# JUDICIAL DISCRETION IN FAMILY AND OTHER LITIGATION

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## *I. Introduction*

In 1972 a case was heard in the High Court of Australia which sought to challenge directly the exercise of the judicial discretion under the *Matrimonial Causes Act* 1959.[1] The case might have been thought to give an opportunity for canvassing this very important topic, both in the use that is made of it in legislation, and in the manner of its use in adjudication in the branch of the law concerned with the family. The Court, however, did not feel it necessary to examine the principles governing judicial discretions, but confined itself to the narrower issues of Australian constitutional law within which the case had arisen.

Because the use of the judicial discretion is of particular importance in the field of family law, I propose to examine its function and scope within the framework of a common law jurisdiction such as Australia. In passing, it must be observed that just as the illustrations and dicta to be quoted are taken from different branches of the law, so the problems and solutions encountered in family law are not unique to that area alone.

The question in *Cominos* v. *Cominos* arose in the following way. Under the Australian Constitution, the Commonwealth of Australia has power to make laws for the peace, order and good government of the Commonwealth with respect to, inter alia, "divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants".[2] In exercising these powers, the Commonwealth had enacted the *Matrimonial Causes Act* 1959 which codified the law of divorce and dealt in comprehensive fashion with ancillary matters such as maintenance of spouses and children, property settlements and the custody of children. The argument raised by the appellant—who contested an order for maintenance made against him consequent upon a divorce decree granted to the wife petitioner—was that the Commonwealth Parliament had left the manner in which the power to regulate these ancillary matters was to be exercised in the discretion of the courts. He argued that this constituted the purported conferral of a "practically unfettered arbitrary power on the

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1 *Cominos* v. *Cominos* (1972) 127 C.L.R. 588.
2 *Commonwealth of Australia Constitution*, s.51(xxii).

judiciary" contrary to the Constitution. The exercise of such an unfettered discretion was said to fall outside the judicial power which, under the doctrine of the separation of powers in the Australian Constitution was the only power with which courts could validly be invested by the Commonwealth. On the contrary, the arbitrariness of the provision under attack was said to be rather in the nature of legislation than of adjudication. This was argued to be an unconstitutional attempt by Parliament to delegate its power of legislation.

The narrow question thereby posed for the consideration of the High Court thus became simply whether the exercise of a discretion, purportedly conferred upon a court in the exercise of its judicial functions in matrimonial proceedings, was itself a judicial function or part of a judicial function.

The six Justices of the High Court who heard the case had no difficulty in disposing of this question. They did so on the basis that "it is a recognized part of judicial power to make orders of the sort authorized by the sections in question in the exercise of judicial power to hear and to determine matrimonial causes".[3] Recent authority was cited[4] to the effect that the power was "an incident to judicial proceedings, it is committed to a court and a judicial process is prescribed for its exercise".[5] It was a function that lay in the "borderland in which judicial and administrative functions overlap".[6] A function that was "not necessarily of a judicial character may acquire such a character by the way in which the legislation treats it; if it be conferred upon a court or is to be exercised in the same way and by the same form of instrument as would be used by a judge it may for that reason become a bestowal of judicial powers".[7] Justification for so holding was said to lie "in an analogy with an admittedly judicial function, or in the fact that the power is ancillary to a judicial function".[8]

For the purposes of *Cominos* v. *Cominos* that disposed of the matter. Neverthless, the case raises a general question as to the manner in which our judicial system deals with the very important ancillary problems encountered whenever the partnership of marriage is to be dissolved. Nor should the use of the word "ancillary" conceal the fact that it is just in

[3] *Cominos* v. *Cominos* at 591, *per* McTiernan and Menzies JJ., cf. at 600 *per* Gibbs J.: "The fact that these powers have as a matter of history been regarded as appropriate to be discharged by the courts is an additional reason for regarding them as judicial".

[4] *Lansell* v. *Lansell* (1964) 110 C.L.R. 353, *Sanders* v. *Sanders* (1967) 116 C.L.R. 366.

[5] *Cominos* v. *Cominos* at 599 *per* Gibbs J.

[6] *Labour Relations Board of Saskatchewan* v. *John East Iron Works Ltd.* [1949] A.C. 134, 148 *per* Lord Simonds, cited in *Cominos* v. *Cominos* at 604 *per* Mason J.

[7] Ibid., at 605 *per* Stephen J., to the same effect at 606 *per* Mason J.

[8] *Reg.* v. *Trade Practices Tribunal, ex parte Tasmanian Breweries Pty Ltd* (1970) 123 C.L.R. at 374.

this area nowadays that most controversies between the contending parties arise. What then is the anatomy of judicial discretions?

*II. Nature and Scope of Judicial Discretion*

Pound, in an analysis of judicial discretions[9] pointed to the complexity of modern life, and the variability of its circumstances which make it impossible to attempt to reduce to a body of strict legal rules the prescriptions which it is necessary or desirable to apply to human conduct in all possible situations. Some kinds of conduct will be more easily susceptible of regulation by rules than others. He gives as an example of a situation in which a more or less mechanical process may apply, the ascertainment of simple criteria such as may determine whether a negotiable instrument or a conveyance embodies the formalities required by law to make it effective.[10] But it may not be equally easy to ascertain whether, for example, conduct in a particular situation constituted negligence.[11] Rules of law and legal conceptions which are applied mechanically, are more adapted to property and to business transactions.[12] Similarly in the criminal law, certainty is required. But "in other branches the law must deal with varying types of human conduct which cannot be regulated by the rigid detailed rules that may be appropriate to the definition of a crossed cheque".[13] Here, "standards where application proceeds upon intuition are more adapted to human conduct and to the conduct of enterprises".[14] In other words, the propositions of the common law are expressed to apply to particular or specific situations. The common law "is always found and made with reference to actual controversies. It is not declared in the abstract except in relatively rare cases by legislation".[15] Where the particular or specific situations cannot conveniently be described with sufficient certainty or comprehensiveness, or where it is to be assumed that factors of great variability or invoking differing principles will occur, perhaps in patterns that cannot readily be anticipated, the law uses a different device. It confers upon courts a discretion in the matter of adjudication. Such a conferral of discretion may be expressed to be at large. More commonly, it will be made subject to certain conditions or considerations, or so as to give effect to certain kinds of results or to be governed by certain principles. But it will always confer upon the judge powers in which greater or less scope is given to him to apply views and judgments that may be said, in some measure, to be his own. For example, to quote Pound

