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Divorce and Mental Cruelty

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Note

Divorce and Mental Cruelty

Mental cruelty, divorce, two expressions one hears so often today — since when have these expressions been used ? What judicial connotations have been attached to them in the past, that is before the *Law Concerning Divorce* [1] in 1968 ? Two questions we shall answer and explain in a first point. In a second point, we shall study the notion of cruelty as seen through Canadian cases before 1969. This will complete the first section, which is a search for definitions of mental cruelty and divorce. In a second section, the statutory definition of mental cruelty [2] will be examined, as well as the way in which this definition is actually being interpreted in Canada. In a third section, we shall study the notion of divorce as a remedy. We shall consider the role of this notion today, and we shall ask ourselves if mental cruelty has become a "legal loop-hole" for those who want a divorce by mutual consent.

Before proceeding, let us keep two fundamental thoughts in mind, firstly, that the law does everything to minimize the possibilities for divorce as a remedy [3] for certain reasons which we shall discuss later. However, divorce as a remedy finds an outlet in one of the causes for divorce as a punitive sanction, that is through mental cruelty. [4] Secondly, that divorce is something which normally implies that a more or less deep relationship between two people will be broken by themselves first, and then acknowledged by the law. The aim of the law however is not only to promote the welfare of the individuals by catering to their desires and needs, but also to promote peace and order in society (actually this aim includes the first, as we know that one of the first needs of the individual in society is order ; but for the purposes of this discussion, the two aims must be distinguished). The legislator is torn thereby between two poles. Bearing this in mind, we will see how he has adopted a variable attitude. This idea will be further developped in the conclusion.

I – MENTAL CRUELTY — DIVORCE — DEFINITION OF

A. Since when have these expressions been used ?

Divorce has existed for a long time, it has existed for as long as marriage has existed. Certain groups of people however have never recognized

1 *An Act Respecting Divorce*, S.C. 1967-68, c. 24.

2 *Ibid.*, note 1.

3 *Ibid.*, note 1, art. 4.

4 *Ibid.*, note 1, art. 3 (d).

divorce, others have admitted that certain causes only could justify a divorce and still other authorities on the subject have admitted that, in certain cases, separation could be granted.

By the *Matrimonial Causes Act* in 1857 in England [5], is was enacted that cruelty was a ground for judicial separation and that adultery would be considered a ground for divorce *a vinculo* if the adultery was accompanied by either cruelty or desertion. [6] According to Blackstone, divorce *a vinculo matrimonii* is "A divorce from the bond of marriage. A total divorce of husband and wife dissolving the marriage tie, and releasing the parties wholly from their matrimonial obligations." This Act did not define cruelty but merely made a global reference to the principles established by the Protestant Church which then was the church of England. The Church considered cruelty a matrimonial offence and a ground for divorce "*a mensa et thoro.*" According to Blackstone, [7] divorce *a mensa et thoro* is when "the marriage is just and lawful *ab initio and*, therefore, the law is tender of dissolving it ; but for some supervenient cause, it becomes improper or impossible for the parties to live together : as in the case of intolerable ill temper or adultery in either of the parties." (It is perhaps interesting to note here, that had the Catholic Church been the Church of England at the time, perhaps the notion of divorce as we know it today in Canada would never have evolved in the same manner as it did).

The concept of mental cruelty was recognized as early as the 1850's : cruelty was thought to include the maltreatment of children in the presence of the mother of the children by her spouse, and such cases of gross insult such as spitting in the face. The fact that no bodily harm was inflicted was not a condition to cruelty. Drunkenness, indifference, unpleasantness towards the other spouse did not in themselves constitute cruelty. Acts committed under cerebral excitement could constitute cruelty only if there was a danger of recurrence and only inasmuch as they could be considered a potential threat to the safety of the individual.

Since no definition has been given of cruelty, we must refer to jurisprudence in order to find out what one had to prove in order to succeed in the use of cruelty as a ground for divorce. By this study of the cases, we shall perceive the essence of the principles referred to in the law at the time, as well as the norms which the court used in order to determine whether or not cruelty existed in a specific case.

B. What judicial connotations have been attached to these expressions in the past ?

Two cases, in particular, have influenced all the jurisprudence on mental cruelty. These cases are *Evans* v. *Evans* [8] and *Russell* v. *Russell.* [9] In the *Evans* case, both husband and wife were widows when they were married to each other. They enjoyed going out to movies, restaurants, and being with

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5 *Matrimonial Causes Act,* 1857, Engl., Sect. 22.

6 1 BL. Comm. 440.

7 *Ibid.*

8 *Evans* v. *Evans,* (1965) 2 All E.R. 789.

9 *Russell* v. *Russell,* [1897] A.C. 395.

friends. After thirteen years of marriage, the wife, without giving any explanation, informed her husband that in the future they could live together without having sexual intercourse. At this time their son was twenty years old. The husband tried to have intercourse with her, but she refused. Later, the wife became disinterested in the type of outings they used to have together. They ceased to be an affectionate couple. This domestic situation brought about a rather severe state of anxiety and depression on the husband. Lord Stowell affirmed in *Evans* v. *Evans* that in order to escape a finding of cruelty, the matter must be grave and weighty.

