The survival of fault in contemporary family law in New Zealand

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The most recent proposals to change family law in New Zealand represent a swing to "no fault" divorce. However the law is unlikely to totally abandon all reference to fault, especially where one party's actions have been detrimental to the financial state of a marriage. In this article, the writer examines some of the major areas of family law, including some of the most recent judgments dealing with matrimonial property, to elicit current approaches to matrimonial misconduct.

I. INTRODUCTION

The burden of this article is to show that the fault principle is still very much a part of New Zealand family law. It has been fashionable in recent years to advocate the removal of the doctrine of matrimonial offence from family law[1] but it may well be wondered whether such a development really reflects the views of the community at large. Many of the arguments against a fault-based family law are very compelling. A good divorce law should aim to ease the tension between parties to a marital dispute and not exacerbate what is of its very nature a trying and emotionally charged situation by attempting to allocate blame. The law should recognise the reality of a marriage breakdown and help the parties come to terms with their changed circumstances rather than engage in a fruitless investigation of causes. The doctrine of matrimonial fault has often allowed the vindictive to feed on the unfortunate shortcomings of the other party.

The trend against fault in family law has received two recent boosts, first with the introduction into Parliament of the Family Procedings Bill 1978 and

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1 For a recent example, see H. A. Finlay "Reluctant, but Inevitable: The Retreat of Matrimonial Fault" (1975) 38 M.L.R. 153. Cf. H. A. Finlay "Fault, Causation and Breakdown in the Anglo-Australian Law of Divorce" (1978) 94 L.Q.R. 120, J. M. Eekelaar *Family Law and Social Policy* (London, 1978) especially chapter 7, Law Reform Commission of Canada, Working Paper 12 *Maintenance on Divorce* 31-34 and Working Paper 13 *Divorce,* both published in the Law Reform Commission of Canada's *Studies on Divorce* (Ottawa, 1975), and Law Reform Commission of Canada *Family Law* (Ottawa, 1976).

secondly with the report of the *Royal Commission on the Courts.*[2] The Family Procedings Bill proposes a single ground for divorce, the irreconcilable breakdown of marriage, which will be provable quite irrespective of considerations of fault.[3] Thus an "innocent" spouse will no longer be able to petition for divorce on the grounds of adultery nor have a veto similar to the present section 29(2) Matrimonial Procedings Act 1963 in the event of the "guilty" spouse seeking a divorce.[4] The Family Proceedings Bill flows from an election manifesto promise in 1975 by the present government and appears certain to be eventually passed into law.

The Royal Commission on the Courts reported in August, 1978. One of its main recommendations was the establishment of a Family Division of the proposed District Courts, which means that New Zealand may in the near future have a system of family courts governed by a judicial philosophy quite different from the present. Procedings will be more informal, greater efforts will be made by counselling to enable parties to resolve areas of dispute without the need for adjudication, and non-judicial support staff will be on the spot. More importantly, the recommendations of the Royal Commission herald a swing away from the strict adversary approach to judicial proceedings. The adversary approach is highly appropriate in dealing with substantive law which requires an assessment of blame and moral culpability, but clearly a family court system aimed at removing incentives for recrimination and antipathy runs into sharp conflict with a fault-based family law. The Royal Commission's procedural recommendations therefore go hand in hand with the substantive changes likely to be made by the Family Proceedings Bill. At the time of writing, the government has made no decision on whether to implement the recommendations of the Royal Commission but the main drawback it appears is not the basic principle of the scheme but the financing and staffing of it.

Despite these developments, there remains a residue of situations where as a matter of justice it would be quite wrong for the law to ignore the parties' misconduct. The most extreme example of this is cruelty, today thought of more in terms of "child abuse" and "wife or husband battering".[5] Less extreme but equally as relevant is the blatant misuse of matrimonial income or property. Both the courts and the legislature are likely to continue to take considerations of justice and the rights and wrongs of a marital situation into account. It is intended here to examine several areas of New Zealand family law, especially the recent matrimonial property legislation, in order to show how these factors are still playing an important role.

2 *Royal Commission on the Courts — Report 1978* (Wellington, 1978) 146 ff.

3 This will be satisfied by proving that the parties have lived apart for two years, or have lived apart for six months and two years ago one of the parties filed an application for marriage counselling: see cl.27 of the Bill. Cf. s.48 Family Law Act 1975 (Aust.).

4 This applies where the grounds for divorce are the existence of a separation order, decree or agreement having been in force for two years. No veto applies to petitions based on four years living apart.

5 See generally J. M. Eekelaar and S. N. Katz (eds.) *Family Violence — an international and interdisciplinary study* (Toronto, 1978).

II. MATRIMONIAL PROPERTY

A. The Law in General

The Matrimonial Property Act 1976 came into force on 1 February, 1977 and replaced the previous law contained in Part VIII Matrimonial Proceedings Act 1963 and the Matrimonial Property Act 1963 in so far as inter vivos applications are concerned. Wrongful conduct could not be taken into account in determining the parties' interests under the latter Act except as it related to the acquisition, extent or value of property in dispute.[6] Conduct in a broad sense was a relevant factor under Part VIII of the Matrimonial Proceedings Act 1963.[7]

The 1976 Act makes little express mention of misconduct, the exception being section 18(3). The interpretation of this provision is a matter of dispute and will have to be analysed subsequently in this article. By implication, however, conduct can in many instances still be of crucial importance in determining the rights of the parties. The Act is liberally peppered with discretions vested in the court to do what it considers just, and in considering the "justice" of a case, the court may be led to examine the moral blameworthiness of the parties. Although this examination might include a search for the traditional examples of matrimonial offences such as adultery, it has not so far proven to be as crude or as limited as that. Indeed it will be suggested that the courts are less interested in such misconduct in itself, and more interested in actions which have altered the economic position of the parties.

One of the complaints about the 1963 legislation was that it left too much discretion in the hands of the courts.[8] This led to considerable uncertainty about the application of the law to particular circumstances. In the desire for clarity the 1976 Act provides that normally parties to a marriage will share equally in the property of the marriage and will have a heavy onus to satisfy if the equal division of the property is to be avoided. Unfortunately the new law has not introduced that longed for note of certainty and one of the reasons is the existence of the numerous discretions already mentioned. Even so, in the eyes of at least one member of the judiciary, there is a need for much more discretion to meet the case of marital misdemeanours. Mahon J. in *Baddeley* v. *Baddeley* had this to say:[9]

> Any Court hearing an application of this kind naturally has in mind the practical consideration, especially applicable in the case of farms, that it is the husband alone who spends his life under the physical burden of the labour and responsibility which such a venture involves. But the duty of every Court must be to apply the provisions of the statute and to recognise the shift in legislative policy which has given every wife the right to leave her husband and to claim thereafter one-half of the value

6 Section 6A.

7 *Pay* v. *Pay* [1968] N.Z.L.R. 140.

