THE MODERN CONCEPT OF CRUELTY

(A Comparative Study)

Of all the matrimonial offences, cruelty is perhaps the most controversial. The cases on cruelty have been decided without unity of thought. Moreover, the judges have not defined cruelty. The existence of cruelty is a question of fact and each case must be considered in the light of its own particular circumstances. But the question whether the acts complained of amount to legal cruelty or not is a mixed question of fact and law.[1] The concept of cruelty was summed up by Danckwerts L.J. in *Hall* v. *Hall*[2] where he said:[3]

> I would respectfully suggest that there is too much talk in matrimonial cases about a party accepting the other "for better or for worse," or about the behaviour which a party bargains to endure". . . The phrase "for better or for worse" in jurisdictions in which divorce is not recognised might have some sense, but in this country, where the law provides for divorce, it seems to me to be something of a cynical jest.

However, in most cases, as Goodhart has pointed out,[4]

> These words are given a more restricted construction, so that they really mean, "for better or for worse" but not for much worse.

It may be said that "although cruelty, as a legal concept, has not changed its features in any significant way since it was a ground for divorce *a mensa et thoro* in ecclesiastical law, the concept accepted and acted on by the courts is just as appropriate to modern marital conditions as it was to conditions in its history when marital duties were regarded in a somewhat different light."[5] The concept of cruelty has been slowly modified with the passage of time in accordance with the growth of modern life. In the words of M. Puxon,[6]

> The position had been reached where any conduct which caused injury to health — and 'injury' was loosely construed — could amount to cruelty, however far removed it was from the everyday concept of cruel conduct.

1. *Tomkins* v. *Tomkins* (1858) 1 Sw. & Tr. 168.
2. [1962] 1 W.L.R. 1246.
3. *Ibid*., at p. 1253. See also A. L. Goodhart, "Cruelty, Desertion and Insanity in Matrimonial Law", (1963) 79 L.Q.R. 98 at p. 110.
4. *Op. cit*., at p. 103.
5. B. D. Inglis, *Family Law,* (New Zealand, 1960), at p. 224.
6. "The Changing Face of Cruelty", (1962) 106 Solicitors' Journal 579.

However, the courts have always resisted the temptation of opening the door of cruelty too widely;[7] "there must be cruelty, not merely incompatibility of temperament resulting in distress and unhappiness;"[8] "Humanity is the second virtue of courts, but undoubtedly the first is Justice".[9]

In 1951, Lord Merriman P. expressed the hope that some day a full Court of Appeal would consider anew the whole question of cruelty.[10] Last year, two important decisions on cruelty were given by the House of Lords.[11] As there is still no unity of judicial opinion, their Lordships being divided, it is appropriate to review the law on this subject as it stands today.

An attempt will be made here to clarify the points in issue. There appear to be the following matters which are in controversy, but they will have to be discussed conjunctively since they are closely connected:

1. Whether cruelty might be denned objectively or subjectively.
2. Whether intent to injure is an essential element of cruelty or not.
3. What is the purpose of matrimonial relief for cruelty? Is it to protect the petitioner or to punish the guilty ?

CRUELTY NOT DEFINED

The divorce law of England, following the ecclesiastical law is founded on the concept of the matrimonial offence. The same principle is followed in the Women's Charter, 1961[12] in Singapore. That concept is used to give some justification for breaking an indissoluble union against the will of the offending party.

In all matrimonial disputes whether in the Magistrates' Courts or in the Divorce Courts, the word 'cruelty' has the same connotation. It has a long history behind it. Before 1857 divorce *a mensa et thoro* [13] on the ground of cruelty was a well established remedy given by the Ecclesiastical Courts. In 1857 by the Matrimonial Causes Act, 1857 [14] the Divorce Court took over the jurisdiction of the Ecclesiastical Courts with the added statutory powers to grant decrees of dissolution of marriage. Under section 16 of the Matrimonial Causes Act, 1857, cruelty combined with adultery was sufficient to support a wife's petition for divorce, and cruelty alone sufficient to support a wife's petition for a