In the *Russell* case, the wife presented a petition for a judicial separation, alleging that her husband has been guilty of a certain odious crime with a M^r^ R. The husband denied this completely, and the jury dismissed the wife's petition. Later, the wife published a statement in a newspaper stating that she had papers to prove her husband's crime and that she had not produced them at the trial out of respect for her husband's family. She then carried on a correspondance with her husband in the hope of meeting him. At first, the husband welcomed this as a sign of sorrow but he soon found out such was not the case as she had published another statement in the newspaper. Later, she wrote to her husband stating that she had a sworn affidavit about his relationship with M^r^ R. and that detectives had collected the necessary evidence to prove his odious acts. She brought suit for restitution of conjugal rights. The husband followed with a petition for judicial separation. Finally, at the trial she excused her conduct saying that she had been led to believe the truth of the accusation she had made by others. However, she had never had any sort of evidence in her hands. The definition of cruelty as given by the *Russell* case is the following one : "conduct of such a character as to have caused danger to life, limb or health, bodily or mental, or as to give rise to a reasonable apprehension of such danger." There is one essential difference between these two definitions of cruelty, though they both refer to danger, and to the grave effects which must incumb as the result of such a conduct, the second definition adds to the first the two important words "reasonable apprehension." The definition is becoming more and more subjective ; through the effects of a conduct, it is easy enough to determine whether the conduct alleged to as cruelty is of a grave enough nature to constitute cruelty. One has only to determine whether the conduct has been detrimental to the physical or mental health of the individual. Difficulties do arise from this definition as we shall see in the cases ; for example, is the poor mental health due to the conduct of the other spouse or is it due to the victim's own hypersensitivity ? Did the victim merit such cruelty, does the victim deserve to be protected by the law ? Is it fair that a person who has more endurance, or who is more idealistic, should be subject to the same quality of cruelty but not relieved from it because superficially the victim's health is not affected to any considerable amount ? In the second definition, what was meant by reasonable apprehension ? It seems that even though the victim suffers detrimental effects to his or her health, the victim's reasonable apprehension of such danger would be sufficient to constitute cruelty. By reasonable, should we refer to the average prudent and well-avised citizen, or to the fear which is perceived by the individual in a given situation considered subjectively ? We shall now undertake the study of the cases in order to discover how the courts have solved these problematic

aspects. Just from the gravity of the questions we have proposed, it is clear that a judge has a major and important role to play, since it is up to him alone to decide, the law furnishing no solution.

One might stop here to consider the value of the definitions given in the two cases (*Russell* and *Evans*). Let us just say that it is impossible to give an exhaustive definition of cruelty ; it would be hard to define cruelty in any other way than by its effects. We shall first study the English Cases and then the Canadian Cases.

C. Cruelty defined through effects

1. *The English Cases between 1897–1968*

As we have said, the *Russell* case is the starting point for all jurisprudence on mental cruelty. Let us try and summarize the principles on mental cruelty as exposed in that case. The judge affirms that cruelty "consists of the willful infliction of bodily or mental pain" and that the mere apprehension of possible injury is sufficient to constitute a ground for divorce. Moreover, there is no legal limitation to the character of cruelty ; it is sufficient that it produces injury to health or that it is intended to make the discharge of matrimonial duties unbearable or impossible.

There are two points of view from which we may consider cruelty, firstly, the doctrine of Danger advocated by the *Russell* case, the *Evans* case and the great majority of all subsequent cases and secondly, the doctrine of Protection which has had few adherents in the past. A ccording to the doctrine of Danger, there is cruelty when one can prove actual injury or the reasonable apprehension of injury. We must conclude that in the case of protection, there has to be injury, and not only must there be injury, but there must be proof that there will be further injury. As for the doctrine of Danger, injury is not essential, and if there is injury, it is not necessary to prove that it is likely to recur. In the *Meacher* case, [10] a child was born one year after the marriage. During this year, severe assaults were committed by the husband against the wife. The wife had not, in any way, provoked her husband. The husband treated his wife badly on the occasion of her visits to her sister. One year later, the wife was sitting on a chair with her child on her lap at her sister's house when her husband kicked her on to the floor. Following this event, they entered into a separation agreement, and it wasn't until four years later that the wife asked for a divorce and obtained a divorce.

The doctrine of Protection has had few advocates in the past. The most notable advocate was Judge Pearce in *Lissack* v. *Lissack.* [11] Judge Pearce said in the case : "Since in petitions on cruelty, the duty of the court to interfere is intended not to punish the husband for the past, but to protect the wife for the future, the question for the court to decide is whether the wife can with safety to life and health live with the husband now." In the *Lissack* case, the husband, an insane man, killed the child of the marriage and then attempted to commit suicide. He was found guilty of murder and was ordered to be

[10] *Meacher* v. *Meacher,* (1946) 2 All E.R. 307.
[11] *Lissack* v. *Lissack,* (1950) 2 All E.R. 233.

detained. His wife alleged that she was entitled to a divorce on grounds of cruelty on account of his terrible acts. It was held here that the defense of insanity was not open to husband or wife and a decree *nisi* was granted.

Judge Mortin, in the *Meacher* case, affirms that a divorce can be granted on the ground of cruelty already suffered by the petitioner.

We shall discuss the English cases after 1897 in relation to five points, firstly, whether or not the cruelty alleged in a case has to be intended, secondly, whether or not cruelty has objective standards, thirdly, whether or not cruelty must be aimed at the victim, fourthly, whether or not it must occur within the matrimonial relationship, and finally, whether cruelty is said to exist when it was provoked. As we will see, the preceeding points are intimately related to one another and are not meant to be sharply distinguished from one another.

a) Intention — Insanity

In the *Kaslesky* case, a wife wrote to her husband while he was overseas telling him that she no longer wished to take care of their child, and that she would have the child adopted. When the husband came home, she spent one night with him, refusing him sexual intercourse. After this, she slept in a separate room. She gave no explanation for her behavior. She neglected her wifely duties, such as preparing meals, etc. [...] and always left the child in the care of her husband or her mother. It was not proved that she intended to hurt her husband's feelings, nor was it proved that she had caused any injury or would be liable to cause any injury to her husband's mental or physical health. In this case, [12] Judge Denning affirmed that there is no cruelty when there was no intent to injure unless the acts committed have been plainly or distinctly proved to cause injury to health. This is clearly a decision which comes under the doctrine of Protection, there being no question of mental cruelty unless there be actual injury.

In the *Gollins* case, [13] it is stated that an intention on the part of one spouse to injure the other is not a necessary element of cruelty.

In this case, the married couple had two children ; the husband ran into debt and had his house mortgaged. The wife paid a few of her husband's debts, and did all she could to pay the other debts by using her house as a guest house. Her husband who was by nature very lazy did nothing to help her, nor did he obtain any employment. However, he was not agressively mean to his wife nor was an intention to harm her manifest. The wife became very worried and distressed and became mentally and physically ill to such a degree that she was no longer able to sustain herself and her children. The doctrine of Danger is concerned with the safety of the spouse and considers impertinent the fact of the cruelty being intentional or not.