8 *Matrimonial Property — Comparable Sharing: An Explanation of the Matrimonial Property Bill 1975* New Zealand. Parliament. House of Representatives. Appendix to the journals, Vol. 2, 1975, E.6:5.

9 (1978) Matrimonial Property Act Cases (Published by the New Zealand Council of Law Reporting, Wellington, 1978) 10, 12 cited in this article as M.P.C. See part of the judgment quoted [1978] N.Z.L.J. 344.

> of a business which he himself built up and maintained. I am not necessarily referring here to the present case, but a wife may leave her husband for just cause or for no cause. She may leave him, bored and discontented after years of marriage, for the sole purpose of starting a new life with another man, but her right to claim one-half the business assets of her husband remains unaffected. She is able to bring to the new marriage a handsome dowry representing half the business assets of her previous husband. While she is basking in the affluent warmth of a last romantic spring-time, her deserted ex-husband is back on the farm struggling with the lawful demands of his mortgage, his stock company, and his bank.

His Honour goes on to surmise that there may be a "gulf . . . between ideological law reform and the simple concepts of justice which reflect the general understanding of the community as to the functions of the law". If such a gulf does exist, especially in an area that is as close to home as family law is, then concern at the state of the law is indeed justified.

However with respect two points must be made. First, the basic premise of the Act, that of equal division of the matrimonial property, is not one that can be easily argued against without returning to the patriarchal philosophy of the nineteenth century. The 1976 Act in this respect is a welcome statement that the non-financial aspects of a marriage relationship are just as important as the financial ones. Secondly, the courts have not been slow to take advantage of the discretions in the Act and with a little ingenuity have been able to apply a popular image of justice. It is to the principal examples of these discretions that we must now turn.

B. The Discretions in the Matrimonial Property Act 1976

1. *Extraordinary circumstances*

Perhaps the most important section in the Act calling for an assessment of justice is section 14:

> Where there are extraordinary circumstances that, in the opinion of the Court, render repugnant to justice the equal sharing between the spouses of any property to which section 11 of this Act applies or of any sum of money pursuant to section 12 of this Act, the share of each shall, notwithstanding anything in section 11 or section 12 of this Act, be determined in accordance with the contribution of each to the marriage partnership.

Section 11 relates to the division of the matrimonial home and family chattels and section 12 deals with the special situation where the matrimonial home is a "homestead" as on a farm. Section 14 has no application to any other items of matrimonial property, which are left to be divided equally under section 15 unless it can be shown that one spouse's contribution to the marriage has clearly been greater than that of the other spouse.

Section 14 has predictably led to a welter of litigation. Prior to the issue reaching the Court of Appeal, two divergent approaches to the interpretation of the section had emerged, one broad and one restrictive. The broad approach received its most articulate treatment from Jeffries J. in *Madden* v. *Madden*.[10] The parties in that case started their marriage with virtually nothing but eventually

10 (1978) M.P.C. 134.

acquired a house which became the subject of the proceedings. The husband argued for the setting aside of the equal division rule, principally on the basis that his ex-wife drank excessively and was alcoholic. The wife had also left home and set up house with another man, but this was not relied upon.

His Honour held that section 14 was satisfied and in doing so, he offered this interpretation of the section:[11]

> The heart of the meaning is in the abstract noun, justice. I think it possibly misleading to be induced to concentrate on "extraordinary" and "repugnant". The circumstances must be out of the usual course, or not customarily found, for them to be "extraordinary".

And later he continued:

> If the facts take the situation clearly outside the broad band of diverse circumstances which equal sharing is meant to embrace, it will be repugnant to justice. Because it is justice that is sought the extraordinary circumstances do not, in my opinion, need to be overwhelming, extreme, or be such as to make one gasp. If the threshold before justice moves is set at those levels, it makes the justice of the Act insensitive and torpid, and I do not believe that was Parliament's intention.

His Honour then examined the facts and found that there were extraordinary circumstances but in so doing he said "There is insufficient information for me to determine culpability, and even if there was more it probably could not be done, but nevertheless through her failure, or inability, to exercise control, it brought the marriage to an end". With respect, the heavy reliance upon the wife's alcoholism as the cause of the marriage breakdown surely represented a clear attachment of blame to the wife. Presumably the suggestion is that alcoholism should really be treated like a disease to which no moral culpability will normally be attached. But if this is so, then the reasoning stands in marked contrast to that of Barker J. in *X* v. *X*[12] where the fact that the wife had been in a psychiatric hospital for eight years with no prospect of recovery was held not to be within the section. In a revealing passage Barker J. says:[13]

> The words "repugnant to justice" are very strong indeed; something more than a situation contrary to justice must be proved. I consider that to find repugnancy to justice, will, in most cases, involve a finding of fault against the party who is not to receive the equal share of the matrimonial property which the legislation intended. It may be an extraordinary circumstance that a spouse develops a mental illness. However, it could be said to be "repugnant to justice" if this unhappy fact were to be the sole reason for depriving such an unfortunate person of his or her rights under a statute of such wide application.

The reference to "fault" will be noticed and the absence of any fault in being a patient in a psychiatric institution was crucial to Barker J.'s finding. The precise relevance of the presence of fault will be returned to shortly. Whether Barker J. would have found section 14 satisfied had he been deciding *Madden* v. *Madden* is of course a matter for speculation. Given that he was inclined to regard mental illness as an extraordinary circumstance, his Honour might well have seen chronic alcoholism in the same light. On the assumption that there is some

11 Ibid., 135.

12 [1977] 2 N.Z.L.R. 423.

13 Ibid., 425.

blameworthiness in a person who has succumbed to alcoholism, Barker J. may not then have hesitated to find equal sharing "repugnant to justice" in the way he did in the case of the mentally ill wife. The same might be the case where for instance a person has been unemployed through sheer inertia. The upshot is therefore that Barker J. may have reached the same result as Jeffries J. but that the presence of moral culpability would have been critical.

X v. *X* is representative of the line of authorities which took a much more restrictive approach to section 14 than did Jeffries J. One of the leading such authorities is *Castle* v. *Castle*[14] where the wife had made a much greater contribution to the marriage through gifts of money from her parents and running a business of her own as well as bringing up three children. The husband on the other hand had made little contribution financially, being unable to keep a steady job for long and even then only receiving a poor income. The argument advanced by the wife was that she should receive a greater share of the proceeds of the matrimonial home because her greater contributions brought the case within section 14. This argument was not accepted but in the course of giving judgment, Quilliam J. said:[15]

> The phrase "extraordinary circumstances that, in the opinion of the court, render repugnant to justice the equal sharing between the spouses" must accordingly relate to the exceptional situation and not to the common recurring one. The extraordinary circumstances will, I think, require to be those which force the court to say that, notwithstanding the primary direction to make an equal division, the particular case is so out of the ordinary that an equal division is something the court feels it simply cannot countenance . . . I think, therefore, that no mere imbalance in the contributions of the spouses, not even a substantial imbalance, is intended to be treated as an extraordinary circumstance. Only a gross disparity of a kind which simply cannot be ignored will suffice.

