REFUSAL OF SEXUAL INTERCOURSE AND CRUELTY AS A GROUND FOR DIVORCE

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The inclusion in the Divorce Act, 1968, of cruelty as grounds for divorce will raise the problem whether the refusal of sexual intercourse by a spouse can be considered as cruelty of the sort contemplated by the Act. The author examines the English cases dealing with this problem and concludes that there exists an area of conduct which may or may not constitute cruelty depending upon the attitude of the judge.

A question which has long been mooted in England and other jurisdictions where cruelty has been a ground for divorce is whether or not refusal of sexual intercourse by one spouse can be considered cruelty.

With the introduction of cruelty as a ground of divorce by the Divorce Act, 1968,[1] it can only be a question of time before the issue is raised in a Canadian court. A consideration of some of the more important English decisions on this point may be of interest. Before doing this, however, some remarks are in order concerning the relevant portion of the Divorce Act, 1968.

CRUELTY

In the past, cruelty has been relevant mainly to the question of judicial separation or actions for separation and/or maintenance in the Family or Magistrates Court.[2] Where no statutory definition of cruelty existed the meaning given to it had been the same as that established by the English courts, namely, that serious conduct must be shown, usually described as "grave and weighty"[3] and that such conduct must have either injured the petitioner's health or there must be a reasonable apprehension of such if it were continued.[4] Confusion at first existed as to whether there was a third requirement, i.e. that a specific mental element had to be proven. It was finally settled by the House of Lords in *Gollins* v. *Gollins*[5] and *Williams* v. *Williams*[6] that such was not the case.

The ground as set out in the Divorce Act is that a petition for divorce may be presented where 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.*[7]

It has been suggested that the reference to "render intolerable the continued cohabitation" infers that the test for this ground is based on conduct only, i.e. is the conduct intolerable. This would be more on the lines of cruelty as defined by the Alberta and Saskatchewan Act in the context of judicial separation.[8]

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1 S.C. 1967-68, c. 24, s. 3(d).

2 The exception to this was that cruelty was a ground for divorce in Nova Scotia.

3 Attributed to Lord Stowell in *Evans* v. *Evans* (1790), 1 Hag. Con. 35; 161 E.R. 466.

4 Finally decided by the House of Lords in *Russell* v. *Russel*, [1897] A.C. 395.

5 [1963] 2 All E.R. 966; [1964] A.C. 644 (H.L.).

6 [1963] 2 All E.R. 944; [1964] A.C. 698 (H.L.).

7 S. 3(d) (italics added).

8 Domestic Relations Act, R.S.A. 1955, c. 89, s. 7(2):

> "Cruelty" in this Act is not confined in its meaning to conduct that creates a danger to life, limb or health, but includes any course of conduct that in the opinion of the Court is grossly insulting and intolerable, or is of such a character

Such an interpretation did not appear to have been in the minds of the Special Committee who recommended cruelty as a ground for divorce and who seemed to have had the dual requirement of conduct and injury in mind. Nor is it, in the writer's opinion, a valid interpretation. The normal rules of interpretation require that when the word "cruelty" is used it be given its usual meaning unless it is clear from the provision that something else is intended. The meaning which has in the past been given by the Courts is that previously set out. That this is the case is further emphasized by the fact that Alberta and Saskatchewan felt it necessary to introduce the statutory definitions they did.

The expression "unendurable conduct" must be taken to have been intended to emphasize the need to prove serious conduct before relief can be granted and to make it quite clear that incompatibility is not a ground for relief.

The other alternative is that it was intended to re-incarnate a rule, known as the "protection theory" which required that a divorce only be granted on the ground of cruelty to protect a spouse from future injury. This might be appropriate in the context of judicial separation but not with regard to divorce.

It is the writer's opinion, therefore, that before a divorce can be granted under section 3(d) of the Divorce Act, the petitioner must prove two things. First, he must show conduct by the respondent of such a serious nature that it has rendered further cohabitation impossible, and secondly, that such conduct has caused or is likely to cause injury to the petitioner's health.