7. *Kaslefsky* v. *Kaslefsky* [1951] P. 38 at p. 48. *per* Denning L.J.
8. *Ibid*., see also Inglis, *op. cit*., at pp. 224-225.
9. *Evans v. Evans* (1790) 1 Hag. Con. 35 at p. 36; See also Inglis, *op. cit*., at p. 225.
10. *Simpson* v. *Simpson* [1951] P. 331 at p. 339.
11. *Gollins* v. *Gollins* [1963] 3 W.L.R. 176; *Williams* v. *Williams* [1963] 3 W.L.R. 215.
12. No. 18 of 1961.
13. "From bed and Board". [Divorce, Judicial Separation]; See J. B. Saunders, *Morley and Whitley Law Dictionary,* (London, 1962).
14. 20 & 21 Vict., c. 85.

judicial separation. By the Matrimonial Causes Act, 1937,[15] (now consolidated in the Act of 1950[16]), divorce for cruelty was introduced for the first time. The Act requires that the respondent shall have "treated the petitioner with cruelty". The Women's Charter, 1961 in Singapore also requires that the respondent has since the solemnization of the marriage "treated the petitioner with cruelty".[17] Earlier Acts had used the words 'guilty of cruelty'. The Commonwealth Act, 1959 in Australia provides as a ground for divorce "that since the marriage, the other party to the marriage has, during a period of not less than one year, habitually been guilty of cruelty to the petitioner".[18] Thus, the ground of cruelty *simpliciter* has been introduced for the first time as a Commonwealth wide measure in Australia. Previously South Australia was the only state with a similar provision. The Australian requirement of habitual cruelty for at least one year will render this ground even more difficult to establish than the English one, *i.e.* that the respondent has "since the celebration of the marriage treated the petitioner with cruelty."[19]

There has been much argument about the meaning of the word 'treated'. In 1963, Lord Reid in *Williams* v. *Williams*[20] said that, what Parliament did in 1937, was to provide an additional remedy for cruelty. It did not touch the older remedy of judicial separation which is still available. For that remedy cruelty must have the same meaning today as it had before 1937. It is incredible that cruelty has now a different meaning according to which remedy is sought. But quite apart from that it seemed obvious to Lord Reid that Parliament could not have intended to alter the former meaning of cruelty. If it had been intended to alter the meaning no one in or out of Parliament would have been so careless as to leave that intention, and the extent of the intended alteration of meaning, to be inferred from the mere use of the word 'treated'.

However, this verb has given rise to the argument that the conduct complained of must be *aimed* at the other spouse. In other words, can unintentional acts however injurious to health amount to legal cruelty, or must there be some evidence of malignity? Must the motive of the respondent be examined, or is it sufficient to show that the behaviour

15. 1 Edw. 8 & 1 Geo. 6, c. 57.

16. 14 Geo. 6, c. 25.

17. By s. 84(1) (c) of the Matrimonial Causes Act, 1950, it is provided that a petition for a divorce may be presented to the court either by the husband or wife on the ground that the respondent has since the celebration of the marriage treated the petitioner with cruelty. Similar is the wording in the Women's Charter, 1961. See s. 84(1) (c) and (2) (e); under s. 84(1) (c), any husband may present a petition for divorce to the court praying that his marriage may be dissolved on the ground that his wife has since the solemnization of the marriage treated the petitioner with cruelty. A similar right is given to the wife under s. 84 (2)(e).

18. Matrimonial Causes Act, 1959 (No. 104 of 1959, s. 28(d)).

19. H. Tarlo, "Intention and Insanity in Divorce Law", (1963) 37 Australian L.J. 3 at p. 9.

20. [1963] 3 W.L.R. 215 at p. 218.

was such that it must inevitably injure, and did in fact injure, the petitioner?[21]

The expression 'cruelty' has not been defined in the statutes of England, Australia or Malaysia. The Royal Commission on Marriage and Divorce proposed that the concept of cruelty should continue to be defined by precedent and not by statute.[22] The word cruelty has often been used as though it were interchangeable with the term 'physical violence'. The two appear to be quite distinct. The essence of cruelty does not consist of violence. "Cruel" is defined in *'Chambers' Dictionary'* as "Disposed to inflict pain, or pleased at suffering; void of pity, merciless, savage; severe"; and in the *Concise Oxford Dictionary* it is defined as "Indifferent to, delighting in, another's pains". Therefore, one may conclude that cruelty really depends on the state of mind of the person inflicting pain, rather than the actual infliction of the pain.