[9] Roscoe Pound, "Discretion, Dispensation and Mitigation: The Problem of the Individual Special Case" (1960) 35 N.Y. Univ. L. Rev. 925, 926.
[10] Pound, "The Theory of Judicial Decisions", (1923) 36 Harv. L. Rev. 940, 947, 950.
[11] D. P. Derham, *Paton's Jurisprudence* (3rd ed., Oxford: Clarendon Press 1964) pp. 203-204.
[12] Pound, "Theory of Judicial Decisions", op. cit. 951.
[13] Paton, op. cit. p. 204.
[14] Pound, "Theory of Judicial Decisions", op. cit. 951.
[15] Ibid. at 952-953.

again—and this underlines the relevance of the present examination to the field of family law: "in proceedings for custody of children where compelling consideration cannot be reduced to rules, judicial determination must be left, to no small extent to the disciplined, but no less personal feelings of the judge. . ."[16]

How much the views and judgments are indeed a judge's own is a vexed question which I cannot attempt to answer here. Certainly one would not expect a legislature to want to confer discretionary powers of a wide nature unless it had some reasonable expectation, at least in general terms, as to the manner in which that discretion was likely to be exercised. The way our judicial system works, this question does not usually create any very great uncertainty. "Judges are Englishmen . . ." said Sir Henry Slesser, a distinguished former Lord Justice of Appeal, who examined this very question in his Haldane Memorial Lecture.[17]

Sir Henry Slesser did not, of course, suggest that their being English was a guarantee that justice would be done, or even that it was in any way material to justice being done. For he went on to say: ". . . and as such share with their compatriots a general idea of what constitutes justice." That is surely the point: that Parliament can entrust some discretionary latitude where the repository of the discretion, by reason of his antecedents and training, is a part and product of the system itself which we call the common law. The fact that under that system appointees to the bench must first have been in actual practice in the very courts of which they are to become members can only confirm the likelihood that they will continue to speak with much the same voice as their predecessors. Indeed the more likely they are to depart from the legal tradition, the less likely are they to be appointed. In this way the future judge's time at the bar forms an essential apprenticeship, and the accolade of judicial appointment sets the seal of the system's approval upon his fitness and aptitude to uphold the continuity of the common law. Other judicial abilities apart, the system almost inevitably promotes orthodoxy and traditionalism. The "timorous souls"[18] are the mainstay of the common law, and the "bold spirits",[19] the adventurous innovators, the exception. But that is another story. As Cardozo pointed out

> "The judge even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system,

[16] Pound, "Discretion, Dispensation and Mitigation", op. cit. 929.
[17] H. H. Slesser, *The Art of Judgment* (London: Stevens 1962) p. 36.
[18] Denning, L.J. in *Candler* v. *Crane Christmas & Co.* [1951] 2 K.B. 164, 178.
[19] Ibid.

and subordinated to 'the primordial necessity of order in the social life'.[20] Wide enough in all conscience is the field of discretion that remains."[21]

I am not versed in the continental systems of jurisprudence, but I am pleased to learn from Cardozo that these principles are not peculiar to the common law. For he drew these conclusions after examining and commenting upon a principle in the Swiss Civil Code of 1907 on which he quotes Gény as saying

> "The statute governs all matters within the letter or the spirit of any of its mandates. In default of an applicable statute, the judge is to pronounce judgment according to the customary law, and in default of a custom according to the rules which he would establish if he were to assume the part of a legislator. He is to draw his inspiration, however, from the solutions consecrated by the doctrine of the land and the jurisprudence of the courts—par la doctrine et la jurisprudence."[22]

But at the basis of this method of adjudication, or of judicial law-making, there is always the personality of the judge which forms the mould in which he is cast. And when I say the personality of the judge I mean not only his conscious personality, but equally important, its sub-conscious substratum. For to quote Cardozo again: "Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions which make the man whether he be litigant or judge."[23]

As has already been noted, the device of the discretion is used in circumstances where the precise conjunction of the various competing considerations and principles may be so variable that no precise formulation of detailed rules for application in every case is practicable. The device makes possible "individualizing the application of the law".[24] Pound compares the result to the hand-made, as distinct from a machine-made product where "the specialized skill of the workman gives us something infinitely more subtle than can be expressed in rules. In law some situations call for the product of hands, not machines, for they involve not repetition, where the general elements are significant, but unique events, in which the special circumstances are significant".[25] And this is so, particularly "in proceedings for custody of children where compelling consideration cannot be reduced to rules, judicial determination must be left, to no small extent,

[20] The quotation is taken from F. Gény, "Méthode d'Interpretation et Sources en droit privé positif", Vol. II (2nd ed., St. Paul: West Publishing Co. 1963) p. 213.
[21] B. N. Cardozo, *The Nature of the Judicial Process* (New Haven and London: Yale University Press 1963) p. 141; cf. also W. A. Robson, *Justice and Administrative Law: a Study of the British Constitution* (3rd ed., London: Stevens 1951) pp. 413-414.
[22] Gény, loc. cit.
[23] Cardozo, op. cit. p. 167.
[24] R. Pound, *Introduction to Philosophy of Law* (New Haven: Yale University Press 1961) p. 68.
[25] Pound, ibid. p. 70.

to the disciplined, but no less personal feeling of the judge for what justice demands".[26]

Discretions have been subjected to sophisticated analysis and distinctions have been drawn between "policies", "standards" and "principles". Recent writers on jurisprudence like H. L. A. Hart[27] and Dworkin[28] have sought to illuminate the subject by drawing analogies with baseball and other games, and to liken the role of the judge to that of an umpire. They have introduced further refinements by imagining variations upon the game in order to illustrate the nature of the discretion.