This is not to say, however, that the writer is satisfied with the situation thus created. The injury to health requirement has caused injustice in England in some instances. It is desirable that it be removed as a separate element. This could be achieved by leaving out the word "cruelty" from section 3(d) and using only the expression "conduct of such a nature as to make married life impossible."[9] Injury would still be relevant but only indirectly in that it would be important in some cases when deciding on the gravity of a particular act.

In the discussion of refusal of sexual intercourse which follows, although injury to health is referred to on several occasions, it is not the main issue. The main question is whether the conduct complained of is sufficiently serious, i.e. "grave and weighty," to amount to cruelty.

REFUSAL OF SEXUAL INTERCOURSE

Refusal of sexual intercourse by one spouse may affect the other spouse for two quite different reasons. He or she may suffer because of sexual frustration due to lack of normal adult sexual life or he or she may suffer because of the desire for a family, the fulfilling of which is prevented by the other spouse's refusal.

Much confusion has been caused by the fact that although the ma-

that the person seeking the separation could not reasonably be expected to be willing to live with the other after he or she has been guilty of such conduct.

Queens Bench Act, R.S.S. 1965, c. 73, s. 25(3):

In subsection (1) "cruelty" means conduct creating a danger to life, limb or health, or any course of conduct that in the opinion of the court is grossly insulting and intolerable or is of such a character that the person seeking judicial separation could not reasonably be expected to be willing to live with the other after he or she has been guilty of the same.

9 The word "cruelty" does not appear in the English Divorce Reform Bill 1968.

jority of judges are prepared to recognize that refusal to have children is a very serious matter, not all seem prepared to accept that married people have a need for sexual fulfillment, and that the refusal of such sexual pleasures can in itself be a serious matter.

It has long been accepted that it is cruel to deprive a wife of the opportunity of having a child by insisting on the use of contraceptives or the practice of *coitus interruptus*. Willmer, J., dealt with the latter situation in the case of *White* v. *White*.[10] In this case the husband had insisted on the practice of *coitus interruptus* despite his wife's objections to this and despite the advice of a doctor that to continue would have a serious effect on the wife's health. Willmer, J., stated that he did not wish to be taken as holding that in all situations the practice of *coitus interruptus* would amount to cruelty, but he continued:

> I feel that a husband must take his wife as he finds her, and if she is a woman of a type who needs the full and natural completion of the act, then to persist in withholding it from her, in the face of her repeated complaints and objections, is in itself an act of cruelty; and if, as in this case, it does result in serious injury to health, or does contribute in marked degree to the breakdown of health of the spouse, then in my judgement it is only right that this court should give relief.[11]

The same conclusion was reached by Wallington, J., in *Walsham* v. *Walsham*.[12] Again the husband had insisted on practising *coitus interruptus* but also he refused sexual intercourse completely for varying periods of time. Wallington, J., seemed to equate sexual intercourse with the procreation of children, treating this as the only justification for sexual intercourse. Although he held the husband guilty of cruelty, he emphatically stated that:

> Mere abstention by the husband from sexual intercourse could not, in my view, amount to cruelty or give to the wife any remedy, even though it might injure her health, but the husband in the present case did more than abstain.[13]

Such a statement was of course obiter in the circumstances, but it was probably a true statement of the law as it then stood.[14] This was followed by the case of *Cackett* v. *Cackett*[15] where on similar facts Hodson, J., held the husband guilty of cruelty, but without the emphasis on the procreation of children aspect.