The Court of Appeal has recently been asked in three cases to decide between the two lines of authority just outlined. The leading decision is *Martin* v. *Martin*[16] and in this case along with the other two cases, *Dalton* v. *Dalton*[17] and *Williams* v. *Williams*,[18] the Court has opted in unmistakable terms for the restrictive approach and expressly approved the dicta of Quilliam J. in *Castle* v. *Castle.* Woodhouse J. was of the view that extraordinary circumstances[19]

> must not only be remarkable in degree but also be unusual in kind. It is vigorous and powerful language to find in any statute and I am satisfied that it has been chosen quite deliberately to limit the exception to those abnormal situations that will demonstrably seem truly exceptional and which by their nature are bound to be rare.

According to Cooke J.'s observations, extraordinary circumstances[20]

> must be such as to demand displacement of the equality rule for the matrimonial home or the family chattels, on the ground that equal sharing would amount to injustice so plain and serious that it ought not to be tolerated.

14 [1977] 2 N.Z.L.R. 97.
15 Ibid., 102-103.
16 [1979] 1 N.Z.L.R. 97.
17 [1979] 1 N.Z.L.R. 113.
18 [1979] 1 N.Z.L.R. 122.
19 Supra n.16, 102.
20 Ibid., 107.

Likewise, Richardson J. regarded the words of the section to be "strong words", imposing a "stringent" and "rigorous test allowing very limited scope for unequal sharing . . . ".[21] In reaching such a forthright and unanimous conclusion, their Honours paid special heed to the easily discernible intention of Parliament that equal sharing of the home and chattels should be a very strong presumption, not lightly to be abandoned.[22] It is submitted that their approach is not only in accord with the policy of the Act but also gives proper weight to the plain meaning of the words of section 14 themselves. If Parliament had intended that the presumption of equality could be avoided merely by showing that there were circumstances "out of the usual course" rendering equal sharing "inconsistent" with justice (the interpretation adopted by Jeffries J. in *Madden* v. *Madden*[23]), it could easily have said so.

In *Martin* v. *Martin*, the Court of Appeal rejected both grounds put forward by counsel suggesting that there were extraordinary circumstances. The first of these, that the change in the law in itself was extraordinary, need not detain us. The second was that the husband, by the provision of the matrimonial home and family income, had made a greater contribution to what was a second marriage for both parties and one that had lasted only a short time (three and a half years living together). Woodhouse J. expressed reservations whether a disparity of contributions could ever fall within section 14, a line similar to that taken in the Supreme Court by Perry J. in *Dalton* v. *Dalton*.[24] However his Honour did say that if such a disparity could ever be sufficient, "then the disproportion would have to be gross indeed".[25] Both Cooke and Richardson JJ. were prepared to countenance a comparison of contributions for the purposes of section 14, but they also required "a truly gross disparity" before the section would be satisfied.[26] On the facts, given the wife's management of the household, performance of family duties and care of the child of the marriage, the imbalance of contributions was hardly in the category of being truly gross.

In both the other cases, the Court of Appeal also refused to find the presumption of equality defeated. In *Williams* v. *Williams*,[27] the provision by the wife of a house valued at $95,968.75 was insufficient and in *Dalton* v. *Dalton*,[28] where the wife not only provided the whole of the capital of the matrimonial home and the bulk of the running expenses but also carried the brunt of the care of the children and the management of the household, their Honours did not find the disparity sufficiently gross (although Cooke J.'s conclusion was reached with some reluctance). It seems the application of section 14 will be rare indeed following these decisions.

21 Ibid, 110-111.
22 Cf. the Title of the Act, which includes a reference to recognising "the equal contribution of husband and wife to the marriage partnership . . . ".
23 Supra n.10. 24 [1978] 1 N.Z.L.R. 829, 836. 25 Supra n.16, 103.
26 Ibid., 107 per Cooke J. Cf. ibid., 112 per Richardson J.
27 Supra n.18. The wife was also alcoholic but an argument based on *Madden* v *Madden* would hardly succeed as she was also the substantial provider.
28 Supra n.17.

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A tentative summary must now be proferred with respect to the relevance of misconduct to section 14. While misconduct cannot by itself amount to a sufficient condition for the purposes of the section, the Court of Appeal's narrow interpretation invites the submission that serious misconduct will normally be a necessary condition, as had been suggested by Barker J. in *X* v. *X*.[28a] The Court has shown itself willing to admit the very rare possibility of a disparity of contributions falling within the section. If the facts in *Dalton* v. *Dalton* are not enough, what more is required unless it is a blameworthy failure by one party to pull their weight within the marriage? It is submitted that misconduct which has serious repercussions on the financial state of the marriage, and not merely proof of a classic matrimonial offence such as adultery, is the sort of additional factor a court will look for. Thus, alcoholism "which is notoriously expensive",[29] indolence, gambling and other methods of whittling away the matrimonial capital and income would be highly relevant, along with the other circumstances of the relationship.

2. *Valuation of the property*

In the context of section 14, the courts do not appear to have considered marriages involving cruelty but they have dealt with desertion and run up against a major problem. In *Bromwich* v. *Bromwich*[30] Barker J. was quite happy to regard a husband's desertion, coupled with a complete failure to maintain his family for seven years thereafter, to be the kind of situation contemplated by section 14. However section 2(3) requires the spouses' shares in matrimonial property to be determined "as at the date on which the parties ceased to live together as husband and wife . . . ". Events occurring after that date, even the most despicable kind of conduct, cannot therefore be taken into account for the purposes of section 14. This result was almost certainly unintended by Parliament. If for instance a party after the couple have separated mortgages the matrimonial home to finance his own private schemes, surely this is a classic situation where equal sharing of the equity left in the home should not take place?

In *Bromwich* v. *Bromwich,* Barker J., in an endeavour to avoid giving "this apparently worthless husband a half share",[31] turned to section 2(2), which states that any property is to be valued as at the date of the court hearing, subject to judicial discretion to decide otherwise. His Honour exercised this discretion and backdated the valuation so that after the inflationary increase in the value of the property between the date of separation and the date of the hearing had been deducted, the husband ended up in fact with a negligible share in the home.

Barker J. however placed a restrictive interpretation on his own judgment in *Bromwich* in another decision *Regan* v. *Regan*.[32] His Honour was asked to apply

28a Supra n.13. 29 *Madden* v. *Madden,* supra n.10, 135. 30 [1977] 1 N.Z.L.R. 613.
31 Ibid., 616. 32 (1977) M.P.C. 176.

section 2(2) where the wife had left home and paid no maintenance, thus forcing the husband to hire a housekeeper. But the wife had no maintenance order against her nor had she ever been asked to pay maintenance. Furthermore, she exercised access rights to the two children of the marriage and provided them with some clothing. His Honour said:[33]

> I do not consider that this is a proper case for me to exercise the discretion under s.2(2); the exercise of discretion is reserved for the cases where fault is far more obvious than it is in the present case, i.e., generally, for situations as in *Bromwich* and the other situations referred to in that judgment.