To one unversed in such sophisticated sports this seems a roundabout way of explaining what can be simply illustrated from actual examples of laws and of judicial decisions. I therefore proceed to set out what I conceive to be, not different kinds of discretions, but different phases in the judicial process in which some exercise of a discretion is called for. The scope for that exercise will vary, subject to greater or less restriction. "Discretion", says Dworkin in one of those gross but picturesque simplifications that are as memorable for the illumination they throw upon the subject under discussion as they are deceptive in the simplicity with which they seem to invest it "like the hole in a doughnut does not exist except as an area left open by a surrounding belt of restriction".[29]

### *III. Adjectival and Substantive Discretions*

There are certain occasions in the judicial process in which a court is asked by the legislation to determine whether a given situation exists, or whether certain considerations apply to it. This process includes a purely "fact finding" exercise such as may be entrusted to a jury, or it may include a finding of law, or of mixed fact and law. On this preliminary determination will depend another, judicial exercise, in the course of which the judge may exercise certain powers or make certain decisions that go to the substance of the jurisdiction in a particular matter, because they concern the granting or refusal of a particular kind of relief which the invocation of the jurisdiction was intended to obtain.

In so far as these two steps in the process involve the exercise of any judicial discretion, I call that discretion which is involved in the first exercise an *adjectival* discretion, while I would characterize the discretionary element in the second exercise as a *substantive* discretion. I propose to examine each of these in turn, but before doing so, I must foreshadow a further phenomenon that will be noted. For the second situation, in the course of which what I have called a substantive discretion is exercised,

[26] Pound, "Discretion, Dispensation and Mitigation", op. cit. 929.
[27] H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press 1961).
[28] Ronald Dworkin, "Judicial Discretion", 60 J. Philosophy, 624; "Is Law a System of Rules?" in R. S. Summers, *Essays in Legal Philosophy* (Oxford: Blackwell 1968) p. 25.
[29] "Is Law a System of Rules?", op. cit. 45.

will be seen to be subdivisible into two further sub-classes. In the first of these the presence of a discretion is more apparent than real, because although as a matter of form the court is left with an apparently unrestricted freedom of decision, there may be concealed in the grant of that freedom a directive of the legislature to the judge that sometimes leaves him very little choice. Only in the second of the two sub-classes can there by anything like a "real" discretion or choice to grant or refuse the relief claimed. Even this latter category, however, is often subject to restrictions and qualifications, as we shall see.

I would regard the distinction between adjectival and substantive discretions as a *qualitative* distinction, whereas I would call the distinction between the two sub-classes of substantive discretion *quantitative*. The former is qualitative because it distinguishes between different discretionary judicial functions which are directed to different ends, of different scope and used in different ways. The other is quantitative because the amount of discretion varies greatly between the first two sub-classes. In order to distinguish between them more easily in this discussion, though with deceptive over-simplification, I shall refer to them, respectively, as *apparent* and *real* substantive discretions.

We may have a law which says that a driver, whose negligence causes a collision, shall pay damages to anyone whose person or property suffers injury as a result of that collision. The judge who is faced with a claim for damages based on alleged negligence in such circumstances must decide whether the driver in question was negligent. He may be assisted in this task by other rules which spell out situations said to constitute negligence. Such a rule, for example, might say that a person's conduct shall be deemed to be negligent if it involves a breach of one of the traffic regulations.

Now let us assume that there is incontrovertible evidence that the driver, whose conduct is in question, had driven on the incorrect side of the road in contravention of the relevant traffic regulation. Once that evidence is accepted by the judge, it supplies the answer to the question whether the driver had been negligent with the simplicity of a mathematical equation or a syllogism. No discretion seemingly is involved. But suppose the rule said that negligence was present whenever a breach of the regulations occurred "or where for any other reason the driver had failed to exercise proper care". Here, in relation to the second clause which includes all kinds of unspecified situations, the judge would have to examine any other relevant aspects of the driver's conduct not specified in the law, and *evaluate* the quality of care or lack of care which had characterized his driving. The considerations might vary considerably from case to case and could not conveniently be anticipated for the purpose of enumeration or statement in a legal rule.

This exercise calls for a certain kind of discretion, although it may be

thought that there is not much scope for widely different conclusions being arrived at by different judges in what is, after all, a simple matter of ascertaining the facts. Nevertheless, when probing the question of negligence, the matter depends on the perception of the judge, on his skill, his experience, his appreciation of the various factors that may be urged upon him by each party for or against a conclusion of negligence. He will be aided, and his judgment will be formed, by reference to other cases he has known, and with which he may be able to draw an analogy.

I call the discretionary element in that example adjectival since it is concerned only with a determination of a preliminary or subsidiary character. It does not go to the substance of any relief claimed, nor does it involve the judge in a determination as to that relief. If the judge finds that there was negligence, the exercise of another kind of discretion will then be called for in his assessment of general damages. The computation of *special* damages may again involve little more than the application of mathematical formulae, such as the examination of medical accounts or of bills of repairs. But when he deals with what we call "general damages" the quantum will be at large (within any outer limits set by the legislation). He must assess such subjective heads of claim as "pain and suffering", or "loss of amenities" or "expectation of life". He may—indeed he must be guided—by other cases that have occurred. Within that area he will find the hole in the doughnut. But what then? Is $20,000 too much or too little. Judge A may say $21,000, Judge B $19,000. Who is right and who is wrong? I do not propose to answer this rhetorical question, if it can be answered at all, but to examine the question again later when we come to look at the limitations to which judicial discretions are subject.

It is easy enough in most cases to distinguish between the two applications of the discretion I have mentioned because of the form in which they are indicated in legislation. They may be encountered in their simplest form as follows: "Where A exists, the court may do B." The judge here proceeds by two stages. First he must ascertain whether situation A exists. This may involve an element of fact, as in my first example of negligent driving. But it may also involve a value judgment as in my second example. If so, I would characterize it as being of a discretionary nature, since the judge is directed by the legislation to arrive at an answer by relying, at least in part, upon his own perception and evaluation of the relevant factors involved.