In *Fowler* v. *Fowler*[16] decided in 1952, the Court of Appeal consisting of Hodson, Denning and Singleton, L.JJ., sought to distinguish between a refusal of sexual intercourse by a husband and refusal by a wife. Here the wife, after having an operation on her womb insisted that contraceptives be used whenever sexual intercourse took place, and eventually she refused intercourse altogether. The court stated that refusal of sexual intercourse was the type of conduct which had to be accompanied by an intention to hurt before it could amount to cruelty. The refusal must be due to ill-will not to selfishness. The court seemed to take the view that in a husband's case there was virtually no reason for refusing other than ill-will, while in a wife's case there could be many reasons for doing this. The wife was found not guilty of cruelty. However, in *Forbes* v. *Forbes*[17] decided three years later,

10 [1948] 2 All E.R. 151; [1948] P. 330.
11 *Id.*, at 156 and 340 respectively.
12 [1949] 1 All E.R. 774; [1949] P. 350.
13 *Id.*, at 775 and 352 respectively.
14 This is supported by the later decisions of *Hayes* v. *Hayes* (Unreported) March 6, 1958, (C.A.), and *Clark* v. *Clark*, *The Times* June 24, 1958, (C.A.).
15 [1950] 1 All E.R. 677; [1950] P. 253.
16 (1952), 2 T.L.R. 143 (C.A.).
17 [1955] 3 All E.R. 311.

Mr. Commissioner Latey, Q.C., made no such distinction and found a wife guilty of cruelty where she had persistently insisted on the use of contraceptives despite the husband's desire for children.

A very interesting case concerned with the practice of *coitus interruptus* is *Knott* v. *Knott*[18] decided the same year. Sachs, J., began by stating that:

> Permanent and unreasonable starvation of the maternal instinct may to my mind, be of itself a cruel thing.[19]

This, I think, is clearly in line with the authorities. However, he went further and in considering the facts of the case before him, stated that:

> There is the added element, and that a serious one, that injury to the wife's health results from the very practice itself, and is an injury which may be distinct from that caused by starvation of the maternal instinct.[20]

This seems to indicate a clear distinction between the two aspects of sexual intercourse. Once it is accepted that *coitus interruptus* which injures the wife's health because of her sexual needs are not satisfied is cruel conduct, then it is only a question of degree as to whether total refusal can amount to cruel conduct.

Sachs, J., reinforced this argument by distinguishing between the practice of *coitus interruptus* and the insistence on the use of contraceptives. While the use of a contraceptive prevents conception (at least in theory), it does not usually prevent the husband or wife from deriving a considerable degree of, if not full, satisfaction from the sexual act. On the other hand, the practice of *coitus interruptus* almost invariably leads to satisfaction only for the husband.

Whether or not refusal of sexual intercourse can *per se* constitute cruel conduct is a far more difficult question. Before the decision of the House of Lords in *Gollins* v. *Gollins*[21] attitudes seemed to vary, from that of Wallington, J., in *Walsham* v. *Walsham*[22] that mere abstention could never amount to cruelty, to that of the Court of Appeal in *Fowler* v. *Fowler*[23] which seemed to accept that it could be sufficient where the spouse who had refused intended to hurt the other party, but this would probably only be possible where a woman was the petitioner. Wallington's, J., approach is supported by two later Court of Appeal decisions, *Hayes* v. *Hayes*[24] and *Clark* v. *Clark*.[25] The former case concerned a husband's failure to satisfy his wife's sexual needs and thus general statements regarding complete refusal must be considered obiter. In the latter case, however, the husband after two years of marriage refused sexual intercourse, as a result of which his wife's health suffered. Hodson, L.J., held that:

> The mere fact that sexual intercourse does not take place between the parties, even if that is because one unjustifiably refuses to have intercourse is not of itself cruelty. . . .

Such a decision was almost inevitable because of the approach taken by the Court of Appeal in the case of *Kaslefsky* v. *Kaslefsky*.[26]

In the last four years there has been a spate of decisions on refusal

18 [1955] 2 All E.R. 305; [1955] P. 249.
19 *Id.*, at 309 and 256 respectively.
20 *Id.*, at 310 and 257 respectively.
21 *Supra*, n. 5. See L. Neville Brown, *Cruelty without Culpability or Divorce without Fault* (1963), 26 Mod. L. Rev. 625.
22 [1949] 1 All E.R. 774, 775; [1949] P. 350, 353.
23 *Supra*, n. 16.
24 *Supra*, n. 14.
25 *Supra*, n. 14.
26 [1950] 2 All E.R. 498; [1951] P. 38

of sexual intercourse but unfortunately the law in England on this point still does not seem to have been settled. In *P.* v. *P.*[27] which appears to be the first case on this subject after *Gollins* v. *Gollins*,[28] Judge H. Brown, Q.C., sitting as a Special Commissioner, held that refusal of sexual intercourse by a husband because he felt no desire for sexual relations did not amount to cruelty to his wife, even though her health had suffered. He stated that:

> I find it in a sense obnoxious to regard the act of intercourse as going according to rule and to be not so much a voluntary act of love of man for woman but a kind of disciplined act to keep a wife happy and in good health. A man should conquer his illness or his sulky bad temper in the interest of, at least, his wife's health. Can it be said that he should, and can, conquer his innate disinclination for sexual intercourse with the same object? If this is so, does it mean that, in an appropriate case, the court has to undertake the distasteful task of deciding the number of occasions in any given time when the husband has to perform the act?[29]

It is impossible to answer this argument as it stands. It must be approached from the point of view that when a normal man and woman enter into marriage they expect to have normal sexual relations and satisfaction of the sexual needs which a normal person has. If one of the parties refused sexual intercourse entirely or will only allow limited relations then it is quite likely that the other spouse will suffer a certain amount of sexual frustration and possibly injury to health. The injured spouse should then be entitled to a divorce on the ground of cruelty in the same way he or she would be entitled to such a decree where the injury to health was due to the inordinate sexual appetite of the other spouse.

The latter part of the passage cited seems out of place in such a discussion since the court is being asked to grant a divorce, not some special type of decree for restitution of conjugal rights.

The Commissioner also raised the argument that if depriving a wife of sexual intercourse by simply refusing to have intercourse with her amounted to cruelty then surely depriving a wife of sexual intercourse by deserting her must likewise amount to cruelty. This is rather a weak argument since it does not take into account the fact that lack of sexual intercourse when the parties are living together and probably sleeping together is likely to have much greater impact than when the spouses are living apart.

The Commissioner's approach was not followed in *P.* (*D.*) v. *P.* (*J.*)[30] decided in the next year. In this case the parties had been married in 1953. For about three months the wife refused to allow sexual intercourse and thereafter allowed it infrequently and only if contraceptives were used or *coitus interruptus* practised. She suffered from a psychological fear of conception and childbirth and the more the husband pressed her to start a family the worse their sexual relations became. Finally in 1958 she refused sexual intercourse altogether. In consequence of this the husband's health suffered. Stirling, J., referred to the interpretation of the cases of *Gollins* v. *Gollins* and *Williams* v. *Williams* by the Court of Appeal in *Le Brocq* v. *Le Brocq*,[31] and decided that the question he now had to ask himself was whether the conduct com-

[27] [1964] 3 All E.R. 919.
[28] *Supra*, n. 5.
[29] *Supra*, n. 27, at 921.
[30] [1965] 2 All E.R. 456; [1965] 1 W.L.R. 963.
[31] [1964] 3 All E.R. 464; [1964] 1 W.L.R. 1085.

plained of could be labelled "unendurable". If it could, and injury to health resulted, then there was cruelty. He held that on the facts the wife was guilty of cruelty.

Both of these cases were considered by the Court of Appeal later in the year in *B.* (*L.*) v. *B.* (*R.*).[32] Here the husband had refused sexual intercourse except at infrequent intervals of weeks or even months; this injured his wife's health. Davies, L.J., seemed to favour the *P.* v. *P.*[33] decision, distinguishing *P.* (*D.*) v. *P.* (*J.*) on its facts in such a way as to make it virtually a dead letter. He stated that:

> There the husband was the petitioner. The wife never allowed him to have sexual intercourse at all; she was prepared only to engage in what the judge described as a degree of sexual love-play. . . . And it may very well be that to excite a husband in that way and then to stop him at the last moment might be a very serious and cruel thing to do. But that is entirely different from the present case.[34]

The inference from this seems to be that without the teasing element there would have been no cruelty. However, this does not seem to be what Stirling, J., had in mind.