Cruelty, however, has been defined in India in the Hindu Marriage Act, 1955 — as meaning that the other party has treated the petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party.[23] It is difficult to understand why the usual phraseology appearing in the other Indian and English enactments on Divorce, *i.e. "treated* the petitioner with cruelty", has been departed from in this section. The possible explanation could be that the courts have almost unanimously held that cruelty consists of danger to life, limb, or health, bodily or mental, or a reasonable apprehension of it. Under this section it is necessary to prove not only that the past acts of cruelty would create a reasonable apprehension of them, but it must also be proved that they would create a reasonable apprehension "in the mind of the petitioner" that it would be harmful or injurious for the petitioner to live with the other party. This phraseology may create complications in the application of the rules by Indian courts.[24] Under this Act, a petitioner

21. See M. Puxon, *op. cit.,* at p. 579.

22. Report on Marriage and Divorce, (1956) (Cmd. 9678), para. 133.

23. S. 10 — The Hindu Marriage Act, 1955 (No. 25 of 1955), has made drastic changes in the old Hindu Law of Marriage in India. The Act has given all Hindus, whether married before or after the commencement of the Act the right, in specified circumstances, to obtain a decree of nullity, or of dissolution of marriage. The marriage must be monogamous. This is a revolutionary change in the Hindu law. The grounds of judicial separation and divorce are not identical. Cruelty is a ground for judicial separation but either party to a marriage may seek a dissolution of marriage by decree of divorce on the ground that the other party has not resumed cohabitation for two years or more after the passing of a decree for judicial separation (s. 12). Under the Special Marriage Act, 1954 (No. 43 of 1954), the grounds of judicial separation and divorce are identical. The Special Marriage Act, 1954, is also applicable to Hindus. Under this Act, it is no longer necessary for parties to a marriage to declare either that they do not belong to any religion or that both of them belong to the same religion. Previously they had to make a declaration that both of them belonged to the same faith, namely, the Hindu, Sikh, Buddhist or Jain religion. (See The Special Marriage (Amending) Act, 1923 (No. 30 of 1923)). Marriage under the Special Marriage Act, 1954 is deemed to effect his severance from such joint family (s. 19). If the Hindus desire to marry in the sacramental form, then their marriage is governed by the Hindu Marriage Act, 1955.

24. S. V. Gupte, *Hindu Law of Marriage,* (Bombay, 1961), at p. 163.

has to prove not only past acts of cruelty but also reasonable grounds for apprehension of cruelty in the future. This may be a difficult thing to prove. The test is objective; yet the standard required would be that of a reasonable person, placed in such circumstances. But one cannot help wondering whether such a test would lead to just results in the case of sensitive persons.

The word 'cruelty' has not been defined in the Dissolution of Muslim Marriages Act, 1939 which is applicable in India and Pakistan, but the acts which have been deemed to constitute cruelty for the purpose of this section have been fully given and they include physical as well as mental cruelty. Under English law, cruelty by the husband as well as by the wife can be a ground for the dissolution of a marriage. Under Muslim law a husband can himself divorce his wife when he is not happy with her and therefore the Act does not make any provision for the dissolution of a marriage in such a case. A woman married under Muslim law is now entitled to obtain a decree for the dissolution of her marriage on the ground that the husband treats her with cruelty, that is to say:[25]

(a) habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment, or

(b) associates with a woman of evil repute or leads an infamous life, or

(c) attempts to force her to lead an immoral life, or

(d) disposes of her property or prevents her exercising her legal rights over it, or

(e) obstructs her in the observance of her religious profession or practice, or

(f) if he has more wives than one, does not treat her equitably in accordance with the injunctions of the Quran.