In the example we are now considering, the exercise of the court's discretion to deal with question B will depend, to begin with, upon the answer to question A. Unless A is decided in the affirmative, question B will not fall for determination at all. A is therefore a threshold question. If it is decided in the negative, there is an end of the matter. If it is decided affirmatively, the judge must then proceed to decide question B. It is here that his discretion is, at least in form, a substantive one, for apart

from any guidelines that are spelt out for him in the legislation, he appears to be authorized to decide whether or not to grant a relief or a dispensation, or to impose a liability or a duty. The application of the discretion in the decision upon the threshold question is an adjectival discretion, for it is concerned with a condition which concerns or qualifies the second and more important, substantive question.

But then we face a further complication. Although proposition B in form appears to confer an unfettered discretion, it may on closer inspection turn out to conceal a directive from the legislature. For an example I turn to the cases that were concerned with the creation of the ground of divorce based on the separation of the spouses for a certain period. Under present Australian law that period is five years.[30] This ground was modelled on New Zealand legislation introduced in 1920[31] which said, in effect, that where the parties had lived separately and apart for three years or more, the court "may if it thinks fit, grant a decree of dissolution".

The apparent discretion to grant a decree was considered by that distinguished jurist, Sir John Salmond of the New Zealand Supreme Court in *Lodder* v. *Lodder*[32] and in the appellate case of *Mason* v. *Mason*.[33] In the latter case, Salmond J. explained the provisions as follows

> "*Prima facie* when husband and wife have been separated for three years, whether by a judicial decree or by mutual agreement, each of them is *entitled*" (my emphasis) "to a dissolution of a marriage which has for that period been a marriage in name only and not in substance, in law and not in fact. The policy underlying this legislation is that it is not conducive to the public interest that men and women should remain bound together in permanence by the bonds of a marriage the duties of which have long ceased to be observed by either party and the purposes of which have irremediably failed. Such a condition of marriage in law which is no marriage in fact leads only to immorality and unhappiness, and the court has now been entrusted with a discretionary jurisdiction to put an end to it. The jurisdiction has been made discretionary in order to enable the court to refuse a decree in those cases in which a dissolution of the marriage would for some special reason be contrary to the public interest."[34]
>
> "A refusal on this ground must be justified by special considerations applicable to the individual instance, and must be consistent with due recognition of the fact that the legislature has expressly enabled either party, innocent or guilty, to petition for a divorce on the ground of three years' separation."[35]

When similar legislation was introduced in Western Australia in 1945,[36]

30 Section 28(m), *Matrimonial Causes Act* 1959.
31 Section 4, *Divorce & Matrimonial Causes Amendment Act* 1920.
32 [1921] N.Z.L.R. 876.
33 [1921] N.Z.L.R. 955.
34 Ibid. at p. 961.
35 Ibid. at p. 963.
36 *Supreme Court Act Amendment Act* 1945, s.2.

the provision authorizing it was similarly cast in a discretionary form. At first, the court was given an "absolute discretion to refuse" a decree. When a case based on this provision came before a primary judge, he refused a decree. On appeal the High Court of Australia ruled that the primary judge had been wrong in refusing, because

> "once facts are proved bringing the case within (the relevant section) a decree for dissolution should be pronounced unless the court thinks on discretionary grounds that a decree ought to be refused. In other words the burden is not on the petitioner to show that special grounds exist justifying the use of a discretion to grant a decree. Once he or she comes within (the section) the presumption is in his favour."[37]

Following that decision, the Western Australian legislature amended the section so as to give the court an "absolute discretion to grant or refuse" a decree.[38] But the High Court held that the change in the words did not make any difference in substance to the construction of the legislation. Dixon C.J. expressed the view of the court as follows

> "On the form of the previous provisions (*Main* v. *Main*) the court decided in that case that the burden was not on the party seeking a dissolution on the ground of a prolonged separation to show that special grounds exist justifying the use of a discretion to grant a decree, but that once the facts are proved bringing the case within the prescribed conditions constituting that ground of divorce then subject to any other bar a decree for dissolution should be pronounced unless the court affirmatively concluded on discretionary grounds that a decree ought to be refused.
>
> In (the new sections) of the Code the form of the legislation is somewhat different. The discretion is not given by means of a proviso. But the result seems to be substantially the same. (The section) begins 'Subject to the absolute and discretionary bars hereinafter set out the court may grant any married person an order for dissolution of his or her marriage on any of the following grounds.' One of the grounds then enumerated is five years' separation. . . Section 25(1) as part of an independent section then confers the discretion.
>
> It seems to follow that if the constituent elements of the ground described . . . are made out and no more appears, an order or decree of dissolution should be pronounced."[39]

Another example of what I am talking about is found in section 43 of the Australian *Matrimonial Causes Act* 1959. Because it is thought that persons who have been married for only a relatively short time may react too hastily to some unexpectedly stressful situation, such as a "lovers' tiff" occurring during the first flush of married enthusiasm (unlike with more experienced spouses who have had time to accustom themselves to the

[37] *Main* v. *Main* (1949) 78 C.L.R. 636 at p. 643.
[38] *Matrimonial Causes and Personal Status Code* 1948, ss. 15(u), 25(1).
[39] *Pearlow* v. *Pearlow* (1953) 90 C.L.R. 70, 81-82.