On the other hand, in the *Williams* case, the husband continuously accused his wife of adultery. He sincerely believed in the truth of his accusations. He admitted that the sources of his findings were imaginary voices. He knew of the nature and quality of what he was saying, but was not aware that his accusations were unfounded. He was found to be insane and the wife did not

[12] *Kaslesky* v. *Kaslesky*, (1950) 2 All E.R. 398.
[13] *Gollins* v. *Gollins*, (1963) 2 All E.R. 966.

obtain her divorce decree. The question we are asking ourselves here is whether cruelty is established when injury is the natural and probable consequence forseeable by a reasonable creature or whether it is necessary to prove, in addition to reasonable awareness of the probable consequences, an actual intent to injure. In the *Kaslesky* case, it was decided that the husband, although guilty of acts which caused grave harm to his wife's health, was not guilty of cruelty since he had not intended to injure his wife. It has been established that the specific intention to injure is not a requirement for matrimonial cruelty. [14]. The doctrine of Danger had triumphed.

We may now ask ourselves the following question : does the fact that a spouse was insane, when he was guilty of a conduct qualified as cruel, entitle his spouse to a divorce on grounds of mental cruelty ? Lord Pearce in *Williams* v. *Williams* [15] answers : "Where however the conduct would be held to be cruelty regardless of motive or contention to be cruel, insanity would not bar relief."

b) Subjectivity — Objectivity

We can affirm that the test by which mental cruelty is found is subjective. However, it is difficult to refrain from asking ourselves what would a normal person have done in the circumstances — how would he have reacted — that is in effect what the judges do. The court takes into consideration the individual characteristics of the persons involved and the special circumstances of the case. The judge asks himself whether the petitioner is not in fact a victim of his own hypersensitivity by comparing the victim with his (judge's) idea of the average man. As to what makes a marriage impossible, some objective norms have been established regardless of individual circumstances, for example, frustrations of the marriage bed do not constitute in themselves an absolute impediment to marriage, however, persistent denial of a wife's wish for children may constitute constructive desertion or cruelty. [16] In the *Gollins* case, [17] Lord Pearce says "when responsible conduct or departure from the normal standards of conjugal kindness causes injury to health or an apprehension of it, it is, I think, cruelty if a reasonable person after taking due account of the temperament and all the other particular circumstances would consider that the conduct complained of is such that this spouse should not be called upon to endure it." This view is similar to that expressed by Judge Merriman in *Jamieson* v. *Jamieson* and with the view expressed in *MacDonald* v. *MacDonald :* the court has to determine whether *this* conduct by *this* man to *this* woman is or is not cruelty. Finally, the Morton Commission, in 1956, officially known as the *Royal Commission on Marriage and Divorce*, might help us to further understand the subjectivity aspect of the cruelty test : "Cruel conduct, as we see it must be judged with reference to the person affected by it. If, as an alternative, it were sought to fix some objective standard, such as that of conduct which no reasonable man should be expected to

14 *Williams* v. *Williams*, (1963) 2 All E.R. 994.
See *Walters* v. *Walters*, (1956) P. 344.

15 *Supra*, note 13.

16 *Cackett* v. *Cackett*, P. 253.

17 *Supra*, note 13.

endure, injustice would be done where conduct did not measure up to the standard set and yet was serious enough to injure the health of a person of delicate physique or susceptible temperament."

c) Aimed At

It is not necessary to have the intention to do acts which are in their result cruel, however, it is generally accepted that a divorce on grounds of cruelty cannot be granted unless the victim comes within the scope created by the matrimonial relationship of the other spouse's actions and results. [19]

In *Gardner* v. *Gardner*, the wife was condemned partly because she was found guilty of wilful and unjustifiable acts directed towards her husband. [20] In this case, the wife had been living before marriage with another woman with whom she had been having unnatural sexual relations. Before the marriage, she had made arrangements to return to live with this woman after her marriage, which she did. She lived intermittently with her husband and with other women until eventually she returned to live with one woman and ceased to live with her husband as a wife and mother.

d) Within the Matrimonial Relationship

Here we are asking ourselves whether a spouse who is not living with the other spouse can be guilty of cruelty or be a victim of such cruelty. In *Britt* v. *Britt*, [21] Judge Denning concludes that cruelty may be found even though the spouses are living apart and even though the acts occur out of the matrimonial relationship. In this case, after the couple had had two children, the husband left his wife. The wife said that he had been very cruel to her before they separated, however this evidence was not corroborated. After the separation however, he was guilty of serious assaults on her, once when he came back to the house and hit her in the eye, and another time when he hit her in a public bus. Merriman in *Suncock* v. *Suncock* [22] believed that the acts invoked as cruel had to happen in the relations between husband and wife. It is debatable to what extent cruelty must arise within the marital relationship.

e) Provocation

If the petitioner has deliberately provoked the respondent into cruel acts towards her, then divorce is not granted. This view was expressed in *King* v. *King*. [23] It could be argued here that in most cases a cruel conduct on the part of one spouse is usually provoked by the other spouse, and that therefore a respondent could always invoke that his acts were provoked. This however does not happen very often because the respondent is more interested in obtaining a divorce that in preserving his reputation as a kind and gentleman. As a result it is very hard for the court to determine whether the acts were provoked or not.

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19 *Supra*, note 12.

20 *Gardner* v. *Gardner*, [1947] All E.R. 630.

21 *Britt* v. *Britt*, (1955) 3 All E.R. 769.

22 *Suncock* v. *Suncock*, (1932) p. 94.

23 *King* v. *King*, (1952) 2 All E.R. 584.

