NOTES

Cruelty as a Ground for Divorce

1. Definition of Cruelty in new Act:

Section 3 of the *Divorce Act* (Canada) of 1968 contains the four types of matrimonial fault which are grounds for divorce, the fourth being cruelty which is defined as follows:

> 3. Subject to section 5, a petition for divorce may be presented to a court by a husband or wife, on the ground that the respondent, since the celebration of the marriage,
>
> (a) ...
> (b) ...
> (c) ...
> (d) has treated the petitioner with physical or mental cruelty of such a kind as to render intolerable the continued cohabitation of the spouses.

2. Jurisprudence under new Act:

There has been some jurisprudence of trial Courts on cruelty under the new *Act*, mostly unreported, but so far as I am aware very few judgments from a Court of Appeal and none from the Supreme Court of Canada. Tritschler, C.J.Q.B. of Manitoba in *Zalesky* v. *Zalesky*[1] stated:

> I wish to make it clear that in considering whether there has been proof of cruelty, I have not been hampered by the definitions relating to the concepts of cruelty which are to be found in the veritable legion of decided cases which preceded and have followed *Russell* v. *Russell*, (1897) A.C. 395.

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[1] [1969] 1 D.L.R. (3d) 471 at p. 472. Quoted with approval in *Paskiewich* v. *Paskiewich*, [1969] 2 D.L.R. (3d) 622 (Gregory, J., B.C.S.C.); *Herman* v. *Herman*, [1969] 3 D.L.R. (3d) 551 (Dubinsky, J., N.S.S.C.); *Williams* v. *Williams*, N.S. 1201-00049, January 31, 1969, Hart, J.; *Nichols* v. *Nichols*, N.S. 1201-00154, December 17, 1968, Pottier, J.; *Patenaude* v. *Patenaude*, Man. Q.B., March 12, 1969, Nitikman, J.; *Delaney* v. *Delaney*, [1969] 1 D.L.R. (3d) 303, (Tyrwhitt-Drake, J., B.C.S.C.); *Countway* v. *Countway*, (1968) 70 D.L.R. (2d) 73, (Cowan, C.J., N.S.S.C.); *Galbraith* v. *Galbraith*, (1969) 69 W.W.R. 390 (Man. C.A.); *Chouinard* v. *Chouinard*, N.B.C.A., October 24, 1969; *Gold* v. *Gold*, N.S.S.C., May 20, 1969, Cowan, C.J.; *Pelletier* v. *Pelletier*, Man. Q.B., July 9, 1969, Hall, J.; See also Gumbert, *Cruelty, Desertion, and Separation: An Analysis of the Common Law in Relation to Certain Sections in the Canadian Divorce Act 1968*, (1969) 29 R. du B. 210, at p. 219 for comparable Australian jurisprudence.

> There is now no need to consider whether conduct complained of caused 'danger to life, limb or health, bodily or mentally, or a reasonable apprehension of it' or any of the variations of that definition to be found in *Russell.*
>
> In choosing the words 'physical or mental cruelty of such a kind as to render intolerable the continued cohabitation of the spouses' Parliament gave its own fresh complete statutory definition of the conduct which is a ground for divorce under sec. 3(d) of the Act.

He added, however,

> Of course, many of the principles laid down in the former cases will continue to be proper guides.[1a]

Accordingly it is useful to consider the law of cruelty generally in the light of past jurisprudence in England and Canada and then to consider some specific cases of cruelty, bearing in mind, however, the changed wording of the new *Act.*

3. Cruelty as a Statutory Ground in Canada Prior to 1968:

It is important to note that before the 1968 *Divorce Act* only in Nova Scotia[2] was cruelty a ground for divorce. In the other common law provinces, cruelty was a ground for judicial separation or for action for alimony by the wife; and cruelty by the petitioner could be a ground on which the Court could refuse a divorce on the grounds of adultery or an action for separation or alimony.[3]

In only Alberta and Saskatchewan was cruelty defined by statute[4] to include, in addition to conduct which creates a danger to life, limb or health, any course of conduct which in the opinion of the court is grossly insulting and intolerable, or of such a nature that the petitioner could not be expected willingly to live with the other consort after the latter had followed such a course of conduct.

In the provinces other than Alberta and Saskatchewan which had their own divorce courts, there was no statutory definition of cruelty and the courts tended to follow English jurisprudence and particularly *Russell* v. *Russell* referred to hereunder. Indeed there is a Nova Scotia case[5] which held that the law of cruelty in Canada and England was the same.

