CRUELTY AS A MATRIMONIAL OFFENCE

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I. CRUELTY AS AN OFFENCE IN N.S.W.

When the Commonwealth Matrimonial Causes Act, 1959,[1] comes into operation, habitual cruelty for one year will for the first time constitute a ground for dissolution of marriage in New South Wales. Cruelty *simpliciter* is not at present a ground for dissolution in this State although it is a ground for judicial separation.[2] On a wife's petition, three years' habitual drunkenness together with habitual cruelty,[3] and (on the petition of either party) repeated assaults and cruel beatings "during" one year prior to the filing of the petition, constitute grounds for divorce.[4] It has become the practice to regard the element of cruelty in the composite offence of drunkenness and cruelty as consisting of conduct which would have been regarded by the ecclesiastical courts prior to 1857 as cruelty, although there is no statutory obligation so to do. For s.5 of the Matrimonial Causes Act 1899-1958 only obliges the court to act on the principles applied by the ecclesiastical courts in suits other than for dissolution of marriage. It should be noted, however, that the composite offence is also a ground for judicial separation,[5] and in such suits s.5 binds the court. In suits for judicial separation on the ground of cruelty alone the court is similarly bound by s.5 to act on the principles on which the ecclesiastical courts would have acted.

The conduct comprising the element of cruelty in the composite offence must coincide with the period of habitual drunkenness[6] and, in common with the habitual drunkenness, it must continue for three years.[7] So far as repeated assaults and cruel beatings are concerned, it seems reasonably clear that the legislature, by adopting the words "has repeatedly assaulted and cruelly beaten the petitioner", was deliberately excluding any element of mental cruelty as a ground for divorce and, moreover, was insisting on something more than a series of trivial assaults, whatever the cumulative effect may have been on the unfortunate victim. The assaults must be of a grave nature and be coupled with

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[1] Matrimonial Causes Act 1959, s.28(d).
[2] Matrimonial Causes Act, 1899-1958 (N.S.W.) s.31.
[3] *Id.* s.16(b).
[4] *Id.* s.13(e),16(f).
[5] *Id.* s.32.
[6] *Norton* v. *Norton* (1916) 16 S.R. (N.S.W.) 57 at 63.
[7] *Moses* v. *Moses* (1920) 27 C.L.R. 490.

battery constituting physical cruelty.[8] It cannot be said, however, that the use of the word "during" displayed the same clarity of intention, for this vague word has caused much legal hair-splitting. It remains to be seen whether the controversy which has raged around this word has been set at rest by the High Court in *Gough* v. *Gough* where Dixon, C.J. said,

> The better mode of interpreting and applying s.16(f) seems to be to understand it as limiting the period within which you must find acts satisfying the description to twelve months and as requiring that there shall be a series of such acts forming separate incidents or examples of conduct on the husband's part. Such a series itself implies that the acts are spread in point of time. But it is difficult to suppose that they must be spread over the whole twelve months. It would mean that at neither end of the period nor anywhere within it could there be a substantial interval in which the petitioner enjoyed a suspension of the cruel beatings or succeeded in avoiding them.[9]

The word "repeated" has added its share to the general obscurity. Two assaults during the year do not qualify as repeated[10] although Bonney, J. by a piece of ingenious reasoning, in a case in which there had been two assaults during the vital year and one of a similar nature just outside the twelve months period, held that the first assault within the period was itself a repetition of the assault outside the period, and accordingly the two assaults within the period were allowed to pass as repeated.[11] The question has arisen whether the offence can be committed when the parties have been married for less than twelve months when the proceedings are instituted. Richardson, J. held that, provided the other requirements are satisfied, relief may be granted in such a case,[12] but Myers, J. considered that since he was bound by authority to look at the whole year's history he could not grant relief where the parties had not been married for twelve months at the date of the presentation of the petition.[13] The High Court, in *Gough* v. *Gough*, noted that this conflict existed but left the question open until the point arose in a case before it.