"ordinary wear and tear of conjugal life"[40] and may be presumed to know a serious marital breakdown when they experience one), the law has placed a restriction upon spouses who wish, or one of whom wishes to apply for a divorce in the first three years of married life. The section, so far as material, provides as follows

> "Section 43. (1) Subject to this section, proceedings for a decree of dissolution of marriage shall not be instituted within three years after the date of the marriage except by leave of the court.
>
> (2) . . .
>
> (3) The court shall not grant leave under this section to institute proceedings except on the ground that to refuse to grant that leave would impose exceptional hardship on the applicant or that the case is one involving exceptional depravity on the part of the other party to the marriage.
>
> (4) In determining an application for leave to institute proceedings under this section, the court shall have regard to the interests of any children of the marriage and to the question whether there is any reasonable probability of a reconciliation between the parties before the expiration of the period of three years after the date of the marriage."[41]

The form here is a little different from the simple formula I set out above, but the effect is the same. The substantive relief is indicated in subsection (1), that is, the leave of the court to institute divorce proceedings in the first three years of a marriage. The threshold question, however, is found in subsection (3). This in effect imposes a duty on the court to determine first, and before it can deal with the substantive question whether *either* the applicant would suffer exceptional hardship if leave were refused, *or* the respondent had shown exceptional depravity.[42]

If the court finds no exceptional hardship or depravity it cannot proceed further. The case is at an end and the matters expressed in subsection (4) will not come to be considered. But if either of the two threshold questions is answered affirmatively, then the court must go on to take into account the matters set out in subsection (4) in coming to a conclusion as to whether or not the substantive relief—leave to institute divorce proceedings within the first three years of a marriage—may be granted. Thus the interests of any children of the marriage, and the presence or absence of any reasonable probability of a reconciliation between the parties are

[40] *Buchler* v. *Buchler* [1947] p. 25, 45-46, *per* Lord Asquith.

[41] The section is similar to s.2 of the English *Matrimonial Causes Act* 1965 on which it is based.

[42] I have commented on this section in "The Unexceptional Exception", (1970) 1 A.C.L.R. 81, criticizing the decision of Joske J. in *Drzola* v. *Drzola* (1968) 11 F.L.R. 215, which was also followed by the same Judge in *Cooke* v. *Cooke* (1970) 17 F.L.R. 300, where he had proceeded in a different way from that which I have suggested here. But other Australian decisions (e.g. *Warford* v. *Warford* (1969) 15 F.L.R. 125, *Szagmeister* v. *Szagmeister* (1969) 15 F.L.R. 240) as well as decisions of the English Court of Appeal on the similar English provision suggest that the process I have described is the correct one.

guidelines for the exercise of the court's substantive discretion. Of course in considering these matters, the interests of the children or the prospects for a reconciliation of the parties are again adjectival questions.

We therefore have, in this example, four adjectival questions, two of which, exceptional hardship and exceptional depravity are at the threshold of the exercise of the substantive discretion. The other two, the interests of the children and the possibility of reconciliation are guidelines for the exercise of the substantive discretion. But common to all of them is the fact that their determination will depend to some extent upon the perception of the judge, his experience and his personality.

The substantive question, the granting of leave to institute proceedings appears to give greater freedom of decision to the judge. For although it does not say so explicitly, the combined effect of subsections (1) and (3) really means, as a general rule that once exceptional hardship or exceptional depravity have been found, then he should prima facie grant leave unless there are reasons why he should not do so. Two of such reasons may arise under the considerations spelt out in subsection (4).

*IV. Apparent and Real Substantive Discretions*

We can now see that the freedom of the judge to decide questions involving a substantive discretion is not as great as the wording of the provision conferring it would suggest. The four corners of the legislation do not in fact say so, and we must therefore resort to case law which has dealt with this kind of provision. One important principle of interpretation that has been laid down says that in certain circumstances the word "may"[43] means "shall".[44] Although the words "may" and "shall" do not appear in section 43 of the *Matrimonial Causes Act* 1959 which I have quoted in relation to the exercise of the substantive discretion, this is only a matter of form. Subsection (3) could equally well have been formulated as follows

> "(3) The court *may* grant leave only on the ground that to refuse to do so would impose exceptional hardship upon the applicant or in cases where there has been exceptional depravity on the part of the other party to the marriage. . ."

The implication which this formulation raises, but leaves unsaid, though case law answers it, could then be expressed by the addition of

> ". . . and *shall* grant leave where exceptional hardship or exceptional depravity is found, unless
> (4) the interests of the children or the reasonable probability of a reconciliation between the parties *or some other reason* makes it undesirable to do so."

The suggested addition of "shall", if validly made by me, would indicate

[43] The effect of which normally is facultative or directory, giving rise to a discretion
[44] Which is mandatory or peremptory.

that the substantive discretion of the judge is in fact so circumscribed that it is substantive in form rather than in essence, so that little remains that is not of an adjectival nature. But if my subsection (4) were omitted, would the discretion be any less restricted?

Of course there are other situations where the proposition that "may" means "shall" does not apply. Examples of this are found in provisions which are concerned with discretionary quantitative awards, e.g. of general damages in negligence actions, or of penalties in penal legislation. Or we have the provision concerning custody of children where a judge may award custody to the father, or to the mother, or to some third party. Here "may" cannot mean "shall" because there is no prima facie conclusion one way or the other to which the legislation points. Instead, we have an overriding direction, that "the court shall regard the interests of the children as the paramount consideration".[45]

The distinction between "may" meaning "shall" on the one hand, and "may" really meaning "may" on the other therefore supplies a convenient criterion for distinguishing between apparent and real substantive discretions. Deciding that particular question is not always easy but it has been discussed by a number of authorities on statutory interpretation.[46] The *locus classicus* in the cases is *Julius* v. *Bishop of Oxford*[47] which was decided by the House of Lords. Lord Cairns, L.C. said there

> "Where a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out and with regard to whom a definition is supplied by the legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised and the court will require it to be exercised."[48]

and Lord Blackburn in the same case said

> "They (the words conferring the power) are apt words to express that power is given and as prima facie the donee of the power may either exercise it or leave it unused, it is not inaccurate to say that prima facie they are equivalent to saying that the donee may do it, but if the object for which a power is conferred is for the purpose of enforcing a right, there may be a duty cast on the donee of the power to exercise it for the benefit of those who have that right, when required on their behalf."[49]

[45] E.g. s.85(1)(a), *Matrimonial Causes Act* 1959.
[46] W. F. Craies, *Statute Law* (6th ed., London: Sweet and Maxwell) pp. 284-288; P. B. Maxwell, *Interpretation of Statutes* (9th ed., London: Sweet and Maxwell) pp. 246-256; C. F. Odgers, *The Construction of Deeds and Statutes* (5th ed., London: Sweet and Maxwell 1967) pp. 370-378.
[47] (1880) 5 App. Cas. 214.
[48] Ibid. 225.
[49] Ibid. 244. See also *MacDougall* v. *Paterson* (1851) 11 C.B. 755, 773. The Supreme Court of the U.S. has followed a similar line of interpretation, see *Supervisors* v. *U.S.* (1866) 4 Wallace 446, cited in Maxwell, op. cit., p. 251.