A Muslim wife cannot sue for the dissolution of her marriage under this section unless the act complained of falls within its scope. But she can, whenever possible, take advantage of section 2(ix) of the Act,[26] if

25. S. 2(viii) The Dissolution of Muslim Marriages Act, (No. VIII of 1939) is an act to consolidate and clarify the provisions of Muslim Law relating to suits for dissolution of marriage by women married under Muslim Law and to remove doubts as to the effect of the renunication of Islam by a married Muslim woman on her marriage tie. The Act is complete in itself and crystallizes a portion of Muslim Law which before it came into force was not codified and consisted of principles only. See further, K. P. Saksena, *Muslim Law as Administered in India and Pakistan,* (Lucknow, 1949), at p. 126.

26. This section in general lays down that any ground for the dissolution of marriages, as recognized by Muslim Law shall remain good and valid for the purpose. The words 'Muslim Law' in this sub-section were provided by legislature to convey that divorce could be granted by the courts for reasons for which it could have been granted under the Shariah regardless of whether that reason had been recognized by the courts. See: *Mt. Umar Bibi* v. *Mohammad Din* A.I.R. 1945 Lah. 51.

her grievance is considered a valid ground for dissolution of her marriage under Muslim law. This section on cruelty is wider in scope than the English rule even though there has been a tendency in England to enlarge the definition of cruelty.[27]

CRUELTY AT COMMON LAW

In England it was held in *Horton v. Horton*[28] that the Matrimonial Causes Act, 1937, does not define cruelty, but without doubt the legislature intended the word to have the meaning assigned to it by the courts in many earlier matrimonial cases in which judges have considered the question whether one spouse has been cruel to the other. Therefore it is necessary to see what the old law was. As interpreted and understood by courts of law, cruelty is of two kinds: (1) physical, and (2) mental.

Physical cruelty is of two kinds: (a) violence to life or limb, or (b) danger to health. Violence and bodily danger are by far the most common forms of cruelty. As far back as 1790, Sir William Scott (as he then was) observed: [29]

> That the duty of cohabitation is releaesd by the cruelty of one of the parties is admitted, but the question occurs, What is cruelty? In the present case it is hardly necessary for me to define it; because the facts here complained of are such as fall within the most restricted definition of cruelty; they affect not only the comfort, but they affect the health, and even the life of the party. I shall therefore decline the task of laying down a direct definition. This, however, must be understood, that it is the duty of Courts, and consequently the inclination of Courts, to keep the rule extremely strict. The causes must be grave and weighty, and such as shew an absolute impossibility that the duties of the married life can be discharged. In a state of personal danger no duties can be discharged; for the duty of self-preservation must take place before the duties of marriage, which are secondary both in commencement and in obligation; but what falls short of this is with great caution to be admitted. The rule of "per quod consortium amittitur" is but an inadequate test; for it still remains to be enquired what conduct ought to produce that effect? whether the consortium is reasonably lost? and whether the party quitting has not too hastily abandoned the consortium?
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> What merely wounds the mental feelings is in few cases to be admitted where they are not accompanied with bodily injury, either actual or menaced. Mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention and accommodation, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty: they are high moral offences in the marriage-state undoubtedly, not innocent surely in any state of life, but still they are not that cruelty against which the law can relieve. Under such misconduct of either of the parties, for it may exist on the one side as well as on the other, the suffering party must bear in some degree the consequences of an injudicious connection; must subdue by decent resistance or by prudent conciliation; and if this cannot be done, both must suffer in silence. And if it be complained that by this inactivity of the Courts much injustice may be suffered, and much misery produced, the answer is that Courts of Justice do not pretend to furnish cures for all the miseries of human life. They redress or punish gross violations of duty, but they go no further; they cannot make men virtuous; and, as the happiness of the world depends

27. K. N. Ahmad, "The Dissolution of Muslim Marriages Act, 1939", (Karachi, 1955), at p. 79.

28. [1940] P. 187 at p. 192.

29. *Evans* v. *Evans* (1790) 1 Hag. Con. 35 at pp. 37-38, See the cases cited by B. D. Inglis, *op. cit*., at p. 225.

> upon its virtue, there may be much unhappiness in it which human laws cannot undertake to remove.