II. MENTAL CRUELTY

Cruelty as a ground for judicial separation or a defence to a petition for restitution of conjugal rights has been considered by the ecclesiastical courts on many occasions. Mental cruelty is often regarded by the layman as an American invention and strange cases are from time to time reported in the press where courts of one or other of the United States have declared the most trivial actions to constitute "gross mental cruelty". But although the ecclesiastical courts seem to have avoided the expression and it is not often used in modern British courts, conduct amounting to mental cruelty has long been regarded as a matrimonial offence, reported cases on the subject going back over three hundred years. In 1850 Lord Brougham indignantly refuted a suggestion that personal violence was necessary to constitute cruelty.[14] In

[8] *Gough* v. *Gough* (1956) 95 C.L.R. 369.
[9] *Id.* at 375-76.
[10] *Cradick* v. *Cradick* (1910) 10 S.R. (N.S.W.) 710, 714.
[11] *Richardson* v. *Richardson* (1944) 61 W.N. (N.S.W.) 12.
[12] *Low* v. *Low* (1953) 70 W.N. (N.S.W.) 37.
[13] *Mossman* v. *Mossman* (1956) 73 W.N. (N.S.W.) 170.
[14] *Paterson* v. *Paterson* (1850) 3 H.L.C. 308.

1861 a wife alleged that when she had followed her husband into the street he, by his conduct, induced a bystander to assume that she was a prostitute. Holding that this amounted to cruelty, Sir Cresswell Cresswell said, "A man who has insulted his wife by treating her in the street like a common prostitute is guilty of at least as gross an indignity as if he had spat in her face. . . . It is a case of the grossest and most abominable cruelty."[15] The reference to spitting in a wife's face was no doubt prompted by a reference to *D'Aguilar* v. *D'Aguilar*[16] where Lord Stowell, in 1794, considered this as amounting to cruelty. There his Lordship referred to a case reported as early as 1630 where one such act had been held to be cruelty.[17] Referring to this insanitary practice Dr. Lushington said, "Lord Stowell declares it to be legal cruelty. . . . Does such a question require any authority at all?"[18] Many cases could be cited in which judges of the ecclesiastical courts, with a fine show of judicial indignation, have conjured up all sorts of indignities which husbands could perpetrate on wives, declaring that such conduct would amount to gross and abominable cruelty; but the House of Lords in *Russell* v. *Russell*[19] put the matter beyond all doubt so far as the principle is concerned. This case is a towering landmark in the development of the law relating to cruelty and has cast its shadow consistently across British courts for the last sixty years.

The House readily accepted the principle that physical violence is not necessary to constitute legal cruelty, the only question before it being whether there must be danger to life, limb or health, bodily or mentally, or a reasonable apprehension of it, as the Court of Appeal had, by majority, decided.[20] The facts were that the Countess Russell had made and persisted in maintaining charges of sexual perversion against her husband, Earl Russell, although there was no reasonable foundation for these charges. The parties having separated, the Countess petitioned for a decree for restitution of conjugal rights which the Earl defended on the ground that he was not obliged to cohabit with her by reason of the false charges with which she persisted; and he cross-petitioned for judicial separation on the ground of cruelty which he alleged was constituted by her false charges. Pollock, B., on the findings of a special jury, dismissed the wife's petition and granted a decree for judicial separation in the husband's favour. It was a touch-and-go decision in the House of Lords, and it is interesting to note that a decision which has had such a far-reaching effect on matrimonial causes was decided by the narrow margin of five to four. Apparently the Earl was a man of tough fibre for there was no evidence that his wife's scandalous conduct had endangered his life, limb or health, bodily or mentally. Lords Herschell, Watson, Macnaghten, Shand and Davey were of the opinion that this omission was fatal to the charge of cruelty; Halsbury, L.C., Lords Hobhouse, Ashbourne and Morris dissented. The dissenting Lords cited strong authority and powerful arguments against the proposition that the petitioner must be endangered, but Lord Herschell impliedly accused them of special pleading. He pointed out that many of the remarks quoted were *obiter*, and that in some cases where judges of the ecclesiastical courts had described a certain course of conduct as cruel they were referring to cruelty in the popular as opposed to the legal sense of the word. The House in this case was bound[21] to apply the principles of the ecclesiastical courts in the same way as the Court

[15] *Milner* v. *Milner* (1861) 4 Sw. & Tr. (Supp.) 240.
[16] (1794) 1 Hagg. Ecc. 773.
[17] *Cloborn* v. *Cloborn* (1630) Het. 149.
[18] *Saunders* v. *Saunders* (1847) 1 Rob. Ecc. 549, 562.
[19] (1897) A.C. 395.
[20] *Russell* v. *Russell* (1895) P. 315.
[21] 20 & 21 Vict. c.85, s.22.

is bound by s.5 of the Matrimonial Causes Act in New South Wales. It would be interesting to enter the lists and argue for the dissenting minority but it would be a fruitless exercise in the case of a decision so firmly entrenched.