For present purposes, the important point to note is the reference again to "fault" as the key factor in exercising the discretion.

The propriety of using section 2(2) in the way just mentioned has now been pronounced upon by the Court of Appeal in *Meikle* v. *Meikle*.[34] In a factual situation not dissimilar from that in *Bromwich* v. *Bromwich* Roper J. had refused to use section 2(2) on the ground that it would be a misuse of that power to apply it for the purpose of reducing the husband's entitlement under the Act. The majority of the Court of Appeal, Woodhouse J. dissenting, reversed this decision and granted the wife a credit of $9000 for her contribution after the date of separation. In a lengthy judgment Cooke J. reviewed the cases on section 2(2) including *Bromwich* v. *Bromwich* and *Regan v. Regan,* and concluded that section 2(2) was "a valuable and flexible instrument of justice" which could be used "to adjust disparities arising after the marriage has broken down" without conflicting with the philosophy of the Act.[35] Richardson J. spoke similarly when he said that section 2(2) allows for "the recognition of the justice of compensating for disparity in contributions to the property subsequent to the date as at which the shares in the matrimonial property are determined".[36]

Their Honours are clearly, it is submitted, contemplating a situation where one party to a marriage has made tangible post-separation contributions to matrimonial property, as for instance by reducing the amount of a mortgage on the matrimonial home or by making structural improvements to the home. These contributions prima facie merge in the matrimonial property by virtue of sections 8(f) and 9(6) of the Act and would therefore be shared equally in the absence of the discretion in section 2(2) being exercised. It follows from this that a finding of fault will not always be necessary for the purposes of section 2(2). The injustice in equal division in the situations just considered flows not from any fault on the part of the non-contributing spouse but merely from the fact of the post-separation contribution. In practice, it is submitted that it is important that no disincentive be placed in the way of people who wish to make improvements to their property after they have separated from their spouse. If it is likely

33 Ibid., 178. Cf. *C.* v. *C.* (1977) M.P.C. 44, 45, and *Dempster* v. *Boyle* (1978) M.P.C. 60, 62 where Chilwell J. said that *Bromwich* v. *Bromwich,* though correctly decided on its facts, "should be confined to the type of serious fault situation which pertained in that case".

34 [1979] 1 N.Z.L.R. 137. Roper J.'s judgment is found in (1977) M.P.C. 142.

35 Ibid., 154.

36 Ibid., 159.

that half of what they do on their own behalf will automatically go to their erstwhile companion, such people would be well advised to do nothing at all, even if this means stalling on urgent repairs. The decision of the majority in *Meikle* v. *Meikle* will certainly go some way to removing any such disincentive. Unfortunately the use of section 2(2) in the way permitted by the Court of Appeal will not help where the post-separation contributions merely sustain matrimonial property rather than increase its value, in which case no benefit to the contributing spouse is going to be obtained by searching for an earlier date of valuation. It is the writer's view that Woodhouse J. in his dissenting judgment in *Meikle* v. *Meikle*[37] was correct in calling for a legislative amendment to make express provision for the courts to discount such post-separation contributions.

The question still arises whether fault can nevertheless be a relevant consideration under section 2(2), especially in the situation where the post-separation contributions are not made in tangible form to the property in question, but in such things as caring for the children of the marriage unaided by the departing spouse. On this question, Cooke J. says:[38]

> Accordingly I do not see a necessary implication in the Act that in exercising its discretion under s.2(2) the Court is bound to ignore the fact that a wife has been deserted and has had to fend for herself and the children between the desertion and the hearing. But a balance must be kept. For instance, if she has had the use of the house and a social welfare benefit, the Court must guard against any double payment. How most fairly to dispose of the case must be very much for the discretion of the Court in the particular circumstances . . . A *Bromwich* type order should be exceptional, as Barker J. himself recognised.

It is submitted that the final sentence quoted is an indirect nod in favour of the statement of Barker J. already quoted from *Regan* v. *Regan*.[39] However the mere existence of fault, especially of fault not in some way connected with the financial support of the family, will not by itself force a different date of valuation. This is recognised by Richardson J. in saying:[40]

> It is not that one spouse is penalised for being at fault in not discharging matrimonial obligations: s.18(3) reflects the principle that misconduct should not be taken into account under the Act unless it has significantly affected the extent or value of the matrimonial property. It is not that one spouse is compensated for the other's failure to fulfil his or her obligations to the family in the post-separation period: the scope of the discretion under s.2(2), tied as it is to considerations affecting the particular property which justify a different sharing of the change in value of that property during that period, is narrower than that.

The point is also well illustrated by the decision of Ongley J. in *Smith-Orton* v. *Smith-Orton*,[41] where the wife argued that an earlier date than the date of hearing was justified because of "the husband's conduct in associating with other women before the separation; in living with another woman since the separation; . . .

37 Ibid., 144.
38 Ibid., 155-156
39 Supra n.32.
40 Ibid., 159.
41 (1978) Unreported, Hamilton Registry M.243/77.

in drinking to excess; in striking his wife; and in 'going underground' following the separation". For his part, the husband argued that "the wife was bad-tempered and unbearable to live with . . . the strain of living with her forced him to give up his occupation as an insurance agent". While his Honour regarded aspects of the husband's conduct as "reprehensible", he did not feel the husband should be deprived of his share of the increased value of the property. What the evidence revealed was not so much unforgivable misconduct by the husband, but rather "a serious state of disharmony" between the two of them.[42] A more general point about matrimonial fault arises from this. If one is looking for evidence of one of the traditional matrimonial offences, it is often possible to pin fault on one of the spouses alone. However as has already been mentioned, the courts are becoming less interested in who committed adultery and more interested in broader kinds of misconduct. In looking at the totality of a marital relationship, it will usually be possible to find 'fault" on both sides.[43] The nagging wife may be just as much at fault as her husband who is driven to seek solace in an adulterous relationship. It is the rarer case where the courts will find only one spouse wholly to blame and even then they will be looking principally at conduct which has an effect on the financial side of a marriage.

3. *Marriages of short duration*

The rule requiring equal division of the home and chattels can be obviated not only by section 14 but also by section 13, if, inter alia, it can be shown that the marriage has been one of short duration. A marriage of short duration is one that has lasted less than three years, but this period may be extended by the court if it "considers it just" to do so.

A restrictive approach to the exercise of this discretion was developed by Barker J. in *Haggie* v. *Haggie*,[44] who said that there should be "some weighty reason" to depart from the three-year cut-off point. In the course of his judgment his Honour also indicated that serious misconduct may amount to such a weighty reason:[45]

> I do not seek to define the occasions when a marriage of more than 3 years will be regarded as 'a marriage of short duration' in terms of the Act. One could think of occasions where the conduct of one of the parties during the marriage had been quite exceptionally bad, or where it became obvious that the wife, say, was just 'hanging on' until the 3 years had elapsed to obtain for herself the undoubted benefits of this new legislation.