He further said:[30]

> These are negative descriptions of cruelty; they shew only what is not cruelty, and are yet perhaps the safest definitions which can be given under the infinite variety of possible cases that may come before the Court ... In the older cases of this sort which I have had an opportunity of looking into, I have observed that the danger of life, limb, or health is usually inserted as the ground upon which the Court has proceeded to a separation. This doctrine has been repeatedly applied by the Court in the cases that have been cited. The Court has never been driven off this ground. It has been always jealous of the inconvenience of departing from it, and I have heard no one case cited in which the Court has granted a divorce without proof given of a reasonable apprehension of bodily hurt. 1 say apprehension, because assuredly the Court is not to wait till the hurt is actually done; but the apprehension must be reasonable: it must not be an apprehension arising merely from an exquisite and diseased sensibility of mind. Petty vexations applied to such a constitution of mind may certainly in time wear out the animal machine, but still they are not cases of legal relief; people must relieve themselves as well as they can by prudent resistence, by calling in the succours of religion and the consolation of friends; but the aid of Courts is not to be resorted to in such cases with any effect.

This case is the leading authority on this subject. Ever since this case, under the law of the Ecclesiastical Courts, cruelty has not been confined to cases of personal danger, but has been determined by the wider and more reasonable *criterion* expressed by Sir William Scott, namely, whether or not the existence of conjugal rights between husband and wife has been possible.

In 1861, in *Milner v. Milner*[31] the wife petitioned for dissolution of the marriage on the grounds of cruelty and adultery. The grounds of cruelty were as follows:—

The respondent in a quarrel struck the petitioner with a slipper upon her back, and in that same year he struck her across the shoulders with a leather strap. On another occasion, when they were staying in the house of a friend in London, the petitioner insisted on accompanying the respondent against his will. When they got to Fenchurch Street, he said she could go no further, and, taking her by the shoulders and making use of the most filthy language, he pushed her against the wall, and thrust his umbrella against her person. The blow inflicted no pain, but in consequence of his conduct a man passing at the time took her for a prostitute and seized hold of her leg. She returned to the friend's house, and lived with her husband for a month.

Creswell J. said:[32]

> A man who has insulted his wife by treating her in the street like a common prostitute is guilty of at least as great an indignity as if he had spat in her face. I can imagine nothing more insulting or shocking to a woman of proper feeling than being so treated. ... It is a case of the grossest and most

30. *Ibid*., at pp. 39-40.

31. (1861) 4 Sw. & Tr. 240.

32. *Ibid*., at p. 241.

> abominable cruelty, and, combined with the adultery, entitles the petitioner to a decree of dissolution of marriage.

In *Pickard* v. *Pickard*[33] the cruelty of the wife consisted in unrestrained violence, irritability on the slightest occasion, bursts of uncontrolled temper, and, in the fact that, although she did not inflict bodily injury, she raised her hand against her husband, and wished to rule his conduct by personal attack. She thrust herself before him on the steps of a public chapel, the service of which he was attending, assailed him with abuse and blows, and, as the sole refuge from an unseemly struggle, drove him in ignomity home. A separation was granted because cohabitation was no longer possible, and there was the danger of the man being incited to retaliate. Thus there was no security for the safety of the wife herself.

In *Milford* v. *Milford*[34] Lord Penzance said that the grounds of the court's interference are regard for the wife's safety and the impossibility of her fulfilling the duties of matrimony in a state of dread. In *Birch* v. *Birch*[35] Sir James Hannen said:

> . . . cruelty must be of such a character that it is dangerous to life, limb or health. In saying that it must be such as is injurious to health, it does not follow that it must actually have reached that point at which injury has been caused. If there is reasonable ground to believe that it will be persisted in so as to cause mischief, then the party may bring that matter into court, because it is not necessary that he or she should wait until violence has actually occurred.