It is a logical consequence of the principle affirmed in *Russell* v. *Russell* that courts, in cases of cruelty, are less concerned with the nature of the acts complained of than with their effect on the petitioner. From this it necessarily follows that a petitioner's capacity of endurance plays an important part in determining his right to relief. A highly sensitive spouse may be endangered, and hence entitled to matrimonial relief, by a course of conduct which to a person of tougher make may be all part of the day's fun. Hence, a series of minor acts, none harmful in itself, may amount to cruelty[22] provided the aggregate result leads to the danger prescribed by the Lords in *Russell* v. *Russell*. This is in direct contrast with the position where the ground relied on is repeated assaults and cruel beatings in which case the court, as previously mentioned, insists on the conduct, irrespective of its effect on the petitioner, complying with the somewhat lurid requirements of the subsection.

III. PROTECTION OF THE WIFE

The ecclesiastical courts frequently stated that judicial separation was granted for the protection of the wife, and this has led to the somewhat strange spectacle of husbands being granted decrees for judicial separation because their wives' conduct has been so provocative as to incite the husbands to retaliate, thereby injuring the wife.[23] The husband in such cases is granted a decree for the protection of the wife.

Emphasising the protective aspect of a decree for judicial separation it has been held that where a wife, by changing her own conduct, can free herself from molestation by her husband, she is not entitled to judicial separation. Thus, where a wife knew that her husband, who had suffered from an accident, was of an irritable and excitable nature but by her own aggressive conduct provoked him to retaliation, G. B. Simpson, J. refused her a decree for judicial separation on the ground of cruelty, holding that the remedy, namely desistance from provocation, lay in her own hands.[24] His Honour reviewed a number of judgments of the ecclesiastical courts which supported this decision. Social conditions have changed considerably since 1899 when Simpson, J. delivered this judgment although the principles he applied remain the same. He said that he was conscious that the law must be moulded by adapting it on established principles to the changing conditions which social development involves; but already some of his words sound archaic. He said, for instance, "It is the duty of the wife, before she can obtain a decree for judicial separation to endeavour to pacify and subdue the evil dispositions of the husband by all reasonable and prudent means"; and again, "If she can secure her own safety by an alteration of conduct, and by reforming her own manners, by being dutiful and submissive to her husband, she will not be entitled to a decree". Shades of Mrs. Pankhurst! Nearly fifty years later the Court of Appeal held that a wife is not debarred from relief where obedience to unreasonable demands made

[22] *Jamieson* v. *Jamieson* (1952) A.C. 525; *Crawford v. Crawford* (1956) P. 195; *Waters* v. *Waters* (1956) P. 344.

[23] *Prichard* v. *Prichard* (1864) 3 Sw. & Tr. 523; *Forth* v. *Forth* (1867) 36 L.J. (P. & M.) 122.

[24] *Vardy* v. *Vardy* (1899) 16 W.N. (N.S.W.) 78.

by her husband would put an end to his violence. In that case a husband, without justification, objected to his wife visiting her sister, violently assaulting her on several occasions when she did so. The Court of Appeal granted her a decree on the ground of cruelty,[25] reversing Henn-Collins, J. who had dismissed her petition, holding that the remedy lay in her own hands.