[1a] Followed in *Bonin* v. *Bonin,* [1969] 5 D.L.R. (3d) 353, (Dubinsky, J., N.S.S.C.).

[2] R.S.N.S. (3d Series), c. 126, as amended by S.N.S. 1866, c. 13, s. 8; reprinted in R.S.N.S., 1954, vol. IV, pp. 31-33.

[3] *Power on Divorce,* 2d ed., by J.D. Payne, (Toronto and Calgary, 1964), p. 473.

[4] R.S.A. 1955, c. 89, s. 7; R.S.S. 1960, c. 35, s. 25(3).

[5] *Clattenburg* v. *Clattenburg,* [1955] 2 D.L.R. 272, (Currie, J.).

In Quebec under Article 189 C.C. it has always been possible for either consort to obtain a judicial separation on the ground of outrage, ill-usage or grievous insult. Article 190 C.C. leaves the grievous nature and sufficiency of the outrage, ill-usage or insult to the discretion of the court, in the light of the rank, condition and other circumstances of the consorts.[6]

The concept of physical or mental cruelty under the 1968 Statute is very similar to outrage, ill-usage or grievous insult in Quebec jurisprudence in cases of judicial separation from bed and board.[7]

In considering jurisprudence prior to 1968 it is important to bear in mind whether or not the case turned on a statutory definition of cruelty and to compare the definition with that contained in the new *Divorce Act.*

4. English and Canadian Jurisprudence Generally prior to 1968:

The existence or non-existence of cruelty is a question of fact in each case in the light of the age, state of health and character of the two consorts.

> Each particular case must however stand on its own footing. For instance if a wife suffered from heart disease, to the knowledge of her husband, and he gave her a sudden shock, through which she might be in danger of sudden death, such an act was not necessarily an act of actual violence; yet if the wife was so constituted as to be thereby made sickly or ill or so forth, the husband's act would amount to legal cruelty.[8]

For, "what is tolerable by one may not be by another."[9]

A similar judgment has been rendered in Canada under the new *Act.*[10]

Up to 1964, in both England and Canada, the Courts followed *Russell* v. *Russell* where the wife had falsely accused her husband of abominable sexual practices and this was held by the Court of Appeal, two to one, not to constitute cruelty because the acts or conduct of respondent must, in order to constitute cruelty, have caused "danger to life, limb or health, bodily or mental or a reasonable

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[6] *Stevenson* v. *Baldwin,* (1923) 34 K.B. 41.

[7] Robert, *Quelques commentaires sur la nouvelle loi concernant le divorce,* (1968) 28 R. du B. 513, at p. 517.

[8] *Barrett* v. *Barrett,* (1903) 20 T.L.R. 73, at p. 74; in Canada see Power, *op. cit.,* p. 476, and cases cited therein including *Plummer* v. *Plummer,* (1962) 31 D.L.R. (2d) 723, (B.C.S.C.) and *Cole* v. *Cole,* (1959) 19 D.L.R. (2d) 643, (N.S.S.C.).

[9] *D'Aguilar* v. *D'Aguilar,* 162 E.R. 748; Power, *op. cit.,* at pp. 475 *et seq.* and cases quoted therein.

[10] *Delaney* v. *Delaney, supra,* n. 1.

apprehension of it".[11] The Court added that it was essential that respondent have inflicted bodily injury upon petitioner or have injured her mental or bodily health etc.

On appeal to the House of Lords,[12] a slim majority of 5 to 4 sustained the judgment with the result that "cruelty was defined as involving either violence or injury to health".[13]

In 1944 in the Ontario Court of Appeal, Laidlaw J.A. refused a wife's action for alimony on the ground of cruelty because she had not established danger to life, limb or health.[14]

Modern cases in England since 1897 may have seemed to be widening the concept of cruelty "but in reality they merely afford diverse illustrations of the principle in *Russell* v. *Russell*...".[15] However advances in medical science and particularly psychiatry have "vastly extended the bounds of what may be called 'health' and when it may be regarded as having been 'injured' ".[16] Power stated in 1964 that in Canada "in recent years cruelty has been held established in many cases in which the conclusion might have been otherwise had the decision been made in former days...".[16a]

5. Intention:

There are many English cases prior to 1964 which held that cruelty must be intentional, probably, as Denning L.J. said in *Kaslefsky* v. *Kaslefsky*,[17] in order not to open the door of cruelty so wide as to grant divorce on grounds of mere incompatibility. For a while, malice was believed to be necessary;[18] but this was rejected by the Court of Appeal in *Squire* v. *Squire*.[18a] From 1955 up to 1964 the cases appear to have held that the respondent to be cruel must have acted voluntarily in a manner which he foresees or should foresee may harm the petitioner.