It was decided in the *Thompson* case [24] that estoppels bind the parties but not the court. By binding the parties, we mean that once a competent court has decided a case, neither of the parties can reopen the issue if the other party objects. By not binding for the court, we mean that the court may reopen an issue or receive the demand of one of the parties to reopen the case, if the court feels that under the circumstances a further inquiry is necessary. The court could inquire into the charge of cruelty all aver again. If the court does decide to reopen the matter, then there is no longer any estoppel on either party. In this case, the wife left the matrimonial home. The wife alleged that her husband had wilfully neglected to provide sufficient maintenance for her. The wife alleged that it was her husband's cruelty which had caused her to leave the matrimonial home. The husband alleged the contrary stating that it was the wife who had treated him with cruelty. In 1955. the appeal was dismissed, the commissioner having stated that the wife had not succeeded in making a case of cruelty, and that she had been unjustified in leaving her husband. She had no claim for maintenance on him and was separated from him. In 1955, the husband filed a petition for divorce on grounds of cruelty and she answered by asking for a judicial separation. The appeal was dismissed. The husband maintained that the wife's allegations of cruelty were all fought out in the maintenance proceedings and that she was estopped from raising them again now.

Let us now examine the notion of mental cruelty as seen through Canadian cases before 1968.

2. *Cruelty — Canadian Cases before 1968*

a) Doctrine of Protection

In *Stewart* v. *Stewart*, the couple bought a house and paid for it by housing six to nine borders. The husband had been drinking at the time of the marriage and he was growing steadily worse. He threw a glass at his wife which smashed on her elbow. Another time, he grabbed her by the throat and threw her to the floor thrashing her around. On another occasion, he was very abusive in his language and knocked her down blackening her eyes. The final incident took place when he hit her in the face with a telephone instrument. He inflicted severe bodily injury on his wife and if we look at his previous conduct, it was probable that his wife would succumb to more bodily harm should she continue to live with him, and that her mental and physical health would be affected. The court found that Stewart must be presumed to have intended the immediate or probable consequences of his acts. The appeal was allowed and the judgment was pronounced by Judge Hall. However, Judge Ordinary presented the following opinion in this case saying that the present health of the victim had to be taken into consideration. He came to the conclusion that in the case presented before him that the incidents alleged to as cruelty had happened long ago and that therefore the recollection of the witnesses was not trustworthy. [25] (Doctrine of Protection).

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[24] *Thompson* v. *Thompson*, [1951] All E.R. 161.

[25] *Stewart* v. *Stewart*, (1945) 1 D.L.R. 500, Nova Scotia Supreme Court.

In *Jones* v. *Jones*, a big and robust man, on his return from overseas service, asked for a divorce, alleging incidents which had occurred before the marriage. These incidents consisted mainly in his wife's threat to suicide, in his wife's constant nagging, in his wife's physical assaults against him, and in his wife's accusations that he was a pervert because he had gone skating with his brother. It seems that his wife had told him that she would remain and make his life hell. They lived apart for many years and there was no possibility of reconciliation. The husband affirmed that his domestic problems considerably affected his work as a radiologist. However, the judge did not seem to be impressed by the husband's evidence mainly because of his healthy physical state at the time of the trial. The appeal was dismissed. In this case,[26] it was affirmed that there was no difference in that degree of cruelty necessary to support a petition for divorce and that necessary to support a decree for judicial separation.

In *MacNeil* v. *MacNeil*,[27] it was decided that the fact that a petitioner has obtained a separation on grounds of cruelty does not prevent him from obtaining a divorce, on the same grounds and for the same acts. In this case, the petitioner commenced a divorce action against her husband alleging acts of cruelty. Before the trial, she was granted leave to amend her petition by substituting a petition for a judicial separation. One year later, she was granted a decree absolute in which a judicial separation was ordered by reason of the cruelty of the respondent. The wife, in this case, now asked, on the same grounds as those alleged to in her prior action, for a divorce decree. The judge held that the doctrine of *res judicata* could not estop him from inquiring into the action for divorce notwithstanding the decree for judicial separation granted to the petitioner based on the same grounds of cruelty as now alleged in the present petition, because he was satisfied that ss. 29–31 of the English Act (M.C.A. 1950 c. 25) were in force at that time in Nova Scotia. The Act states that the doctrine of *res judicata* is not applicable in such a case.

b) Doctrine of Danger

Most of the Canadian cases are followers of the Danger theory, and among the most important of these cases are *Connelly* v. *Connelly*,[28] *Fralick* v. *Fralick*,[29] *Cole* v. *Cole*[30] and *White* v. *White*.[31] Let us state briefly a few of the facts of these cases.

In the *Connelly* case, the husband, a chef, was away from home the whole year long except for a vacation of two weeks which he spent at home. During this time, the wife alleges cruelty on the part of her husband, saying that he was rough and indecent in his conduct and language. He even told her that

26 *Jones* v. *Jones*, (1947) 3 D.L.R. 878, Nova Scotia Supreme Court.

27 *MacNeil* v. *MacNeil*, (1968) 65 D.L.R. (2d) 171, Court for Divorce and Matrimonial Causes Nova Scotia.

28 *Connelly* v. *Connelly*, (1955) 2 D.L.R. 73.

29 *Fralick* v. *Fralick*, (1958) 11 D.L.R. (2d) 346, Court for Divorce and Matrimonial Causes Nova Scotia.

30 *Cole* v. *Cole*, (1959) 19 D.L.R. (2d) 643, Nova Scotia Supreme Court.

31 *White* v. *White*, (1968) 69 D.L.R. (2d) 60, Nova Scotia Court for Divorce and Matrimonial Causes.

should a person wish to get rid of someone, all they had to do is shoot them during the deer hunting season. Since that time, she has not been hunting. The petitioner also alleged two acts of physical assaults on the part of her husband. However, the first attack was not corroborated. As for the second assault, the scratch on the arm may have been unintentional. The wife testified that each time her husband came home, she had to have medical attention. She eventually had a hysterectomy necessitated by excessive uterine bleeding due to her highly nervous state which a doctor says could have been caused by her difficulties at home. However, it was not plainly proved that it was respondent's conduct that caused such bleeding nor that his conduct was intentional. In this case, the judge considered that the conduct complained of had not caused her danger nor a reasonable apprehension thereof. The petitioner was "allergic" to her husband, this does not constitute cruelty.