IV. INTENTION OF THE RESPONDENT

Since 1937 when cruelty became a ground for dissolution of marriage in England,[26] the subject has frequently come before the appellate courts of that country. The principle laid down in *Russell* v. *Russell* requiring proof of injury or danger of injury is still firmly established but the question of the respondent's intention has been the subject of considerable discussion. In 1864 Lord Penzance said, "With danger to the wife in view, the Court does not hold its hand to inquire into motives and causes".[27] For many years this *dictum* appears to have been accepted unreservedly, but in recent years courts have departed from the strict view that motive is immaterial and have inquired whether the conduct of the respondent can be said to be "aimed at" the petitioner. Denning, L.J., discussing this aspect, said, "There is much conduct which may be injurious to the health of the other but which, if not aimed at him, is not cruelty. The conduct of the drunkard, the gambler, the criminal or the profligate may cause his wife to break down in health, but it is not cruelty unless combined with some conduct which is aimed at her, as for example, when her justifiable remonstrances provoke unjust resentment on his part directed at her".[28] This view, which is gaining increasing respect, requires some nice balancing between the proposition of the ecclesiastical courts that relief on the ground of cruelty is granted for the protection of the wife, and the presumption that a person may be presumed to intend the natural and probable consequences of his acts. In *Squire* v. *Squire*,[29] for instance, an invalid wife who suffered from insomnia made unreasonable demands on her husband, demanding that he read to her for long periods during the night and otherwise preventing him getting sufficient sleep as a result of which his health suffered and his efficiency as an army officer was impaired. The Court of Appeal, reversing Finnemore, J., held that her conduct amounted to cruelty despite the absence of any intention on her part to injure her husband. Tucker, L.J. based his judgment on the proposition that a person is deemed to intend the natural and probable consequences of his acts, and found ample support from ecclesiastical authorities for the proposition that motive is irrelevant in cruelty cases. Evershed, L.J. (as he then was) though agreeing with his brother Tucker, was careful to emphasize that he was dealing with one particular case on the facts of that case as found by the trial judge. Hodson, J. dissented, mainly on the ground that the evidence disclosed no compulsion on the part of the wife, adding, "Acts between spouses must necessarily be examined in relation to the obligation of each other to accept the other for better or for worse, in sickness or in health".

It is difficult to reconcile the decision of the majority in this case with

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[25] *Meacher* v. *Meacher* (1946) P. 216.
[26] Matrimonial Causes Act, 1937, s.2; now Matrimonial Causes Act, 1950, s.1(i)(c).
[27] *Hall* v. *Hall* (1864) 3 Sw. & Tr. 347.
[28] *Westall* v. *Westall* (1949) 65 T.L.R. 337.
[29] (1949) P. 51.

the requirement, insisted upon in later cases, that the conduct complained of must be aimed at the petitioner. Indeed, one cannot escape the suspicion that the court over-emphasized the presumption that a person intends the natural and probable consequences of his acts. Numerous warnings have been given in recent years against the fallacy of regarding this presumption as irrebuttable.[30] However, in *Jamieson* v. *Jamieson*,[31] Lord Merriman referred without disapproval to *Squire* v. *Squire* and said that he must not be taken to suggest that it is essential to impute to the wrongdoer a wilful intention to injure the aggrieved spouse in order to establish cruelty. Lord Normand was not prepared to discard entirely the element of intention, stating, ". . . I am of the opinion that actual intention to hurt may have in a doubtful case a decisive importance. . . . Actual intention to hurt is a circumstance of peculiar importance because conduct which is intended to hurt strikes with a sharper edge than conduct which is the consequence of mere obtuseness or indifference".

The previous year the Court of Appeal had affirmed the requirement insisted on in *Squire* v. *Squire* that the conduct complained of must be aimed at the petitioner. A husband's petition on the ground of cruelty had been dismissed and the Court of Appeal affirmed its dismissal, holding that the wife's conduct was the result of her temperament and character and was not aimed at the petitioner.[32] Bucknill, L.J. based his decision largely on the wording of s.2 of the Matrimonial Causes Act, 1937, which provided, as a ground for dissolution, the fact that the offending spouse had "treated the petitioner with cruelty". His Lordship stated that the use of the word "treated" indicated conduct aimed at the offended spouse. Denning, L.J. qualified, to some extent, what had been said in *Squire* v. *Squire*. He said that when the conduct of one party consists of direct action against the other, then it is not essential that there should be a specific intent to injure or cause distress. When the conduct does not consist of direct action against the other but only of misconduct indirectly affecting him or her then it can only be said to be aimed at the other when it is done with intent to injure or inflict misery. He then uttered a warning against treating as irrebuttable the presumption that a person intends the natural and probable consequences of his acts.