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[11] [1895] P. 315, at p. 322.

[12] *Ibid.*, [1897] A.C. 395, at p. 456.

[13] Biggs, *The Concept of Matrimonial Cruelty*, (London 1962), p. 43; See also *Halsbury's Laws of England*, Lord Simon, ed., (London 1952), 3d ed., vol. 12, at p. 269.

[14] *Hawn* v. *Hawn*, [1944] 4 D.L.R. 173, at p. 186; See, however, *Walsh* v. *Walsh*, (1914) 7 W.W.R. 620 (B.C.); *MacDonald* v. *MacDonald*, [1954] O.R. 521, (C.A.) where divorce was granted.

[15] Biggs, *op. cit.*, p. 44.

[16] *Ibid.*, p. 47.

[16a] *Op. cit.*, p. 477.

[17] [1951] P. 38, at p. 48.

[18] *Astle* v. *Astle*, [1939] P. 415 at pp. 419-420.

[18a] *Squire* v. *Squire*, [1949] P. 51, at p. 58 (C.A.).

The House of Lords in *Gollins* v. *Gollins*[19] in 1964 definitely decided by a majority of 3 to 2 that intention to injure was not a requisite in matrimonial cruelty. In 1968 it was so held in a Canadian case[20] prior to the new *Act*.

6. Effect of Insanity:

Also in 1964, the House of Lords decided that if the conduct of a respondent would be held to be cruelty irrespective of motive or the intention to be cruel, insanity would not be a defence.[21] Accordingly proof of cruelty is purely objective and not subjective. As *Power on Divorce*[22] states:

> Proof of insanity is not necessarily an answer to a charge of cruelty, although the mental derangement of the respondent cannot be wholly disregarded. It falls on the respondent to prove that he or she was not legally responsible for his or her actions and the onus must be discharged in the same way and to the same extent as would be required in civil proceedings, that is, on a balance of probabilities.

It was held in *Herman* v. *Herman*[23] under the new *Act* that the fact that respondent had been in and out of mental hospitals over many years was no defence to a petition for divorce based on physical and mental cruelty to his wife.

7. Particular Types of Cruelty:

A. Drunkeuness:

A leading English case[24] held in 1865 that habitual drunkenness could not, by itself without violence, constitute cruelty, perhaps because drunkenness was more common then than now. Modern jurisprudence[25] holds to be cruelty drunkenness causing injury to the health of the other consort. Usually, but not always, drunkenness is combined with abusive treatment.[25a]

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[19] [1964] A.C. 64; Followed in *N.* v. *N.*, [1969] 4 D.L.R. (3d) 639, (Munroe, J., S.C.B.C.).

[20] *White* v. *White*, (1968) 69 D.L.R. (2d) 60, (McLellan, J., D.C.N.S.); Power, *op. cit.*, p. 480.

[21] *Williams* v. *Williams*, [1964] A.C. 698; followed in Canada in *Brown* v. *Brown*, N.S. E-6871, 1966, Cowan, J.

[22] *Op. cit.*, pp. 480-481.

[23] *Supra*, n. 1.

[24] *Brown* v. *Brown*, (1865) L.R. 1 P. & D. 46, at p. 50.

[25] *Baker* v. *Baker*, [1955] 1 W.L.R. 1011, at p. 1015, (Davies, J.); In Quebec see: *Danyluke* v. *Dubkowetska*, [1964] B.R. 909.

[25a] See, for example, *Stewart* v. *Stewart*, [1945] 1 D.L.R. 500, (N.S.C.A.).