So, in *Lewis* v. *Lewis*,[46] Mahon J. held there was a marriage of short duration where in the month before separating, the wife had been out all night on eleven

42 Ibid., 5-6.
43 Cf. *Wachtel* v. *Wachtel* [1973] Fam. 72, 89-90 per Denning M.R. His Lordship prefers not to talk in terms of blame but to say that "both parties have contributed to the breakdown".
44 (1978) M.P.C. 98. Cf. *Edwards* v. *Edwards* (1978) M.P.C. 65. Contra *Chittenden* v. *Chittenden* (1978) M.P.C. 39.
45 Ibid., 99.
46 (1977) M.P.C. 125.

occasions and "there can be no dispute that those nocturnal absences all involved her association with [another man]".

In *Martin* v. *Martin*,[47] which has already been discussed in the context of section 14, the Court of Appeal made no direct reference to the relevance of fault in deciding whether to use the discretion in section 13(3), however their Honours' approach can by no means be regarded as a generous one towards those wishing to escape the equal division rule. They emphasised that the court must have "regard to all the circumstances of the marriage" and, in the words of Richardson J. must "refer to factors affecting the quality of the marital relationship, the manner in which the parties lived together and the time they did so."[48] According to Woodhouse J. " . . . the question in every case will be whether the marriage has been so restricted in point of time and unduly limited in terms of quality that it may justly be described as a marriage of short duration".[49] Thus "[a] marriage 'in name only' and with little companionship or mutual support, although the parties ostensibly lived as husband and wife under the same roof, could well be an example".[50] What is not an example is where one spouse has merely made a significantly greater contribution to the marriage or its assets than the other, but it is submitted that in evaluating the quality of the marriage there is no reason to leave out of the evaluation conduct of one of the spouses which has been "quite exceptionally bad". The precise weight to be attached to such conduct must however be left to the individual case.

4. *Contributions to the marriage*

Where the home and chattels are not to be divided equally because of the operation of sections 13 and 14, division is to be on the basis of the parties' respective contributions to the marriage partnership. Also, equal division for other items of matrimonial property can be obviated under section 15 where one spouse's "contribution to the marriage partnership has clearly been greater".[51]

Section 18 of the Act sets out what can be taken into account when assessing "contributions to the marriage partnership". By virtue of section 18(3) misconduct is excluded from this assessment unless it has been "gross and palpable and has significantly affected the extent or value of the matrimonial property". Despite this narrow definition of misconduct, general misconduct may be indirectly relevant if for instance it affected the ability of the spouse to make positive contributions of the kind listed in section 18(1). Jeffries J. recognised this in *Madden* v. *Madden* when he said that "[a]lcoholism usually brings about a

47 Supra n.16. 48 Ibid., 109. 49 Ibid., 101.
50 Ibid., 106, per Cooke J.
51 An issue left unresolved by the Court of Appeal in *Barton* v. *Barton* [1979] 1 N.Z.L.R. 130, is whether s.15 requires a clearly greater contribution to be proved or whether it merely requires clear proof of some difference in contribution, no matter how great or small. Woodhouse J. favours the first interpretation, Cooke J. the second, and Richardson J., while expressing a preference for the second refused to reach a final conclusion on the matter. The writer prefers the first interpretation for reasons similar to those which influenced the Court of Appeal's decision on s.14.

diminished performance on the part of the sufferer".[52] Such things as alcoholism can also be brought directly within section 18(3) so long as there are significant financial side-effects. In interpreting section 18(3), the words of Lord Simon in *Haldane* v. *Haldane*,[53] commenting on a similar provision in the previous law, must still be the leading authority:[54]

> . . . such matrimonial misconduct as adultery or cruelty or desertion will generally be irrelevant to any order made under the Matrimonial Property Act. On the other hand, such misconduct as sluttishness or extravagance on the part of a wife or reckless gambling by a husband could be taken into account where it has had a direct or indirect effect on the family fortunes.

One might wonder what exactly "sluttishness" means but clearly alcoholism, and the spending of substantial amounts of money on a mistress during the course of a marriage will be relevant.[55] It is submitted however that the decision under the old law in *Coffey* v. *Coffey*[56] could not stand under the 1976 Act. There a couple were forced to shift house from one side of Auckland to another in order to remove temptation from the husband's way, namely the lady with whom he was having an affair. The plan failed, the affair continued and the marriage broke down. It was held that the husband's conduct affected the acquisition of the matrimonial home and could therefore be taken into account. The 1976 Act makes no mention of "acquisition" of property and refers only to its "extent or value".

The conduct must also be "gross and palpable". In *Mentink* v. *Mentink*,[57] Roper J. did not consider a husband's "irresponsible decision to give up work, his refusal to seek other employment and his unrealistic and ill-prepared plans for self-employment" (as alleged by the wife) to be gross and palpable misconduct. His Honour went on:[58]

> This submission . . . really amounts to a plea that I should penalise the Respondent for failing to act as a 'reasonably prudent' husband, but I think the Act presents enough difficulties without attempting to import the standards of that unadventurous bore into its provisions.

The meaning of "gross and palpable" will be discussed again in the context of the law of maintenance.

5. *Ancillary orders*

The final aspect of New Zealand's matrimonial property law it is intended to mention is the form of order that the court can make to give effect to its primary decision about the parties' respective shares in the property. This question is most sharply brought into focus when one party seeks the immediate sale of the matrimonial home and the other seeks an occupation order.[59]

52 Supra n.10, 135.
53 [1976] 2 N.Z.L.R. 715 (P.C.).
54 Ibid., 728. See s.6A Matrimonial Property Act 1963.
55 Cf. *Greenslade* v. *Greenslade* (1978) Unreported, Christchurch Registry M. 346/77. See also *Godfrey* v. *Godfrey* (1978) M.P.C. 90 (unexplained dissipation of cash).
56 [1976] 2 N.Z.L.R. 629.
57 (1978) M.P.C. 143, 144.
58 Idem.
59 Sections 27, 28 and 33 Matrimonial Property Act 1976.

The second part of section 18(3) states:

> The Court may, however, have regard to such misconduct in determining what order it should make under any of the provisions of sections 26, 27, 28, and 33 of this Act.

According to Jeffries J. in *Hackett* v. *Hackett,*[60] the kind of misconduct which can be considered in deciding ancillary orders is the narrow kind which is gross and palpable and significantly affects the extent or value of the matrimonial property. Other cases on the other hand have taken the line that Jeffries J. misinterpreted section 18(3). According to Chilwell J. in *Y* v. *Y*[61] the narrow approach renders the second sentence of section 18(3) "otiose" and Vautier J. in *Petty* v. *Petty*[62] expressly followed a much wider test suggested by Roper J. in *Van Zanten* v. *Van Zanten*[63] that any misconduct may be relevant if serious enough. More recently in *Eade* v. *Eade*[64] Roper J. has expressed the view that where a wife has left home for no good reason it is unjust that the husband could be ousted from the home by an occupation order simply because the wife had the foresight to take the children with her.