In the *Fralick* case, two elderly persons got married. The husband was perhaps jealous and dictatorial ; when his wife came home at one o'clock from her son's house, he accused her of "ratting around in cars." Later on, when she obtained a job as a cleaning woman, he often accused her of flirting around with men, because he had seen men enter the building she worked in during her working hours. The wife left her husband but continued to see him from time to time. He still accused her of going with other men. On one occasion, she slapped him on the mouth and he took her by the arm in which she had bursitis and threw her on the couch. On another occasion, while cleaning up after they had spent the night together, he stated that he would not have been in such a mess it he had not married her. She did not forgive him, and asked him to drive her to a friend's house which he did and where she accidentally fell on her pelvis. Nothing here leads us to believe that the husband was unsafe to live with or caused danger to her health. An assault may have been committed in the eyes of the criminal law but this does not constitute danger to health or a reasonable apprehension of it.

In the *Cole* case, the couple after having been married for nine years were separated because the wife had been going out with army men and had been drinking. The husband joined the army and when he came back went to live at his mother's house. The wife began to phone him at all hours, often when she was in a drunken state. These phone calls were a real torment for him and his wife knew that her conduct would have an adverse effect on him, because she was aware of his nervous and sensitive temperament. The husband finally became a mental case. Her conduct constituted legal cruelty, not only was her conduct detrimental to his health, but were they to continue living together such danger would still exist. It is interesting to note here that it is the duty of the Court to grant that relief the law allows whether the relief may turn out to be effective or not. In this case, the fact that a divorce is granted does not mean that the phone calls will stop.

In *White* v. *White*, the parties lived a normal matrimonial relationship during ten years. After these ten years, the wife refused to have any more sexual relationships with her husband, giving no explanation for this attitude. The husband did not force the issue. Two years later, the wife demanded that they enter into a separation. The husband remained two weeks at the house after the agreement was signed. The wife then left with the four children without giving notice to her husband on where they were going. Later on,

she told her husband that she was ready to take care of the children if he would purchase a house near the university where she was attending courses. He did as she asked. This arrangement did not last long, she left the children for her studies. The effect of her actions on his health was disastrous — he turned to alcohol. However, early the next year, he gave up drinking, and took care of his children. His health, at the time of the hearing, was very good. This evidence was corroborated by a physician. The petition was granted and the court considered that it was immaterial that the evidence showed the husband's complete recovery at the time of the petition.

In *Cole* v. *Cole*, Judge Patterson enumerated a few facts which he thought a Court should keep in mind in a case concerning cruelty. We shall summarize these facts here : what must be considered is the effect of such a conduct upon a person of the nature and temperament of the petitioner ; one must be certain that the petitioner's condition is the result of the respondent's conduct ; the whole picture of married life must be considered ; legal cruelty is composed of two elements, ill treatment and results ; it is immaterial that the acts of ill treatment occurred during separation, what is important to consider is what would happen if cohabitation was resumed ; it is impossible to give a list of acts which are thought of as legal cruelty and a list of those who are not — the whole surroundings must be considered ; conduct alleged as legal cruelty must be directed at the petitioner ; a conduct that constitutes legal cruelty must be differenciated from a conduct arising from incompatibility of temperament ; when the respondent's conduct has been provoked it is not considered as legal cruelty ; the Court plays a more than active role since its opinion on the petitioner's present state of health is to be considered. Finally, if the Court has found no intent to cause injury, then the conduct alleged as cruel must be proven.

H. Currie, in *Clattensburg* v. *Clattensburg*,[32] affirmed that :

> "a spouse who requires the dissolution of the marriage by reason of the other spouse's cruelty must satisfy the Court not only that he or she suffered in the past but also that he or she is in need of protection in the future. This is perhaps the most fundamental difference between cruelty as a ground for divorce and adultery or desertion."

In this case, the petitioner left her husband on the ground of his cruelty towards her. Her husband asked that his marriage be dissolved on the ground of his wife's adultery. A year after she had left her husband, she wrote him a letter asking for a divorce. He said he would be willing to divorce her if she returned the diamond ring to him. He paid the cost of her trip to see him. They spent two days and two nights together in a hotel as man and wife. The petitioner failed to prove her husband's cruelty and that she was in need of protection. As recently as 1963, it has been held both in England and in Nova Scotia that the necessity for protection of the innocent spouse is a consideration for the Court in mental cruelty cases.

We may conclude here that the doctrine of Danger in effect contains the doctrine of Protection. In the doctrine of Protection the condition "proof of

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[32] *Clattensburg* v. *Clattensburg*, (1955) 2 D.L.R. 272, Nova Scotia Court for Divorce and Matrimonial Causes.

further injury if cohabitation is resumed" is equivalent to "reasonable apprehension of danger to health" in the doctrine of Danger. However in the doctrine of Danger it is not an absolute condition whereas in the doctrine of Protection it is an essential condition to the obtaining of a divorce on grounds of mental cruelty. In the doctrine of Danger, actual injury is not essential whereas in the doctrine of Protection it is. One can affirm that the doctrine of Danger is much wider and can be thought to include the doctrine of Protection. We can observe that divorce is harder to obtain under the theory of Protection. That is why it is important to know exactly which doctrine should be applied in order that the judgments concerning mental cruelty be uniform in the future.

II – LAW CONCERNING DIVORCE (S.C. 1967-68 c. 24)

A. Statutory definition of mental cruelty

The answer to the question of which doctrine was the right one was finally solved in 1968,[33] the doctrine of Protection was clearly adopted with the enactment of section 3, paragraph d), of the *Divorce Act*, allowing a petition for divorce to be presented if the respondent "has treated the petitioner with physical or mental cruelty of such a kind as to render intolerable the continued cohabitation of the spouses."[34] In general, prior to 1968, divorce has been thought of as a sanction, a penalty for an act which was so contradictory to the nature and essence of marriage that the marriage had to be dissolved. However, today marriage having lost most of its essence, or should we say most people having forgot what its nature is, divorce as a remedy has been introduced. Divorce as a remedy is a simple recognition of the fact that a marriage has broken down.