As the passages from *Julius* v. *Bishop of Oxford* show, the principle involved is not really very complicated, though its application to a given set of facts may not be easy. In these cases when "may" means "shall", the provision so expressed is a facultative or enabling provision which is ancillary to a provision conferring a right or creating an entitlement. The facultative provision is a machinery device supplied for the purpose of executing the grant of the right or entitlement. By saying "the court may grant the right" the legislature is really saying: "If it turns out that the applicant is entitled to the right, (on the basis of whatever criteria have been spelt out elsewhere, or are otherwise applicable), the court shall grant it." I suggest that the word "if" which I have introduced into my paraphrase for the purpose of clarification indicates that the vesting of the right in question is potential or conditional only and cannot take place until certain other questions have been decided, and that the word "may" is used to indicate this hypothetical or contingent quality adhering to the vesting of the right at that stage. As *Julius* v. *Bishop of Oxford* shows, the four corners of the provision indicate no more than a power, a discretion to do something. "They are potential, and never (in themselves) significant of any obligation. The question whether a judge or public officer to whom a power is given by such words is bound to use it upon any particular occasion, or in any particular manner, must be solved *aliunde*, and in general it is to be solved from the context, from the particular provisions, or from the general scope and objects, of the enactment conferring the power."[50]

### *V. How Real is "Real"?*

I now return to the question with which we began, namely, what is the "real" substantive discretion in matrimonial—as indeed in other proceedings? What we will want to know particularly of course is what the ambit of that discretion is, and how much real freedom in judicial decision making our legal system allows to the courts. To probe this question we must look at the cases in which the review of the exercise of judicial discretion has been dealt with on appeal.

We turn to *Evans* v. *Bartlam*,[51] a decision of the House of Lords and the modern *locus classicus* on this topic. The case concerned the exercise of a discretion conferred on the court by the Rules of Procedure. Under those Rules a plaintiff could ask the court to enter judgment against the defendant in an action in which the defendant had failed to enter an Appearance and thereby to indicate that he intended to defend the action within the time allowed by the Rules. However if, after judgment had been entered, the defendant wished to defend after all, he could apply to the court to have the judgment set aside as a first step towards making his defence. The

[50] Maxwell, op. cit., p. 254.
[51] [1937] A.C. 473.

Rules conferred a discretionary power on the court in such a situation to set aside or vary the judgment "upon such terms as to costs or otherwise as such court or judge may think fit . . .".[52] After the plaintiff had obtained judgment the defendant invoked the rule to have judgment set aside so that he could defend. He was granted leave by a judge in the exercise of his discretion to do so. The plaintiff then appealed on the basis that the defendant had already accepted the judgment by asking for time to pay. The Court of Appeal, by a majority of two to one, disallowed the discretionary decision to set aside the judgment. The case then went on appeal to the House of Lords which therefore had to consider whether the Court of Appeal had been right in refusing to uphold the original discretion.

The House of Lords, which on this occasion included two of the great judges of the common law, Lords Atkin and Wright, unanimously overruled the Court of Appeal. Lord Wright said: "It is clear that the Court of Appeal should not interfere with the discretion of a judge acting within his jurisdiction unless the court is clearly satisfied that he was wrong."[53] But how can the appellate court say that the judge had been wrong? *Evans* v. *Bartlam* does not help us in specific terms, though it states the principle to be applied. Lord Atkin stated

> "I conceive it to be a mistake to hold . . . that the jurisdiction of the Court of Appeal on appeal from such an order is limited so that . . . the Court of Appeal 'have no power to interfere with the primary judge's exercise of discretion unless they think that he acted upon some wrong principle of law'. Appellate jurisdiction is always statutory: there is in the statute no restriction upon the jurisdiction of the Court of Appeal: and while the appellate court in the exercise of its appellate power is no doubt entirely justified in saying that normally it will not interfere with the exercise of the judge's discretion except on grounds of law, yet if it sees that on other grounds the decision will result in injustice being done it has both the power and the duty to remedy it."[54]

And Lord Wright said further

> "A discretion necessarily involves an attitude of individual choice according to the particular circumstances, and differs from a case where the decision follows *ex debito justitiae* once the facts are ascertained. In a case like the present there is a judgment . . . and the applicant must show grounds why the discretion to set it aside should be exercised in his favour. The primary consideration is whether he has merits to which the court should pay heed; if merits are shown the court will not prima

[52] Rules of the Supreme Court, Order 27, rule 15; cf. Order 13, rule 10. It is usual in such cases to compensate the plaintiff for the costs thrown away by him thus far by the defendant's tardiness, by ordering the defendant to pay those costs, regardless of who eventually wins. The normal rule otherwise is that the loser pays the successful party's costs of the entire action.

[53] [1937] A.C. at 486.

[54] Ibid. at 480.

facie desire to let a judgment pass on which there has been no proper adjudication."[55]

More specific is the judgment of the House of Lords in *Osenton* v. *Johnston*,[56] another leading case on the discretion, where the Lord Chancellor, Lord Simon, stated the principle as follows

"The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. But if the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified."[57]

Or, as was said more simply in another case: "That discretion, like other judicial discretions, must be exercised according to common sense and according to justice, and if there is a miscarriage in the exercise of it it will be reviewed."[58] The dominant consideration therefore appears to be whether justice has been done. And I would draw attention to the collocation of "common sense" and "justice", which indicates how the concept of justice is to be approached here.

But these principles are generalities. Do they enable us nevertheless to perceive clearly exactly how far an appellate court may go in overruling a primary judge's discretion? Or is all this mere verbiage, designed solely to wrap a cloak of judicial certainty around the mere exercise of a sense of justice and fair play and of common sense, and are these qualities sufficient to be called law?