In 1895 Lopes L.J. in *Russell v. Russell*,[36] defining cruelty, said that "there must be danger to life, limb, or health, present or proximate, by which we mean a reasonable apprehension of it, to constitute legal cruelty." In an appeal from this decision,[37] the House of Lords had to decide whether this definition or concept of cruelty was exhaustive. In this case, the Countess Russell petitioned for a judicial separation from the Earl Russell on the ground of his cruelty. She made allegations that her husband had committed an unnatural offence with another man. At the hearing of the petition this charge was completely refuted, and it was withdrawn by the Countess's counsel. The Countess then made a statement, published by the editor of *'The Hawk',* the gist of which was, that she had in her possession letters from the Earl's relatives supporting her charge, and that she did not produce them at the trial partly out of regard for his family and partly from misapprehension of the cause of the proceedings. It was clear that she made these statements not because she believed that they were true, but for some ulterior purpose. The Countess then brought a suit in the Divorce Court, praying for restitution of conjugal rights, and the Earl cross-petitioned for a judicial separation on

33. (1864) 33 L.J. P. & M. 158.

34. (1866) L.R. 1 P. & D. 255.

35. (1873) 28 L.T. 540 at p. 541.

36. [1895] P. 315 at p. 329.

37. [1897] A.C. 395; followed in *Wong Siew Fong* v. *Wong Siew Fong* (1964) 30 M.L.J. 37. See also S. V. Gupte, *op. cit*., at p. 155.

the ground of her cruelty. The Divorce Court pronounced a decree of judicial separation and the Court of Appeal reversed that decision. The husband appealed to the House of Lords. The House of Lords reviewed all the authorities and gave an authoritative pronouncement. The question of defining legal cruelty caused their Lordships considerable difficulty and there was no unanimity of opinion as to what constitutes it. Out of the nine Law Lords, four (including the Lord Chancellor) laid down that legal cruelty is not to be confined to cases of personal danger. The test according to them is, whether the conduct of the husband or wife has made the continuance of cohabitation and the performance of conjugal duties an impossibility. Five Law Lords, on the other hand, disagreed with the above test and held that the true criterion was whether there had been injury to body or health or reasonable apprehension of it. In other words, they introduced the element of mental cruelty into the definition. Thus, the House of Lords — by a majority of one — affirmed the decision of the Court of Appeal. It may therefore be taken that the definition propounded by Lopes L.J. is now indisputably established.

That definition still remains the basis of the law, but its application has vastly changed within the last sixty years. The main question is, what is meant by injury.

Lord Herschell in *Russell* v. *Russell* said:[38]

> I have no inclination towards a blind adherence to precedents. I am conscious that the law must be moulded by adopting it on established principles to the changing conditions which social development involves. But marital misconduct is unfortunately as old as matrimony itself. Great as have been the social changes which have characterised the last century in this respect, there has been no alteration — no new development. I think it is impossible to do otherwise than proceed upon the old lines.

These remarks of Lord Herschell prompted the courts in some cases to attempt to mould the established principles of law to the changing conditions of modern life.

Cruelty might conceivably be defined objectively, that is to say solely with regard to the effect upon its victim; but it would still be necessary to define the extent of the bodily or mental injury which should be recognized as sufficient to justify the court in granting relief. Alternatively, it might be defined subjectively, that is to say, in addition to the effect upon the victim, there must be another essential element, the state of mind of the person who causes the injury; it would then be necessary to define also the state of mind which the law regards as an essential element of 'legal cruelty.'

With regard to the extent of the injury necessary to constitute a ground for relief, Lord Herschell in *Russell v. Russell, (supra),* said that it did not include every act of cruelty in the ordinary or popular sense; to qualify for relief in the divorce court, there must be bodily harm or injury to health or reasonable apprehension of the one or the other. The extent of the bodily or mental injury required was clarified in subsequent cases.

38. *Ibid*., at pp. 460-461.

In *Astle* v. *Astle*[39] the husband, in the first year of the marriage, committed a series of violent assaults upon the wife, but by reason of unsoundness of mind he was, in the language of the *M'Naghten* rules, "incapable of knowing the nature and quality of his acts." He was certified insane, but discharged in the same year. Four years later he approached the wife, who was living apart, and stated that, though she thought herself safe, she would not live much longer; he was then sufficiently sane to know what he was doing. For the wife it was argued that cruelty was to be judged solely from the point of view of the sufferer, reliance being placed on *Kirkman* v. *Kirkman*[40] where Lord Stowell had said:

> The persons of both parties, however, must be protected from violence. ... If that safety is endangered by violent and disorderly affections of the mind, it is the same in its effects as if it proceeded from mere malignity alone . . .