In *King* v. *King*[33] the subject of cruelty was again before the House of Lords. Here the question whether the conduct was aimed at the husband petitioner did not arise. The cruelty alleged consisted of constant nagging accusations of infidelity made by the wife until the husband's health was affected. The husband had committed adultery with one woman, later confessing this to his wife; but the trial judge, Barnard, J., accepted the husband's explanation of later incidents which the wife persisted in regarding as evidence of adultery. His Honour granted a decree on his finding that the wife's conduct was wilful and unjustifiable. The Court of Appeal reversed this decision and the House of Lords, by majority, affirmed the Court of Appeal. The Lords, in this case, were careful not to bind themselves by any artificial formula. They examined the whole picture of the married life of the parties as disclosed by the evidence, drawing their conclusions in the light of all the surrounding circumstances. Lord Reid summed up the opinion of the majority when he said, ". . . it is not right first to ask whether the respondent's conduct was cruel in fact and then to ask whether it can in any way be justified. The

[30] See *Baily* v. *Baily* (1952) 86 C.L.R. 424; *Lang* v. *Lang* (1955) A.C. 402.
[31] *Jamieson* v. *Jamieson* (1952) A.C. 525, at 540-541.
[32] *Kaslefsky* v. *Kaslefsky* (1951) P. 38.
[33] (1953) A.C. 124.

question whether the respondent treated her husband with cruelty is a single question only to be answered after all the facts have been taken into account."[34]

In *Lang* v. *Lang*,[35] a case of constructive desertion, the Privy Council considered at some length the presumption that a man may be presumed to intend the natural and probable consequences of his acts. The Divisional Court in *Waters* v. *Waters*[36] applied to the question of cruelty the test which the Privy Council had applied to constructive desertion. Lord Merriman, P., said, "If a reasonable man (if I may paraphrase) would know—and this husband did know—that continuance in the course of conduct complained of would have an injurious effect on his wife's mental health, what more is necessary?"[37] Discussing the matter of intention earlier in his judgment his Lordship, after reviewing the recent authorities, said that in cases of mental cruelty intention is not necessary to constitute the offence; conduct is just as reprehensible if the husband can be said to have been unwarrantably indifferent as to the consequences to his wife.[38]

V. INSANITY AS A DEFENCE

Testing the matter by inquiring whether the conduct was aimed at the petitioner or was the result of a malignant intention or was justifiable raises a further problem when the respondent is insane. In *Hall* v. *Hall*,[39] although insanity was not pleaded, it appeared from the wife's evidence that her husband, the respondent, might have been insane. The Judge Ordinary adjourned the case so that evidence as to the husband's mental condition could be adduced, stating: "An insane man is likely enough to be dangerous to his wife's personal safety but the remedy lies in the restraint of the husband, not the release of the wife. Though the object of this Court's interference is safety for the future, its sentence carries with it some retribution for the past."

The question was carefully considered by the Court of Appeal in *Swan* v. *Swan*.[40] There, the respondent husband was found to have been suffering from such a defect of reason from disease of the mind as not to know the nature and quality of the acts complained of. The wife's petition on the ground of cruelty had, accordingly, been dismissed whereupon she appealed on the ground, *inter alia*, that insanity is not a defence to a petition based on cruelty. Hodson, L.J., after reviewing the authorities, including *Hall* v. *Hall*, agreed with the remarks of the Judge Ordinary previously quoted. He went further and stated that he could find nothing in the old authorities to justify the proposition that a decree based on cruelty is a remedy given, not for a wrong inflicted, but solely as a protection for the victim. He was satisfied that insanity was a defence in the circumstances. Somervell, L.J. was of the same opinion, but laid more emphasis on the requirement that the conduct should be aimed at the petitioner or done with the intent to injure or inflict misery, a requirement which cannot be fulfilled by an insane person. Jenkins, L.J. agreed with the general proposition that insanity is a defence in such cases but added that while he was satisfied that a man who does not know what he was doing cannot be held guilty of cruelty, he preferred to reserve for later consideration the question whether the position was necessarily the same if a man's state of mind