We can find precedents that offer more specific guidance. The High Court of Australia defined and delineated the judicial discretion in the following terms

"The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge

[55] Ibid. at 489.
[56] [1942] A.C. 130.
[57] Ibid. at 138.
[58] *Gardner* v. *Jay* (1885) 29 Ch. D. 50, 58 *per* Bowen L.J.

> has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, *although the nature of the error may not be discoverable*, (my emphasis) the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred."[59]

Here then at last we have come to the heart of the matter. The judge to whom an unfettered discretion has been entrusted is free to exercise it as he thinks fit,—provided that in doing so he does not make a mistake. He must not be under any misapprehension as to any material facts. He must not take into account any extraneous consideration, nor omit to take into account a material one. If he runs into any of these hazards he is liable to be overruled for being in error. Yet if he does none of these he may be still more at risk. For he may have committed that cardinal error of all, the error that one cannot quite put one's finger on, but which results in plain injustice. As in the story of Rumpelstiltskin, he has to make the right guess, but he must make it on his first attempt. And how is it determined that there has been an injustice? By "common sense". The task of steering an impeccable course between the Scylla of unreason and the Charybdis of injustice is not made any easier by the fact that when the legislature has not seen fit to spell out any guidelines, it has been held to be wrong for judges to do so, for "if the Act or the Rules did not fetter the discretion of the judges, why should the court do so?"[60] Which need not prevent courts from laying "down, not rules of law, but some general indications to help the court in exercising the discretion, though in matters of discretion no case can be authority for another".[61]

This then is the rationale. No case of discretion can be direct authority for another. The device of the discretion is used in order to individualize cases, the circumstances of which may be infinitely variable. In this way they can all be accommodated within the compass of a given principle, capable of being stated in a law of universal application.

Although I propose not to pursue my enquiry into the nature of discretions further at this stage, I am not suggesting that the statement I have attempted is entirely satisfactory. But I have deliberately confined myself to an attempt at exposition rather than criticism. That must be left to another occasion.

[59] *House* v. *R.* (1936) 55 C.L.R. 499, 504-505 *per* Dixon, Evatt and McTiernan JJ. Many decisions to similar effect could be found: see e.g. *Grimshaw* v. *Dunbar* [1953] 1 Q.B. 408; *Ward* v. *James* [1966] Q.B. 273. The literature of criminal jurisprudence in particular offers countless other examples of the same principle in relation to the fixing of penalties.

[60] *Gardner* v. *Jay*, at 58.

[61] *Evans* v. *Bartlam*, at 488.

*VI. The discretion in custody cases*

And so we come to the custody of children. The court is given a discretion to "make such order . . . as it thinks proper".[62] The dominant criterion is the "paramount interest" of the child.[63] How the court proceeds and what decision it must make is not prescribed in the statute. Hence books on the subject are limited to enumerating a large body of decisions from which "principles" are then deduced. I am not concerned to repeat them here.[64] It is beyond the scope of this paper, in which I have sought to sketch out general principles, to attempt a detailed and critical evaluation of the discretion in custody proceedings, but some comments may be made. In favour of the device we could say that it appears to work. The impression that may at first worry the uninitiated, that it creates uncertainty, could be said to be more mistaken than real. Firstly, because "Judges are Englishmen"[65]—or Australians, Americans, Canadians or whatever, trained in the same school, which tends to make for a certain uniformity of approach. And secondly because there is a large body of reported decisions, both at nisi prius and on appeal, which contribute a persuasive body of case law for its own time. But because the rules and prescriptions expressed in legislation are kept to a minimum, there is a considerable degree of flexibility. This flexibility enables the courts not only to individualize the cases but also to give expression to changing values as they manifest themselves within society. In 1862 an English judge was able to say: "It will probably have a salutary effect on the interests of public morality, that it should be known that a woman, if found guilty of adultery, will forfeit as far as this court is concerned, all right to the custody of or access to her children."[66] True, there was legislation to support that decision, but there seems little doubt that the paramount interest of the child was for years thought to demand just this sort of decision, that the child be not contaminated by contact with an immoral mother. Immorality was interpreted broadly, i.e. it was not confined to considerations of sexual morality but applied also, for example, in the case of a mother who held atheistical views.[67]

The changing desiderata that are comprised within the complex concept of "public policy" or the "public interest" are but another aspect of the

62 *Matrimonial Causes Act* 1959, s.85(1)(b).
63 Ibid. s.85(1)(a).
64 They are to be found in every textbook or practice manual on the subject. In relation to Australia see H. A. Finlay and A. Bissett-Johnson, *Family Law in Australia* (Butterworths 1972) Ch. 15, pp. 527-554; P. Toose, R. Watson and D. Benjafield, *Australian Divorce Law and Practice* (Sydney: Law Book Co. 1968) paras [726]-[745], pp. 474-503. I have commented on them elsewhere, Finlay and Bissett-Johnson, *ante*, Finlay: "'First' or 'Paramount?' The Interests of the Child in Matrimonial Proceedings" 42 A.L.J. 96, Finlay and Gold, "The Paramount Interest of the Child in Law and Psychiatry" 45 A.L.J. 82, Finlay: "Natural Justice in Custody Proceedings" (1970) 2 A.C.L.R. 94.
65 See fn. 17, supra.
66 *Seddon* v. *Seddon & Doyle* (1862) Sw. and Tr. 640.
67 *Re Besant* [1879] 11 Ch. D. 508.