Although Davies, L.J., stated that it was impossible to lay down any general rules in this area of law, relating as it does to such intimate aspects of the life of two individuals, nevertheless he did appear to consider that for refusal of sexual intercourse to constitute cruelty, it must be part of a deliberate course of conduct, calculated to injure the health of the other spouse. This would indicate, of course, that it could never *per se* be sufficient. In refusing a decree, Davies, L.J., held that:

> The real truth of this case is that the husband's appetite was less than that of his wife, and, possibly his power also.[35]

Salmon and Willmer, L.JJ., concurred.

Further consideration was given to the question later in the same year in *Evans* v. *Evans*.[36] Here the wife not only refused sexual intercourse without any real justification, but also broke off all relations with the husband. His health suffered in consequence and Cairns, J., did not hesitate to hold the wife guilty of cruelty. He stated that:

> . . . the conduct of the wife, taken as a whole, is conduct which was unjustified, (and) can properly be described as grave and weighty. . . .[37]

Although he avoided commenting on *P.* v. *P.*[38] it would seem in the light of his earlier remarks that it did not commend itself to him. He appeared to consider that in the right circumstances refusal of sexual intercourse could be called cruel, e.g. where shortly after the marriage of two young people one of them refuses.

The following year the Court of Appeal in *Sheldon* v. *Sheldon*[39] set out to rationalize the situation and in so doing accepted that refusal of sexual intercourse could constitute cruelty. This is particularly interesting since virtually the same judges sat as did in the *B.* (*L.*) v. *B.* (*R.*) case, the only exception being that Lord Denning, M.R., sat instead of Willmer, L.J.[40]

In a sense the court was forced to reach the decision it did because

[33] *Supra*, n. 27.
[34] *Supra*, n. 32, at 267 and 1418 respectively.
[35] *Ibid.*
[36] [1965] 2 All E.R. 789.
[37] *Id.*, at 792 *et seq.*, my brackets and contents.
[38] *Supra*, n. 27.
[39] [1966] 2 All E.R. 257; [1966] P. 62 (C.A.).
[40] Perhaps the liberal Lord Denning, M. R., precipitated the change.

of the factual situation before it. During the first eight years of married life the parties had had quite normal sexual relations. The husband was then sent to work in Scotland for one year by his employers. From the time of his departure sexual intercourse ceased, although the parties saw each other on a number of weekends. After his return from Scotland he stated that he no longer found his wife attractive. The wife very much desired a child. Her doctor warned the husband that his refusal to allow his wife a child and sexual satisfaction was affecting her health. The husband ignored this warning and the wife eventually left him. Her petition for divorce on the ground of cruelty was dismissed by the judge at first instance who considered that on the authorities he was bound to hold that mere refusal of sexual intercourse was not sufficient.

The problem facing the Court of Appeal was put clearly by Lord Denning, M.R., that either the wife was guilty of simple desertion or the husband was guilty of cruelty, there was no alternative. The Court felt great sympathy for the woman, but the problem was finding cruelty in the light of such cases as *P.* v. *P.* and *B.* (*L.*) v. *B.* (*R*).

Lord Denning, M.R., adopted Lord Reid's test in *Gollins* v. *Gollins* that there is cruelty, if, having made allowances for all of the particular facts of the case, the conduct is such that this spouse cannot be called upon to endure it. Applying this is *P.* (*D.*) v. *P.* (*J.*) he explained that the court had made all possible allowances for the wife's psychological infirmity, yet her conduct was still cruel. The same applied to *Evans* v. *Evans*. On the other hand in *P.* v. *P.* where the husband had no desire for sexual intercourse and *B.* (*L.*) v. *B.* (*R.*) where he was just undersexed the court made allowance for the husband's respective disabilities and found they should be excused.