Under Section 4(1) (b) of the new Canadian *Act*, gross addiction to alcohol for three years, with no reasonable expectation of rehabilitation, is a ground for divorce if it causes a permanent breakdown of the marriage. Drunkenness of a lesser degree can constitute cruelty if it renders continued cohabitation intolerable, as was the case in *Williams* v. *Williams*.[26] However, a divorce on the grounds of chronic alcoholism under the new *Act* was refused in the Ontario case of *Knoll* v. *Knoll*[27] as the evidence showed the respondent to be merely a heavy drinker and not a chronic alcoholic, and because his conduct had "not produced such injury to health as will give reasonable apprehension that the continuance of such conduct will cause permanent injury of mind or body".

B. Verbal Abuse, Humiliating Treatment, Nagging:

In England "there seems to be nothing to prevent abuse of one spouse by the other constituting cruelty if it be of such a degree as to be grave and weighty . . .".[28] Nagging can be a ground for divorce, for,

> One knows that dropping water wears a stone. Constant nagging will become completely intolerable and though in the course of married life you may be able to point to no single instance which could possibly be described as, in common parlance, "a row," yet nagging may be of such a kind, and so constant that it endangers the health of the spouse on whom it is inflicted.[29]

Sulking and refusal to talk can also be cruelty.[30] Furthermore, it can be said that continued humiliation of a wife in the presence of others, as well as before the children; treating the wife as inferior; and swearing and cursing at her, may in certain circumstances be held to be mental cruelty.[31]

One surprising case[32] held that where an invalid wife made excessive demands on her husband requiring him to read to her throughout the night and otherwise preventing him from sleeping so that his efficiency as an army officer was impaired, the husband was entitled to a divorce for cruelty.

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[26] *Supra*, n. 1.

[27] *Knoll* v. *Knoll*, [1969] 6 D.L.R. (3d) 201, (Moorhouse, J.); See to the same effect *Moore* v. *Moore*, C.S.M. 349, September 25, 1968.

[28] Biggs, *op. cit.*, p. 151.

[29] *Atkins* v. *Atkins*, [1942] 2 All E.R. 637, at p. 638; See also: *Usmar* v. *Usmar*, [1949] P. 1, and *King* v. *King*, [1953] A.C. 124, (H.L.) where divorce was refused as cruelty was not proven.

[30] *Lander* v. *Lander*, [1949] P. 277 (C.A.).

[31] *Nichols* v. *Nichols*, *supra*, n. 1.

[32] *Squire* v. *Squire*, *supra*, n. 18*a*.

C. Abnormal Marital Relations:

a) The jurisprudence is confusing and contradictory and it may be said that "unjustifiable refusal of intercourse to the other party to the marriage is capable of constituting cruelty but it may be a matter of considerable difficulty to convince the court that the refusal was, in fact, unjustifiable".[33]

Refusal was held to be unjustified and to constitute cruelty sufficient to justify a divorce in *Evans* v. *Evans*,[34] whereas a divorce was refused in *B.* v. *B.*[35] as the refusal was considered to be justifiable because not accompanied with the intention to injure. In several other cases[36] a petition for divorce for cruelty was dismissed where one consort had an invincible repugnance to intercourse or where one consort found the other repugnant.

The decisions in the United States go both ways and are almost equally divided.[37]

Jurisprudence in Quebec in separation from bed and board cases prior to 1968 often assimilated refusal of sexual relations to grievous insult[37a] and will probably, in appropriate cases under the new *Act* find cruelty.

In one recent Quebec case[38] the absolute refusal of the wife to have intercourse during the first three weeks of marriage because of invincible repugnance followed by her desertion and return to her parents was held not to constitute cruelty sufficient to justify a divorce under the new Canadian *Act*. In that case the judgment was dated only 11 months after the wife's desertion so permanent breakdown of the marriage could not be invoked either on grounds of desertion or non-consummation.

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[33] Biggs, *op. cit.*, p. 174.

[34] [1965] 2 All E.R. 789; See also *P.* v. *P.*, [1965] 2 All E.R. 456; *Sheldon* v. *Sheldon*, [1966] P. 62 (C.A.).

[35] [1965] 3 All E.R. 263, (C.A.).

[36] *Kaslefsky* v. *Kaslefsky*, [1951] P. 38, at p. 42, (Buckwill, J.); *Clark* v. *Clark*, [1958] C.L.Y. 968, The Times, June 25, 1958; *P.* v. *P.*, [1964] 3 All E.R. 919; See also the Scottish Case of *Scott* v. *Scott*, [1960] S.C. 36.