flexibility of the discretion to accommodate its changing content. An example is found in the evolution of the modern attitude of the court to the discretion to refuse a divorce decree to a petitioner who has been guilty of adultery. That circumstance apart, proof that his spouse had committed adultery prima facie entitled him to a decree. But if he also had committed adultery the old principle of *compensatio criminis* or recrimination converted the petitioner's prima facie entitlement into a discretionary remedy. Under the old ecclesiastical law the petitioner's adultery resulted in the refusal of a decree, as in *Beeby* v. *Beeby*.[68] When the modern English law of divorce was first enacted in 1857, the discretionary bar of the petitioner's adultery was firmly ensconced in it.[69] But by the early years of the present century the attitude to this matter had changed as may be seen from the exposition of that change in the judgment of Lord Simon L.C. in *Blunt* v. *Blunt*.[70] He quoted Lord Penzance who "deprecated 'a loose and unfettered discretion' exercised as 'a free option subordinated to no rules' and added that 'the duty of reducing its exercise to method devolves upon the court' ".[71] In *Blunt* v. *Blunt* the principle in the exercise of the discretion was stated to be "the interests of the community at large, to be judged by maintaining a true balance between the respect for the binding sanctity of marriage and the social considerations which make it contrary to public policy to insist on the maintenance of a union which has utterly broken down".[72]

As I said, this paper is concerned with exposition. I therefore do not do more than indicate in general terms the main criticism I have against the exercise of the discretion in custody cases. The judicial discretion seems to have worked well enough in a majority of those cases, so far as we know from legal literature, because of the flexibility of application which it confers. But I am not at all satisfied that it works as well as we like to think. For one thing, legal literature reflects the views of lawyers and judges, who tend to be apologists for the system as it exists. For

[68] (1799) 1 Hag. Ecc. 789, cf. *Proctor* v. *Proctor* (1819) 2 Hag. Con. 292. In *Beeby* v. *Beeby* the judge said "But a plea in bar has been given—a plea of recrimination or *compensatio criminum* . . . The doctrine, that this if proved is a valid plea in bar, has its foundation in reason and propriety; it would be hard if a man could complain of the breach of a contract which he has violated; if he could complain of an injury when he is open to a charge of the same nature. It is not unfit if he, who is the guardian of the purity of his own house, has converted it into a brothel that he should not be allowed to complain of the pollution which he himself has introduced; if he, who has first violated his marriage vow, should be barred of his remedy: the parties may live together, and find sources of mutual forgiveness in the humiliation of mutual guilt."—I cite this case merely as an illustration of a contemporary attitude, not as an exercise of the discretion. But the point is that had it been a matter of discretion it is likely that it would have been exercised in the same way at that time.

[69] Section 31, *Divorce Act* 1857.

[70] [1943] A.C. 517.

[71] In *Morgan* v. *Morgan* (1869) L.R. 1 P. & D. 644, 646-647.

[72] *Blunt* v. *Blunt* [1943] A.C. at 525. Cf. Finlay: "Discretion Statements: An Old-fashioned Melodrama", (1969) 1 A.C.L.R. 35.

another, I am not aware of any methodical, empirical study having been done to determine whether what judges do in custody cases is really always in the paramount interest of the child, as determined in the light of modern knowledge of child psychology. I know of enough cases[73] to suspect that the application of the judicial discretion in these cases in actual practice is often a "hit and miss affair", based ultimately on a judge's "own idiosyncratic conceptions and modes of thought".[74] I do not mean that the judge does not think he is acting in the paramount interest of the child. But how does he know whether Solution A answers that description better than Solution B? I have criticized elsewhere[75] the failure of our law to ensure that a judge dealing with custody is adequately equipped, or informed of the psychological factors involved in a situation before him, or of the likely consequences of any decision he may make, or fail to make. Section 71(1) of the *Matrimonial Causes Act* 1959 provides that a judge shall not pronounce a decree unless he is satisfied, in a case where there are children under sixteen, that "proper arrangements in all the circumstances have been made for the welfare of those children" or that "there are special circumstances by reason of which the decree nisi should become absolute notwithstanding that the court is not satisfied that such arrangements have been made". But as in section 85 of the Act, when it comes to clothing the concept of the paramount interest of the child with flesh, the judge is left to rely on such knowledge, experience or intuition as he may be fortunate enough to possess, or as the parties may be sagacious enough to provide. Some judges have been openly critical or suspicious of the opinions of psychiatrists whose evidence was called before them.[76] In fairness it should be said that the basis of some of those criticisms seems valid, namely that it is preferable for experts, such as psychiatrists, to be instructed by the court, or by both parties, rather than acting for one party only.[77] At all events, having regard to the sophisticated body of knowledge that is available today in this area, it seems foolhardy to allow judges, who may be eminent lawyers but in matters of child psychology almost entirely self-taught, to rush in where angels fear to tread or, with respect, to act like the proverbial bull in the china shop. The least we can do is to give family law judges some training in child psychology—not with a view to making them into psychologists, but to give them some appreciation of the factors involved. They must be further

[73] *D.* v. *D.* Commented on in: "The Paramount Interests of the Child in Law and Psychiatry", fn. 63, supra, or *In re Thain* [1936] Ch. 676, or *In re O.* [1962] 2 All E.R. 10.

[74] The expression was used in another context by Kitto J. in *Reg.* v. *Trade Practices Tribunal; ex parte Tasmanian Breweries Pty Ltd* (1970) 123 C.L.R. 361, 376.

[75] Finlay and Gold: "The Paramount Interest of the Child in Law and Psychiatry", see fn. 63, supra.

[76] Cf. *Lynch* v. *Lynch* (1967) 8 F.L.R. 433, cf. *Re C.* (*M.A.*) (*an infant*) [1966] 1 All E.R. 838.

[77] *Re S.* (*infants*) [1967] 1 All E.R. 202, *B.*(*M.*) v. *B.*(*R.*) [1968] 3 All E.R. 170, *W.* v. *W. and C.* [1968] 3 All E.R. 408.

assisted by experts appropriately qualified, and the law and the administration of justice must contain machinery to ensure that such experts are available and that their skills are used where the occasion demands.

This then appears to me to be the weakness in our present Australian law governing the custody of children. We have the vehicle: the judicial discretion, but in providing a driver for that vehicle we have done nothing to ensure that he knows the rules of the road. To make the provision effective, we must supply the information that will give it direction, and we must devise the machinery to ensure that the information gets to where it matters: to the court. A discretion to deal with custody may be a good device, but an uninformed discretion is worse and can be more dangerous than no discretion at all.