorce had gone sporadically since October, 1932. Apparently MacPherson, like Brownlee, was inclined to attribute both the personal and public attacks as a politically motivated campaign to discredit the U.F.A. through him. *See* C. Betke, "The United Farmers of Alberta, 1921-1935" in *Society and Politics in Alberta* (1979 C. Caldarola ed.) 14 at 28. This may lend credence to Brownlee's assertions that he too was framed. Further support for such an interpretation came from an interview with Henry Wise Wood's granddaughter, Lois Hollingsworth, who suggested that the same thing had been attempted on Wood but failed.