[37] Biggs, *op. cit.*, p. 172; Clark, *The Law of Domestic Relations*, (St. Paul, 1968) p. 346; *Pro: Diemer* v. *Diemer*, (1960) 203 N.Y. Supp. 2d 829, (C.A.N.Y.); *Martin* v. *Martin* (1922) 118 A. 410; *Sonmore* v. *Sonmore*, (1961) 360 P. 2d 359; *Reeves* v. *Reeves*, (1952) 55 N.W. 2d 793; *Contra: Hinkle* v. *Hinkle*, (1953) 74 S.E. 2d 657; *Dominik* v. *Dominik*, (1951) 81 A. 2d 147; *X.* v. *X.*, (1946) 47 A. 2d 470.

[37a] Robert, *Quelques commentaires sur la nouvelle loi concernant le divorce*, *loc. cit.*, at p. 517; *Brosseau* v. *Dame Peachy*, (1923) 35 K.B. 389; *Dasylva* v. *Plante*, (1882) 8 Q.L.R. 349.

[38] *Webster* v. *McKay*, [1969] C.S. 132.

b) Birth Control:

In England, "any form of birth control is capable of being cruelty if practised to an extent which proves injurious to the other spouse"[39] and if unjustified. The reported cases[40] turn on their own facts and sometimes appear contradictory, as for instance *Fowler* v. *Fowler*,[41] where insistence on contraception by the wife who feared childbirth was held to be justified.

Sterilisation of either spouse on medical grounds cannot be cruelty, but sterilisation as a matter of convenience in order to prevent pregnancy can be if the petitioning consort did not consent to the operation and if there is injury to health of the petitioner.[42]

c) Sexual Abnormalities:

Having engaged in a homosexual act or being guilty of sodomy are grounds for divorce under Section 3(b) of the new *Act*. It may well be that such acts may still constitute cruelty within section 3(d) in which event the English cases, where completed or attempted sodomy with the consort[43] or with others[44] or lesbianism on the part of the wife[45] was invoked as constituting cruelty, would be relevant.

8. Degree of Proof Required:

It had been held before 1968 in both England by the House of Lords[46] and in Canada by two judgments of the Supreme Court of Canada[47] that in a divorce case proof need not be made beyond a reasonable doubt, but according to the civil standard, that is on the basis of the balance of probabilities.[48]

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[39] Biggs, *op. cit.*, p. 175; *Clark* v. *Clark*, [1969] 6 D.L.R. (3d) 383, (Henderson, J., Ont. H.C.).

[40] *Baxter* v. *Baxter*, [1948] A.C. 274, at p. 290, (Jowitt, L.C.); *White* v. *White*, [1948] P. 330; *Knott* v. *Knott*, [1955] P. 249.

[41] *Fowler* v. *Fowler*, (1952) 2 T.L.R. 143, (C.A.).

[42] *Bravery* v. *Bravery*, [1954] 3 All E.R. 59, (C.A.).

[43] *C.* v. *C.*, (1905) 22 T.L.R. 26; *N.* v. *N.*, (1862) 164 E.R. 1264; *Lawson* v. *Lawson*, [1955] 1 W.W.R. 200, (C.A.); *Davidson* v. *Davidson*, [1953] 1 W.L.R. 387, at p. 392. In Canada see *Cesale* v. *Cesale*, (1920) 57 D.L.R. 435, (N.S.); *F.* v. *F.*, (1950) 2 W.W.R. 54, (Alta.); *Fast* v. *Fast*, [1945] 3 W.W.R. 66, (B.C.); *Warden* v. *Warden*, [1951] 3 D.L.R. 336, (Ont.).

[44] *Mogg* v. *Mogg*, (1824), 162 E.R. 301; *Countway* v. *Countway*, *supra*, n. 1.

[45] *Gardner* v. *Gardner*, [1947] 1 All E.R. 630; *Spicer* v. *Spicer*, [1954] 1 W.L.R. 1051.

[46] *Blyth* v. *Blyth*, [1966] A.C. 643, (H.L.).

[47] *Smith* v. *Dame Smith*, [1952] 2 S.C.R. 312; *Forester* v. *Forester*, [1955] 4 D.L.R. 710.

[48] *Delaney* v. *Delaney*, *supra*, n. 1, at p. 308; *Zalesky* v. *Zalesky*, [1969] 1 D.L.R. (3d) 471, at p. 472; Power, *op. cit.*, at p. 486.

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