It is submitted that the prevailing view is that any misconduct may be taken into account in determining ancillary orders. It is also submitted that this should be so as a matter of policy. Normally the decision whether to order the sale of a house is going to cause hardship to one spouse or the other. Either the present occupant of the home will have to leave and find alternative accommodation or else the other spouse will have to be prepared to see his capital tied up in the property for as long as the occupation order is in force. Given such hardship, it seems not unreasonable that in the case where one party has clearly been at fault and carries the main responsibility for the marriage breakdown, the other party should not be the one to suffer. This view is proffered not with any desire to see the "guilty" punished, but rather to avoid too great a burden falling upon the "innocent". In some cases, other factors, such as the need to provide the children with a roof over their heads, may still justify an order favouring the "guilty" spouse. And it must also be reiterated that in many cases if the whole of the relationship is examined there may be fault on both sides. The evidence of misconduct by one spouse only ought therefore to be very compelling before affecting the form of order.

60 [1977] 2 N.Z.L.R. 429, 431-432.

61 [1977] 2 N.Z.L.R. 385, 387.

62 (1977) M.P.C. 157.

63 (1977) M.P.C. 217.

64 (1978) Unreported, Christchurch Registry M. 351/78. Cf. *Rountree* v. *Rountree* (1977) M.P.C. 187 where Roper J. also casts serious doubt on the general proposition that the spouse with custody of the children of the marriage should be entitled to possession of the matrimonial home. The children in that case were aged 5 and 7 and his Honour thought "that if they are to be uprooted it is better that it be done now". The parties were divorced and the grounds for the divorce were the wife's adultery with a man she continued to have an association with. Roper J. was of the view that this association had to be considered, "not as a matter of misconduct in terms of s.18(3) for the parties are now divorced, but as a potential source of support, financial and otherwise".

The ancillary powers in section 33 of the Matrimonial Property Act 1976 can also be of use in another situation, exemplified by *Brink* v. *Brink*.[65] There, following the separation of the parties, the husband shipped out of New Zealand chattels worth $15,000 and then himself sailed from New Zealand in a yacht worth $30,000 taking $4000 cash with him. The only substantial asset left in New Zealand was the home, the equity being $24,000. There is no doubt that justice favoured Mrs. Brink and that her husband's conduct was deplorable. However both were entitled to equal shares in the property. Speight J. used the powers in section 33 to give the wife an unencumbered right to the whole of the equity on the basis that the husband already had more than his equivalent share in the things he took away with him. As Speight J. observed if the husband had still been entitled to a share in the equity after taking those things into calculation, a much less fortunate result would have been achieved.[66] The wife's rights would not have been unencumbered. Even less satisfactory is the situation where one spouse has disposed of some of the matrimonial assets and squandered the proceeds. The only possible redress for the innocent spouse here, apart perhaps for an argument based on the date of valuation of the remaining assets, is to challenge the disposition under section 44.[67] It must be shown however that the disposition was made "in order to defeat the claim or rights" of the other spouse under the Act and that the recipient of the property received it "otherwise than in good faith and for valuable consideration". The protection given the innocent spouse is therefore somewhat limited.

III. MAINTENANCE

A. *The Present Law*

The law of maintenance in New Zealand is at present encompassed within the Domestic Proceedings Act 1968 and the Matrimonial Proceedings Act 1963. Under section 43(d)[68] of the latter Act the conduct of the parties is a factor the courts must have regard to. Under section 28[69] of the former Act, the court is given a discretion whether or not to have regard to the parties' conduct, provided that it shall not refuse to make an order in favour of a wife if she is unable to provide the necessities of life for herself "having regard to her health, to her responsibilities towards any child of the family, or to other circumstances".

Strangely, very little judicial guidance has been given on the precise effect of misconduct on maintenance claims. One suspects that particularly at the Magistrate's Court level there are variations in the application of the law depending upon the views of the individual magistrate. In *Taylor* v. *Taylor*[70] however, a

65 [1978] 1 N.Z.L.R. 734.
66 Ibid., 738. Cf. *Letica* v. *Letica (No. 2)* (1978) M.P.C. 122, 124-125.
67 See also s.43 whereby dispositions may be restrained in advance and s.42 which entitles a caveat to be lodged against the title to land over which the caveator claims an interest under the Matrimonial Property Act 1976. For an excellent discussion see Fisher *The Matrimonial Property Act 1976* (Wellington, 1977) 37-46 and 139-140.
68 Cf. c.44(2)(b) Matrimonial Proceedings Act 1963 as amended by the Matrimonial Property Act 1976, Second Schedule.
69 Cf. s.33 Domestic Proceedings Act 1968.
70 [1974] 1 N.Z.L.R. 52, 53.

case under the Matrimonial Proceedings Act 1963 Beattie J. said ". . . the Court should not impose such a burden on the husband as to jeopardise the chances of his second marriage, more particularly where the other party has misconducted herself after the separation". So if there is the hint of hardship on the respondent, the courts are unlikely to assist a "guilty" applicant, even more especially where the applicant's predicament has been caused by or exacerbated by her own misconduct, as in *O'Sullivan* v. *O'Sullivan*.[71] In that case the wife gave birth, after the parties had separated, to a child of which the husband was not the father. The child suffered from a serious brain disorder and needed constant care, thus preventing the wife from working and at the same time creating her need for financial support. McMullin J. held that the husband should pay no maintenance because the wife's difficulties had been caused by her misconduct. This case may be contrasted with *Dykhoff* v. *Dykhoff*[72] where during the marriage the husband had viciously assaulted the wife and received a four month prison sentence as a result. After the marriage however the wife had committed isolated acts of adultery. Casey J. held that although the wife's actions amounted to wrongful conduct they were not of sufficient gravity to disentitle her from maintenance. In other words, her financial needs had been totally unaffected by the adultery. The court in *Dykoff* was also doubtless influenced by the husband's blatant misbehaviour.

In respect of misconduct by the respondent the law has moved rapidly in recent years, especially where there are insufficient funds to support two households. So if for instance the husband is living with a woman in a de facto relationship, even if he is supporting her and her own children, the courts will not grant a maintenance order against him which will have the effect of reducing him below the poverty line.[73] The first wife who misses out in her application for maintenance will not suffer too much because if she is in financial need, this will probably be met by the state through the payment of a domestic purposes benefit.[74]

Variation of maintenance orders is dealt with in section 85 of the Domestic Proceedings Act 1968 and although no express mention is made of misconduct,

71 [1974] 1 N.Z.L.R. 257.