It was, however conceded that, if intention was a necessary element, there was no cruelty in the first year of the marriage. How then could the husband's conduct be an offence in the Divorce Court, whose jurisdiction was not discretionary and, if exercised, would alter his civil status? There was some indication in the use of the word *treated* in the Statute that the action must be conscious. There was, further, the presumption that the Statute did not create an exception to the general rule of law. The court was, however, able to grant the wife a decree, because the threat in the fourth year of the marriage was uttered wilfully and consciously and, in consequence of the husband's past conduct, caused a reasonable apprehension of hurt. Had there not been, in this case, this escape from the operation of the rule laid down, it is probable that the wife would have appealed basing her case on *Kirkman v. Kirkman, (supra).*

In the following year *Horton* v. *Horton*[41] came before the court. This was a husband's petition based on a succession of spiteful acts by the wife causing damage to articles he treasured. The petition was granted, and the rule laid down was that the question for determination was, whether the wife had committed wilful and unjustifiable acts, inflicting pain and misery upon the husband, which had caused him bodily hurt or injury to his health, or reasonable apprehension of such hurt or injury. In this case again an intention was established.

A different attitude was adopted in the case of *Squire* v. *Squire*.[42] The wife, who was devoted to her husband, but in low physical and mental health, made such exacting demands upon the husband's time and service as to injure his health. There was no question of any conscious intention of causing injury to the husband. The petition was dismissed by the trial judge on the ground that cruelty, to afford a ground for relief, must be deliberate, malignant, or intended. In the Court of Appeal the husband succeeded, and the rules laid down in *Astle* v. *Astle, (supra)*,

39. [1939] P. 415.

40. 1 Hag. Con. 409 at pp. 409-410.

41. [1940] P. 187.

42. [1949] P. 51.

and *Horton* v. *Horton, (supra),* were rejected. Tucker and Evershed L.JJ. based their decisions on the principle that, in considering what amounts to cruelty for the purpose of section 2 (a) of the Matrimonial Causes Act, 1937, a party is to be presumed to intend the natural consequence of his or her acts.

This decision was discussed in *Westall* v. *Westall*,[43] where Denning L.J. stated some general principles as follows:

> Although malignity is not an essential element of cruelty as *Squire* v. *Squire* [44] shows, nevertheless intention is an element in this sense, that there must be conduct which is, in some way, aimed by one person at the other. There may, in some cases, be an actual intention by one person to injure the other in body or in health. In other cases there may be a display of temperament, emotion or perversion whereby the one gives vent to his or her own feelings, not actually intending to injure the other, but making the other the object — the butt — at whose expense the emotion is relieved.

He went on:

> I would point out that there is much conduct which may be injurious to the health of the other but which if not aimed at him is not cruelty. The conduct of the habitual drunkard, the gambler, the criminal or the profligate may cause his wife to break down in health but it is not cruelty unless combined with some conduct which is aimed at her, as, for example, when her justifiable remonstrances provoke unjust resentment on his part directed at her.

He said further that the presumption that a man intends the natural consequence of his acts is not a proposition of law but a proposition of good sense: it is an inference which may be drawn, not one which must be drawn.

This rule was followed in *Kaslefsky* v. *Kaslefsky*.[45] The wife wrote to the husband, while he was on active service in the armed forces during the war, that she was tired of him and wanted her freedom. On his return to England she refused sexual intercourse, stayed up late, did not work at all, stayed in bed most of the time, grossly neglected the child of the marriage and said that she wanted a divorce. The husband sued for judicial separation on the ground of cruelty. The Commissioner was not satisfied that the husband's health was to any serious extent injured by his wife's conduct and, applying *Westall* v. *Westall*,[46] decided that the acts were not aimed specifically at the husband. He therefore dismissed the petition. The Court of Appeal, in a reserved judgment, upheld this decision. Bucknill L.J. (with whom Somervell L.J. agreed) said:[47]

> ... to say that a woman who refuses to have sexual intercourse with a man because he is repugnant to her is being cruel to him seems to me to be a misuse of the word. If it could be proved that she refused intercourse solely

43. (1949) 65 T.L.R. 337 (C.A.), at p. 337.