Will the judges interpret the law on divorce strictly or will they continue to rely on old English jurisprudence ? Parliament has an exclusive legislative right in what regards divorce.[35] It seems to me that in the light of a new definition, of the first statutory definition, that the judges should abide by it as much as possible. However, we shall see that such is not the case.

Two trends have been set in Canada regarding the interpretation of the law on divorce, we shall study the two originating cases of these trends and then we shall mention a few of their mutual followers.

B. Possibilities of interpretation of such a definition

The first case is the *Zalesky* case.[36] In this case, Judge Tritscher did not bind himself to the old principles laid down by the *Russell* case, he did the only logical thing — he saw that it was futile to consider whether the conduct complained of had caused "danger to life, limb or health, bodily or mentally

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33 *Supra*, note 1.

34 *Ibid.*, art. 3 (d).

35 Art. 91, par. 21, B.N.A. Act.

36 *Zalesky* v. *Zalesky*, [1969] D.L.R. (3d) 1.

or a reasonable apprehension" of that definition given in the *Russell* case. He thought this consideration useless. He read the *Divorce Act* of 1967-68 (Can.) c. 24, and saw that in the words "physical or mental cruelty of such a kind as to render intolerable the continued cohabitation of the spouses" Parliament had given its own fresh statutory definition of conduct which could be a ground for divorce. In this case, however, Judge Tritschler reaffirmed old principles such as :

> "The whole history of marriage must be examined and a conclusion reached after taking into account all the relevant facts — the question is whether *this* conduct by *this* man to *this* woman or vice versa is cruelty." [37]

The facts of this case were the following : the consorts were separated following completion of a comprehensive separation agreement. The wife gave the impression of being happy, cheerful, independent — nothing to suggest the wronged spouse. Moreover, her evidence was a vague mixture of trivia. Later on, after alleged assaults, the petitioner lived with her husband for many months. None of the incidents she mentioned as constituting grounds for legal cruelty were brought to the attention of her parents, friends, neighbors, doctor, police or Family Court. This is significant, as the spouses were on close terms with the petitioner's mother. The fact that there was no corroboration of the petitioner's affirmations created a credibility gap.

In the second case, *Delaney* v. *Delaney*, Judge Tyrwhitt Drake asked himself :

> "whether Parliament in its use of the phrase 'physical or mental cruelty of such a kind as to render intolerable [...]' meant to qualify the definition of cruelty as we now know it or whether it intended to indicate that courts were to take an entirely new approach to the matter of definition." [38]

Judge Drake adopted the first alternative after having followed this line of reasoning : He noticed firstly that the word cruelty in the *Divorce Act* had not been used alone. Among the matrimonial *offences* one can invoke to obtain a divorce is physical *or* mental cruelty. For what reason had Parliament specifically used both of these adjectives ? Was it to create a new offence or to clarify an old one ? The judge believes that the use of these two adjectives is not significant and does not alter the substantive meaning of cruelty. In the context of the law, he believes that they refer only to the effects of the respondent's conduct on the victim. The judge referred to mental cruelty as being "conduct injurious to mental health or which may reasonably be apprehended to be so" and to physical cruelty as "similar effects real or apprehended to bodily health" ; he concluded that physical or mental cruelty did not bring a larger definition to cruelty than it now has in matrimonial law.

The second section of his reasoning concerns the following alternatives : whether a divorce granted on grounds of cruelty "of such a kind as to render intolerable the continued cohabitation of the spouses" requires proof of something more than what is required for proof of cruelty in a separation, or

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[37] *Ibid.*, at 174.

[38] *Delaney* v. *Delaney*, (1969) 1 D.L.R. (3d) 303, British Columbia Supreme Court.

whether the Court must redefine cruelty as something relating to future intolerability of cohabitation rather than on past conduct. The judge maintains that the first alternative would require a highly developed degree of prophetic foresight. He finally concludes that the words physical or mental cruelty used in S. 3 (d) of the *Divorce Act* have a certain meaning which is defined in the *Russell* case. He also insists on a subjective approach in order to determine the intolerability of continued cohabitation.

In the *Delaney* case, the facts were as follows : at the time of the marriage and afterwards, the respondent had a drinking problem. The respondent used abusive language and did not lend the comfort which it was his duty to lend to his wife. For example, when her brother was dying in tragic circumstances, her husband did not try to offer her consolation ; in the midst of the bereaved family, he was drunk and was using bad language. Later on, the petitioner sought the aid of the Church and attempted a reconciliation. Her husband stopped drinking for a period of one month and relapsed into his old habits. When the second child of their marriage was born to her, her husband neglected her completely. At the birth of the third child, she miscarried. From the time of the miscarriage to the time she left the respondent, she was under the care of a physician. The husband's conduct was not condoned by cohabitation in this case — the primary purpose being reconciliation. The future cohabitation of the spouses will be intolerable. The admission of adultery on the part of the petitioner has no importance in this case. The fact that alcohol addiction is a cause of a marriage breakdown was not considered, because no proof had been presented to say that he was addicted within the three years preceeding the petition.

C. Ways in which the Divorce Act is actually being interpreted in Canada

Now, as for the adherents to these two trends, Judge Gregory in *Paskiewich* v. *Paskiewich* [39] believes that the *Russell* case it outdated and should be used only as an aid in the interpretation of a new legislative definition. In *Paskiewich* v. *Paskiewich*, the petitioner affirmed that she would never again live with her husband as husband and wife even if he were discharged from the mental hospital. There was no possibility of reconciliation in this case as the guardian said that there was no hope for an early release of the respondent from the mental hospital. Early in their married life, her husband treated her badly. He beat her quite often. On one occasion, one day after the birth of her fourth child, he wished to have sexual intercourse with her, when she refused to do so, he beat her and did not stop beating her until a neighbor interfered. Quite often, she was obliged to leave her home being in fear of him. She never called the police, but was treated by a doctor when he punched her on the nose. All these events were corroborated. This was a case of marriage breakdown where the conjugal relationship had been abandoned and would never be resumed. Judge Gregory follows the *Zalesky* case.