72 (1975) Unreported, Christchurch Registry; [1975] N.Z. Current Law 1089.

73 *Letica* v. *Letica* [1976] 1 N.Z.L.R. 667. Cf. *Matangi* v. *Matangi* [1974] 1 N.Z.L.R. 55, *Newton* v. *Newton* [1973] 1 N.Z.L.R. 225, *Roberts* v. *Roberts* [1974] 2 N.Z.L.R. 654, *Skelton* v. *Skelton* (1978) Unreported, Auckland Registry M. 615/78. It is assumed by the writer that conventional morality still regards de facto relationships as wrongful conduct.

74 Section 27A-27H Social Security Act 1964. Where the entitlement to a domestic purposes benefit cannot be established, applicants are normally given an emergency maintenance allowance under s.61 (emergency benefits). An element of fault can enter into eligibility requirements for social security benefits by virtue of the "cohabitation rule" under which the Social Security Commission is entitled to treat as husband and wife "any man and woman who, not being legally married, have entered into a relationship in the nature of marriage": s.63 as inserted by s.17 Social Security Amendment Act 1978. For the very broad interpretation which can be given to this new provision, see *Furmage* v. *The Social Security Commission* (1978) Unreported, Wellington Registry M. 500/77.

the courts have clearly affirmed that it may be the basis of variation proceedings.[75] It will be much easier to convince a court of the need to change an order if the misconduct has financial consequences, as where a man with whom the wife is having relations is financially supporting the wife. But White J. in *Mitchell* v. *Mitchell*[76] makes it clear that something less may be adequate:

> . . . conduct may well be an important consideration where, for example, a wife has become involved in a semi-permanent association falling short of a stable de facto relationship or where a husband's maintenance is being used in part to enable a wife to associate intimately and continually with other men. It seems to me that associations of that nature were not intended by the Legislature to be subsidised by a husband or former husband and that they are contrary to the public interest. In my view, the cases support the view that conduct is a factor to be considered and that the variation of an order does not depend in all cases on the question whether the evidence has established a financial contribution by 'the other man'.

B. *The Future Law*

The law on maintenance is at present under review. Reform measures are contained in the Family Procedings Bill 1978 and express reference to the parties' conduct is retained, although in a modified form. Clause 52 reads:

> A right of a party to a marriage to be maintained by the other party to the marriage (whether during the marriage or after its dissolution), and the amount of maintenance, may be affected by —
>
> (a) Conduct of the first party that artificially prolongs the needs for which maintenance is payable; or
>
> (b) Misconduct of the first party that is so gross and palpable that it would be repugnant to justice to require the other party to pay such maintenance.

Several points are worthy of comment. First, the clause favours the approach of the Domestic Proceedings Act 1968 rather than that of the Matrimonial Procedings Act 1963 in making the relevance of conduct a matter of discretion for the court. The court is not required to consider conduct with respect to either the initial obligation to pay maintenance nor the actual amount to be paid, but may do so.

Secondly, only the actions of the spouse seeking maintenance may be taken into account. Presumably the policy behind this change is that a potential recipient might forfeit his maintenance rights by blatant misconduct, but if the payer had acted wrongfully, there should be no opportunity of being punitive towards him and granting a larger order than might otherwise be justified. It must also be presumed however that the payer's conduct cannot entirely be left out of account because of the need to test whether the requirement to pay maintenance would be "repugnant to justice", a phrase reminiscent of section 14 of the Matrimonial Property Act 1976. If the payer has been guilty of gross misconduct as well as the recipient, then the payer can hardly claim that justice demands he pay no maintenance.

75 *Mitchell* v. *Mitchell* [1975] 2 N.Z.L.R. 127, *Cross* v. *Cross* (1977) Unreported, Auckland Registry M. 204/77, *Turner* v. *Turner* (1978) Unreported, Christchurch Registry M. 551/77.

76 Ibid., 129-130.

Next, the phrase "gross and palpable" in clause 52(b) indicates that not all misconduct is the kind a court may have regard to. The word "gross" means that the conduct must be serious and flagrant while "palpable" requires the conduct to be obvious and blatant. A line of English authorities has considered similar words and they reveal that the misconduct must be very serious, totally without mitigating factors and selfishly one-sided. A classic instance of this strict approach is *Harnett* v. *Harnett*,[77] which was dealing with the phrase "both obvious and gross", first coined by Ormrod J. in *Wachtel* v. *Wachtel*.[78] In *Harnett* v. *Harnett* the wife was caught "red-handed" by her husband with a twenty years old lodger. This "ridiculous affair with a youth half her age"[79] did not continue after its discovery although it had lasted eight months prior to that. The court took the view that although the wife had acted foolishly, her behaviour fell far short of being obvious and gross. One might be forgiven for thinking the wife's conduct to be serious and though some explanation was offered for it,[80] the case still represents a strict line on what will influence the court's decision. It is submitted that a New Zealand court interpreting clause 52 of the Family Procedings Bill 1978 should be similarly strict.

Fourthly, the conduct required for clause 52(b) need not affect the extent or value of the matrimonial income or property. A manifestly disgraceful series of adulterous relationships might therefore be sufficient. The contrast should be apparent with matrimonial property where, as has been seen, the legislative and judicial trend is principally towards the relevance of misconduct only with financial consequences. Whether the discrepancy in approach between maintenance and property division can be justified is moot. Some justification may be found in the permanent nature of a matrimonial property decision, which is based essentially on rights accrued over years of married life which should not be negated by adultery. This may be compared with the transitory nature of the maintenance obligation, the imposition and amount of which is so much more uncertain and based more on present circumstances.[81] Whatever the rationale for clause 52(b), the kind of conduct necessary for clause 52(a) of the Family

77 [1974]1 All E.R. 764 (C.A.).
78 [1973] Fam. 72, 80. Cf. Lord Denning M.R.'s comments, ibid., 90.
79 [1973] Fam. 156, 166 per Bagnall J. in the High Court.
80 The husband was described as having "a dominant and dominating personality . . . he undoubtedly lacked the gentle touch. He saw situations in clear terms of black or white with no grey. Clearly he was capable of violence, at any rate under provocation": ibid., 167, quoted by Cairns L.J., supra n.65, 768.
81 Other fundamental differences between the Family Proceedings Bill 1978 and the Matrimonial Property Act 1976 can be elicited. The emphasis in the latter Act is upon marriage as a partnership of equals and hence the basic rule is one of equal division of the marital property. No comparable concept of marriage can be found in the Family Proceedings Bill 1978, and so there is no suggestion of equal division of marital income, even though during marriage salary and wages are matrimonial property under s.8(e) Matrimonial Property Act 1976. The discrepancy is perhaps inevitable considering that the 1978 Bill deals principally with circumstances arising after a marriage has broken down, when income is likely to be separate property: s.9(4) Matrimonial Property Act 1976. See also K. J. Gray *Reallocation of Property on Divorce* (Abingdon, 1977) 278 ff, who distinguishes between the "property approach" and the "support approach".