In the present case the husband did not suffer from any infirmity, he was not undersexed, he had no excuse, he knew well the effect his conduct was having on his wife, he just was not attracted to her. After making allowances for these and other factors, Lord Denning, M.R., held that his conduct was such that the wife could not be called upon to endure it and that in the circumstances the husband was guilty of cruelty. He concluded, however, that:

> It may be said that if refusal of sexual intercourse is to be regarded as cruelty, we should be opening far too wide a door for divorce. But I do not think so. No spouse would have any chance of obtaining a divorce on such a ground except after persistent refusal for a long period: and it would usually need to be corroborated by the evidence of a medical man who had seen both parties and could speak of the grave injury to health consequent thereon.[41]

Davies and Salmon, L. JJ., also found cruelty, the former distinguishing the earlier Court of Appeal decision in *Hayes* v. *Hayes*[42] on its facts, and *Clark* v. *Clark*[43] because it was based on the *Kaslefsky* v. *Kaslefsky*[44] decision. Salmon, L.J., stressed that he felt failure to have sexual intercourse because of physical or psychological impotence could never be cruelty. It was a misfortune both spouses must endure. He distinguished on this basis *P.* (*D.*) v. *P.* (*J.*) from *P.* v. *P.* In the former the wife was able to have intercourse, she just refused. In the latter the husband had been virtually impotent.

41 [1966] 2 All E.R. 257, 261; [1966] p. 62, 73 (C.A.).
42 *Supra*, n. 14.
43 *Supra*, n. 14.
44 *Supra*, n. 26.

The same approach was taken by the Court of Appeal in *Hughes* v. *Hughes*,[45] consisting of Lord Denning, M.R., and Harman and Diplock, L.JJ. The former emphasized that no distinction should, in this context, be drawn between a husband and a wife.

However, in the most recent decision on the topic, *Walker* v. *Walker* (No. 2),[46] Ormrod, J., managed to bring back the earlier confusion. Soon after their marriage in 1948 the wife told the husband that she was dissatisfied with the sexual side of their relationship. By 1952 sexual intercourse ceased altogether. In 1956 the wife stated she desired a child, and sexual intercourse took place for a while but ceased during the pregnancy. Since that time there had only been one further act in 1960. In her petition for a divorce the wife complained that she had suffered frustration due to her husband's sexual incapacity and his unwillingness to accept responsibility.

Ormrod, J., considered *B.* (*L.*) v. *B.* (*R.*) and *Sheldon* v. *Sheldon* and found them difficult to reconcile. He accepted that in both of these cases sexual failure had been isolated as the sole cause of the injury to health, but he felt that on the whole sexual failure was more a cause of cruel conduct than cruel conduct itself.

He considered that the case at hand was on all fours with *B.* (*L.*) v. *B.* (*R.*). In dismissing the wife's petition, he held that:

> As the authorities stood, it would be wrong to find that the husband's sexual failure, which unquestionably had destroyed the marriage, amounted to cruelty. The case did not approach *Sheldon* v. *Sheldon*, where the husband had, for reasons unknown, lost interest in his wife. Here, the husband could not help his sexual failure, as it was simply his nature.

However, it may be possible to derive some broad principles from a study of the two Court of Appeal decisions, *B.* (*L.*) v. *B.* (*R.*) and *Sheldon* v. *Sheldon*, in the light of *Walker* v. *Walker* (*No. 2*). In the latter two cases as in the judgment of Davies, L.J., in *Sheldon* v. *Sheldon* it seems to have been accepted that failure of sexual intercourse due to the impotence of one spouse can not *per se* constitute cruelty to the other, even if injury to health has resulted. On the other hand, where a spouse wilfully and unjustifiably refused, or as in *Sheldon* v. *Sheldon* allows himself to lose interest, perhaps by associating with other women, then this can *per se* constitute cruelty if the other spouse's health is injured. Neither *B.* (*L.*) v. *B.* (*R.*) nor *Walker* v. *Walker* (*No. 2*) seems to prevent this.

The problem remains in deciding into what category a given factual situation falls, and here as in all areas of cruelty there is a no-man's land of conduct which may or may not constitute cruelty depending on the impression and attitude of the judge at first instance.

[45] (1966), 110 Sol. J. 349.
[46] (1967), 111 Sol. J. 436.