Judge Dubinsky, in the *Herman* case, [40] followed the *Zalesky* case, once again reaffirming the principles of subjectivity and the principles on insanity.

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[39] *Paskiewich* v. *Paskiewich*, (1969) 2 D.L.R. (3d) 622, British Columbia Supreme Court.

[40] *Herman* v. *Herman*, (1969) 3 D.L.R. (3d) 551, Nova Scotia Supreme Court.

Judge Dubinsky also adopted the attitude of Judge Tritschler in the *Bonin* case.[41] In this case, the petitioner was subjected to physical assaults by her husband, and she alleged that her husband played on her nerves continually. They separated and later attempted a reconciliation, however this attempt was fruitless. The doctor diagnosed her state as one of neurotic depression and said that she had a paranoid personality. The wife was, as stated the doctor, excessively jealous and suspicious. It is significant that, notwithstanding all her complaints against her husband, she testified that after she was deserted by him in September 1968, she once again attempted a reconciliation but there was no hope. This petition was dismissed.

In *Webster* v. *Dame McKay*, shortly after their married life had begun, the respondent refused to have sexual relations with her husband, and in order to avoid such relations left her husband's domicile and went to live with her parents. The petitioner received no explanation for such conduct, except for a letter in which she stated that she was not fit for married life, that sex was repugnant to her and that she could not bear the responsibility of raising children. Judge Challies dismissed the petition bearing in mind that the parties lived together for only three weeks and that the respondent's refusal to have relations with her husband was by letter after she had left him. There was no evidence that the petitioner's health had been affected.[42] Here, the attitudes of Judge Tritschler are adopted and many old principles are reaffirmed such as that it is not necessary that mental cruelty be intentional. The *Walsham* case[43] was cited, in which it was affirmed that :

> "a mere abstention from sexual intercourse could not amount to cruelty, the bodily and mental health of woman such as the petitioner, who had entered matrimony hoping to fulfil what was one of its most important functions namely the bearing of children, was likely to be affected when the normal means of child bearing was denied them and when their sexual functions were abused by *coitus interruptus*, especially if that practice followed substantial periods of a complete denial of intercourse." (Divorce a sanction).

Let us examine two other Quebec cases. In *Dame L.* v. *L.*,[44] Judge Perrier quotes from the *Paskiewich* case.[45] He affirms the principle that a divorce decree may be granted on grounds of mental cruelty even if there has not been any physical cruelty at the condition only that the mental cruelty alleged to be grave enough to permit the court to presume that future cohabitation of the spouses would be intolerable and would result in a complete marriage breakdown. In this case, the spouses had stopped living together five times within a period of two years and a half. The wife accused the respondent of being mean and of forcing her to lead a life below her social condition. She also alleged that he treated her as a servant if not as a slave, that he paid no attention to her nor did he show her any affection. Even while she was pregnant, he continued to live his own life and ignored her. The husband had such a dominant character that he prevented his wife from seeing to the

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41 *Bonin* v. *Bonin*, (1969) 5 D.L.R. (3d) 533, Nova Scotia Supreme Court.

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

43 *Walsham* v. *Walsham*, (1949) P. 350.

44 *Dame L.* v. *L.*, [1970] C.S. 222.

45 *Ibid.*, note 39.

administration of her own property. The judge however made reproaches to the wife, saying that she had married too early and without any experience. However, the husband was older and should have treated her with more kindness. These domestic troubles affected the health of the wife, and since she had left her husband, she was in much better health.

In *Dame B.* v. *R.*,[46] Judge Nichols says that mental cruelty implies a conduct which results in a physical or mental danger or a bad home atmosphere for the children. In this case, the petitioner had never loved her husband. She lost all trust in him at the very beginning of the marriage for two reasons, because he was not making the salary he had told her he made before the marriage, and because he did not have the qualifications he said he had before the marriage. The consorts were, when they married, of an age where they could discern between what was boasting and what was the truth about their mutual characters. The greatest difficulty and source of their misunderstandings was that the wife always thought of herself as belonging to a hihger social class than her husband. The wife, right from the start of their married life, had made herself "boss" of the home and it was she that took all the decisions. In this case, the petition was dismissed, the judge having come to the conclusion that the acts of the husband did not provoke the depression and desertion of his wife but that the real cause of the breakdown was the poor foundations on which their marriage rested.

The notion of mental cruelty as it was perceived in England and as it is perceived now in Canada in spite of the new *Divorce Act* has not evolved in any considerable manner. However, what has changed considerably is the number of divorces, and the number of judicial separations in relation to the population of today as compared to yesterday.

III – NOTION OF DIVORCE AS A REMEDY

Prior to the *Divorce Act* of 1968 (Can.), divorce by mutual consent was a possibility which was not ignored by the judges of the time. For instance, Judge Denning in the *Kaslesky* case said : "If the door for cruelty were opened too wide, we would soon find ourselves granting divorce for incompatibility of temperament."[47] As early as the *Russell* case, the judge asked himself whether the mental cruelty alleged to came under minor annoyance or under no *consortium* possible. The judges prior to 1968 used their common sense in order to prevent divorces obtained by mutual consent. In the *Bravery* case, the judge affirmed that when the act alleged to as cruel by the victim had been fully consented to by the victim, then this victim had no right to invoke it as a ground for divorce.[48] In this case, the spouses had had one child and thereafter had not been too happy. The petitioner had often talked about not having any more children, and at this time, they were using contraceptives. However, the husband informed his wife that he had arranged for sterilisation, which operation subsequently was performed. The petitioner suffered great anguish

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[46] *Dame B.* v. *R.*, [1970] C.S. 212.

[47] *Supra*, note 12 at 406.