Procedings Bill will probably be the sort that has financial consequences, as when a spouse of employable age makes no attempt at all to find an income. This provision would appear to be in line with the unstated policy of the Act that maintenance should be seen primarily as rehabilitative and that the obligation should not last unreasonably beyond the time when the recipient should have become self-supporting.[82]

Finally, clause 52 will also be the test to be applied where an application has been made to discharge or vary a maintenance order or agreement. This follows from clause 93 of the Bill which expressly states that the same principles governing the initial proceedings also govern variation proceedings.

IV. CHILDREN

In any proceedings under the Guardianship Act 1968, i.e. custody, access, wardship and guardianship proceedings, the welfare of the child is the first and paramount consideration.[83] Because the law aims to do what is right for the child rather than mete out justice as between the competing parents (who will be the most common parties to proceedings under the Act), fault is relevant only in so far as it affects the welfare of the child.

The so-called "unimpeachable parent" cannot therefore expect by virtue of their perfect behaviour to secure any significant advantage over the other parent in a custody dispute. This point is made clear in the important but unhappily unreported judgment of Richardson J. in *H* v. *H*:[84]

> It is well established and was recently re-emphasised in *S.(BD)* v. *S.(DJ)* [1977] 1 All E.R. 656 that the question is not what the essential justice of the case requires having regard in that context to amongst other considerations the views of an unimpeachable parent. It is what the best interests of the child requires. In that case too Ormrod L.J. deprecated the use of terms such as 'unimpeachable parent' and the kind of value judgment involved in the use of that term in custody disputes between parents. There can only be one 'first and paramount consideration'. All other considerations must be subordinate.

His Honour went on however to point out that all aspects of a child's welfare need to be taken into account, including its moral welfare. It is another question to determine what a child's moral welfare demands especially as "the concept of what is in the child's best interests necessarily changes with changing community values and moral standards".[85] His Honour continues:[86]

> It is not for a court to impose any moral standards other than those which in the society of the time are regarded as properly conducing to a child's welfare. It does

82 The clearest example in the Bill expressly embodying this policy is cl.50(2) which states:

> "Where a marriage is dissolved, each party shall assume responsibility within a reasonable period of time for meeting his or her own needs, and on the expiry of that period of time his or her right to maintenance . . . shall accordingly cease."

83 Section 23 Guardianship Act 1968.

84 (1977) Unreported, Auckland Registry M. 614/77, 4. Cf. *In re K (minors)* [1977] 2 W.L.R. 33.

85 Ibid., 5.

86 Ibid., 6-7.

not follow that moral standards are to be abdicated in deference to the apostles of a permissive society . . . marital faithfulness may not be universally regarded as an absolute whatever the circumstances. But I cannot agree that the community regards it as outmoded and of no consequence. All things being equal, it is an unnecessary complication for a child to live in a de facto association.

In the opinion of Richardson J. community values have not changed so much that one can safely ignore a continuing course of adulterous conduct.[87] But he is surely concerned about this not from the point of view of protecting the interests of an innocent or unimpeachable spouse, nor from the point of view of ensuring the entrenchment of one particular value system but rather because the child's personal development might suffer from close exposure to unconventional behaviour.

In disputes involving children the courts will also of course be interested in the parties' conduct as parents, not merely in the way they treat their marriage vows. It is highly relevant in a custody dispute to know if a parent has been violent towards the child or has been guilty of child neglect. Any such evidence would raise the suspicion that it would be repeated and therefore cast serious doubts on the person's suitability to have custody of the child in the future.

To sum up, fault is not irrelevant in the modern law relating to children. However it operates quite differently in this area from the area of adjustment of financial rights as between spouses.

VI. CONCLUSION

The Family Procedings Bill 1978 and the predicted introduction of family courts may suggest the decline of fault as a major consideration in family law disputes. However this survey of some of the major areas of family law[88] has shown that the fault concept persists. Further evidence could be marshalled from the legal treatment of phenomena such as domestic violence. Wife or husband battering is a form of marital misconduct that few would condone and the law's response has rightly been to increase the protection given to the victims of such violence and thereby place greater responsibility on the wrongdoer for his action.[89]

Generally, however, the treatment of fault today is rather more sophisticated than in the days when the simple matrimonial offence doctrine decided all, and one act of adultery could place the "innocent" party in a position of complete

87 Cf. judicial attitudes to homosexuality. See *In the Marriage of B.A. and B.W. Spry* (1977) 3 Fam. L.R. 11,330, 11,334 per Murray J.: "It is my view that lesbianism *per se* does not make a mother unfit to have custody, but it is a factor which cannot be ignored and must be taken into account with other factors that make up the total situation". See also *Campbell* v. *Campbell* (1974) 9 S.A.S.R. 25 and *In the Marriage of Cartwright* (1977) 3 Fam. L.N. 55.

88 Reference could also be made to the principles for awarding costs (see especially Webb "Costs in divorce suits again" [1976] N.Z.L.J. 290) and that curious anachronism, the enticement action (see s.3 Domestic Actions Act 1975 and J. Hodder "On Enticement of Spouses" (1979) 2 The Capital Letter (No. 2), 1).

89 Sections 161 and 162 Family Proceedings Bill 1978. Cf. Domestic Violence and Matrimonial Proceedings Act 1976 (U.K.) and the leading authority on that Act, *Davis* v. *Johnson* [1978] 1 All E.R. 1132 (H.L.).

and enviable superiority. On the one hand the courts are more interested in the potential effect of likely future conduct on the welfare and safety of other members of the family. This is especially important in custody applications and in determining the duration of a maintenance obligation. On the other hand, the courts are concerned to adjust rights where past actions have had financial consequences. This may affect the maintenance obligation but it is of greatest significance in relation to the law of matrimonial property. The situations which are resolved purely by reference to the allocation of blame for the breakdown of the marriage are becoming increasingly few.

All attempts to remove recrimination and bitterness from marital disputes must surely be wholeheartedly applauded. For this reason the Family Proceedings Bill 1978 is to be welcomed. Nevertheless the law advances at its peril if it does not reserve some place for popular notions of justice. While the proof of fault should not at the instance of the "innocent spouse" hold up the granting of a divorce and hence the chance of remarriage nor pre-empt the decision of what is in the best interests of the child in custody cases, it should play an appropriate part in the law on financial adjustment . It is the writer's view that the law is moving to a position where substantive rights to matrimonial income and capital will be determined by taking into account misconduct only where it detrimentally influences the financial state of the parties. Procedural matters, such as the form of order in a matrimonial property application, may be affected by misconduct of a more general kind, so long as it is sufficiently serious. One way or another, the law will not totally ignore the morality of the conduct of parties to a marriage.

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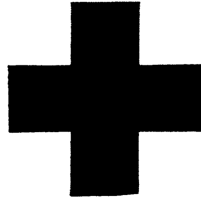

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