[34] *Id.* 140.
[35] (1955) A.C. 402.
[36] (1956) P. 344.
[37] *Id.* 361.
[38] *Id.* 359.
[39] (1864) 3 Sw. & Tr. 347.
[40] (1953) P. 258.

was such that, whilst he knew what he was doing, he did not know that it was wrong. The matter was again considered by the Court of Appeal in *Palmer* v. *Palmer*[41] where the doubts of Jenkins, L.J. were laid at rest, the Court holding that a person who came within either limb of the M'Naghten Rules could not be found guilty of cruelty.

VI. PRINCIPLES NOT YET COMPLETELY DEVELOPED

There are many more modern authorities on the subject of cruelty but enough have been cited to justify the conclusion that the process of development of the law on the subject is not yet completed, particularly as regards the element of intention and the requirement that the conduct should be aimed at the petitioner. Many *dicta* seem to be irreconcilable. So it seemed to Lord Merriman when he said, "Now, I am not going to attempt the task, which I think would be difficult, if not impossible, of reconciling all the recent cases in the Court of Appeal on these topics, or of reconciling some of them with some of the older cases."[42] The appellate courts in England have travelled a long way from the less complicated views of the ecclesiastical courts, but it must be remembered that a court would be more cautious in considering whether conduct amounted to cruelty when an affirmative finding would involve dissolution of marriage than when such a finding would involve no change of status but merely a right to live apart from the offending spouse. The ecclesiastical courts, of course, had no power to dissolve a marriage. Courts have been most reluctant to attempt a definition of cruelty and the wisdom informing such reluctance is understandable when one considers the infinite variety of human behaviour. Too rigid a definition might well exclude a course of conduct which contains all the elements of cruelty as it is now understood. Reported cases on the subject cover an extraordinary range of human behaviour and it may confidently be assumed that the list will never cease to grow; it would be fruitless to attempt to set out a record of acts which have been held to constitute the offence. In modern cases they have included lesbianism,[43] refusal, by means of *coitus interruptus*, to allow a wife to have a child,[44] a wife's conviction of a treasonable offence in a case in which the husband was an officer in the Royal Air Force,[45] and a course of conduct consisting of extreme boorishness and taciturnity, personal uncleanliness and complete indifference to the wife's health, coupled with deliberate refusal to co-operate in domestic matters.[46] In all these cases the health of the other party was affected. But the fact that certain conduct has been held to be cruel in one case is by no means decisive in another, for the effect of such conduct on the petitioner remains a vital consideration.[47]

The problems dealt with in the preceding pages have not yet agitated the High Court of Australia, but when the Matrimonial Causes Act, 1959, comes into operation, thereby making habitual cruelty for one year a ground for dissolution of marriage,[48] it may be anticipated that the High Court will be called upon to deal with many of them. In view of the firm attitude of that

[41] (1955) P. 4.
[42] *Waters* v. *Waters* (1956) P. 344, 355.
[43] *Gardner* v. *Gardner* (1947) 1 All E.R. 630.
[44] *Knott* v. *Knott* (1955) P. 249.
[45] *Ingram* v. *Ingram* (1956) P. 390.
[46] *Waters* v. *Waters* (*supra*).
[47] *Jamieson* v. *Jamieson* (1952) A.C. 525.
[48] This already constitutes a ground for dissolution of marriage in S.A.: Matrimonial Causes Act, 1929-1941, s.6(b).

Court[49] in its refusal to follow the Court of Appeal[50] where the standard of proof of adultery is involved, it will be interesting to see whether it will share Lord Merriman's reluctance to attempt a reconciliation of the conflicting views which have been expressed in the English courts or whether it will strike out on a bold line of its own.

[49] See *Wright* v. *Wright* (1948) 77 C.L.R. 191; *Watts* v. *Watts* (1953) 89 C.L.R. 200; *Locke* v. *Locke* (1956) 95 C.L.R. 165; *Mann* v. *Mann* (1957) 97 C.L.R. 433.
[50] *Ginesi* v. *Ginesi* (1948) P. 179.