[48] *Bravery* v. *Bravery*, (1954) 1 W.L.R. 1169.

and this added considerably to the deterioration of the marriage. However, the wife did not allege any other acts of cruelty. Apparently, the wife waited for her husband to commence the divorce proceedings and when he did not do so she said she would, and she said she would use the illegal operation as a ground for divorce under the heading of cruelty. She *said* that she most certainly would have objected to that operation, however, it is clear that the petitioner did not desire to have any more children.

Under the new law of 1968, perhaps it is easier to obtain a divorce by mutual consent than it was before the law was passed. It is important to understand the law of 1968 in order to understand divorce by mutual consent. Divorce as a sanction has always existed and still exists in the new law. Mental cruelty is one of the causes which might justify divorce as a sanction. Divorce as a sanction includes those causes which constitute matrimonial offenses, that is acts which impair the commitment taken by the spouses to love and cherish one another. Mental cruelty, an act which is grave and reprehensible in itself, is on the border line which divides divorce as a sanction and divorce as a remedy which has been introduced only recently in an official way in the new divorce law. Not only is divorce a sanction for not having fulfilled a conjugal obligation, but it becomes a remedy for a situation which has become inextricable.

Divorce as a remedy is a result of the Breakdown theory. According to this theory, the role of the court is to acknowledge the life or death of the marriage.[49] The role of the court is different depending on which article of the law is invoked, article 3 refering to divorce as a sanction and article 4 refering to divorce as a remedy. In the first case, the court plays an accusatorial role, in the second, the court plays an inquisititorial role.

One may well ask, at this point, why the legislator, why the judges do not take to the idea of divorce by mutual consent. If divorce is granted by mutual consent, then the contract of marriage will become a contract like any other contract, it will loose its essence, its institutional character which has been consecrated through the ages by the legislative branches of most governments.

In order to prevent an abusive use of divorce, the legislator enumerated certain factors which would nullify a demand for divorce. Applicable to both divorce as a sanction and to divorce as a remedy, mutual consent of the spouses, admissions or default of the spouses, or of one of them constitute an obstacle to divorce.[50] Also applicable to all grounds for divorce is collusion which automatically prohibits the grant of a divorce decree.[51] Now, as for those prohibitions concerning divorce obtainable on those grounds mentioned in article 3 of the law (divorce sanction which includes mental cruelty), the legislator has named pardon and connivence. It is generally agreed upon that connivence must precede the event, which is alleged as being a ground for divorce.[52] For example, in *Douglas* v. *Douglas*, the husband petitioned for the dissolution of his marriage on the ground of his wife's adultery. The husband

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49 *Zalesky, supra,* note 36.

50 *Supra,* note 1, art. 9 (1) a.

51 *Ibid.,* art. 9 (1) b.

52 *Douglas* v. *Douglas,* (1950) 2 All E.R. 748.

asked his wife if she had committed adultery and she denied having had any adulterous associations. The husband was not satisfied by his wife's answer and decided to confirm his suspicions. He hired some detectives to come and watch his wife and the co-respondent. While the detectives were there, he made an excuse and left his wife and her lover alone. The agents saw the wife commit adultery. There is no reason to believe that the petitioner encouraged the illicit association nor did he deserve it. This husband did not have any corrupt intentions, nor did he wish to promote the adultery of this wife by absenting himself on a false pretext.

The two prohibitions (connivence and pardon) are always causes for the rejection of a divorce petition except in a case where the judge believes that the public interest would be better served if the divorce was granted. In England, pardon is an absolute bar to relief.[53] Mental cruelty is probably the most susceptible ground to be invoked by those who get a divorce by mutual consent because mental cruelty is the most subjective concept among the present grounds for divorce in the law. The legislator supposedly has done his best to prevent divorce by mutual consent ; in effect, one might do well to realize that separation is the best option in the law for those who want divorce by mutual consent.

Separation is based on the marriage breakdown theory, it is therefore not a matrimonial offense, also, separation is voluntary or consensual. One spouse does not accuse the other of such and such a behavior, they simply decide to live separate lives. After having obtained a separation by mutual consent, the couple remains separated for three years. After this period they can invoke their separation as a cause for divorce (article 4e (i)), which will be sufficient in itself for the obtaining of their divorce. Divorce obtainable through separation by mutual consent is a natural consequence of the breakdown theory, and the breakdown theory is a natural consequence of human nature.

CONCLUSION

The subject we have studied in this discussion is a difficult one to unravel primarily because it has, as its origin, a diametrical conflict between the particular and concrete, and the general and abstract. This conflict is likely never to be solved. Let us examine what we mean by the abstract and general pole. Here we are refering to the welfare of the collectivity of society as a whole. It has been proved that marriage as an intitution has held an important place in the structure of a state. When the institution of marriage in Rome became decadent, we witnessed the comeback of a primitive patriarchal society, then slowly a feudal society based on the personal relations between persons and things and finally we returned to the state which passes from personal relationships to collective relationships. The State, the organization of the State is a necessity for the man living in Society, because it is the State which guarantees him a minimum of order and protection, order being man's first psychological need in society. So, we see by this link of causality that the institution of marriage is essential to the life of the People taken in an

53 See Julien D. PAYNE, "The Divorce Act of Canada", (1968) 7 *Alta Law Review* 1969, pp. 6-7.

abstract sense. The other pole is the individual particular concrete man who has not realized marriage in the way he had wished, and who wants to try and find what he desires elsewhere. For many reasons, which cannot be qualified as legal causes for divorce, the spouses fall out of love with each other and find other partners with whom they believe they can fulfill themselves to a greater degree. Is the ideal, the happiness of the individual to be sacrificed for the abstract man and the preservation of something one cannot even touch like the State ? This is a question which demands thought, but it is a question to which I believe there is no answer to be found. It seems to me that in the presence of such a dilemma, man must adopt a set of principles and follow them blindly but without seeking compromises. But which trend to adopt, the individualistic trend, the one which corresponds to the reality of the day, or the trend we think is supposed to be adopted ? A jurist would probably favor the latter proposal, as law is a science which is not concerned by constantly adapting its laws to reality, but is primarily a normative science primarily concerned with edicting norms which translate how things are supposed to be.

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