44. [1949] P. 51.

45. [1951] P. 38 (C.A.).

46. [1949] 65 T.L.R. 337 (C.A.).

47. [1951] P. 38 at p. 42.

> because she knew it would injure his health and because she wished to inflict unnecessary pain and suffering on him, that would put the matter in quite a different light . . .

Adopting the test of Denning L.J. in *Westall* v. *Westall*,[48] he held that the wife had not treated the husband with cruelty because she had not been guilty of conduct which was 'aimed at' him. Her conduct was not meant to injure him or inflict misery on him; it was the result of a defect of character and temperament which he, having married her, should have put up with; it was not aimed at him and did not amount to cruelty.

Bucknill, Somervell and Denning L.JJ. came down on the side of the *'aimed at'* school of thought. If the respondent's conduct is *prima facie* innocent, therefore, it will not amount to cruelty unless a specific intent to injure can be proved. *Kaslefsky* v. *Kaslefsky, (supra),* has been applied in a number of cases, *e.g. Fowler v. Fowler*,[49] *Cooper* v. *Cooper*[50] and *Crawford* v. *Crawford*[51] where it has been held that, in the absence of an actual intention to injure the other spouse, cruelty was not established. Moreover, the House of Lords, in subsequent decisions, has considered the general principle of the law of cruelty without indicating any doubt as to the correctness of the decision or the proposition of law there enunciated.

Thus, in *Jamieson* v. *Jamieson*,[52] Lord Reid reserved his opinion as to the position where a respondent was not deliberately ill-treating the petitioner, and as to the application, in these circumstances, of the maxim that a man intends the natural and probable consequences of his acts. In *Fowler* v. *Fowler* Hodson L.J. said: [52a]

> The word "cruel" itself, in its ordinary meaning, seems to me to imply the notion of malignity, but it is not necessary to prove affirmatively an intention to be cruel if the acts themselves readily allow that inference to be drawn . . . When acts are not such as to render that inference readily to be drawn, the Court will look to see whether there is an intention to injure . . .

In the same case, Denning L.J. said that if a man takes contraceptive measures against the will of his wife, whether by means of an appliance or by *coitus interruptus,* so as to prevent conception, without reasonable excuse for so doing, then it is easy to infer that he does it with intent to inflict misery on her.

In *Cooper* v. *Cooper, (supra),* the husband pleaded guilty to, and was convicted of, an indecent assault upon the child of his marriage. The wife's summons alleging persistent cruelty to her was dismissed by

48. (1949) 65 T.L.R. 337 (C.A.).

49. [1952] 2 T.L.R. 143.

50. [1955] P. 99.

51. [1956] P. 195.

52. [1952] A.C. 525.

52a. [1952] 2 T.L.R. 143 at p. 145.

the court upon the ground that there was no evidence to show that the assault was committed in the presence of the wife and with the intention of causing her pain. It was on appeal held that the assault, which was an offence that must by its nature go to the very root of the marriage relationship, was one which any man of ordinary intellectual capabilities must have known, had he paused to reflect, to be likely to cause the gravest distress to the mother of the child, his wife, and possibly severe injury to her health. It was also held that an actual intention to injure is not an essential averment in cruelty, although in a 'doubtful' case it may be of decisive importance. Conduct which is the consequence of mere obtuseness or indifference may none the less be cruelty.

This rule was applied, though with modifications, in *Eastland v. Eastland.*[53] The wife petitioned for dissolution of the marriage on the ground of cruelty. It was an undefended suit, but Karminski J. had the advantage of a full argument on behalf of the Queen's Proctor. The gravamen of the wife's charge was her husband's failure to make provision for her maintenance, his irresponsibility and his shiftlessness. The husband was a reckless, Micawber-like character, who failed as a farmer, ran up debts for which his wife was pressed by the creditors, and neglected to maintain her even though an order had been made against him. These things had impaired the wife's health, although the husband had not desired to injure her. Karminski J. held that, although there had been hardship and unhappiness and injury to health caused by the husband's grave defects of character, as well as by his conduct, that conduct was negative; it was not aimed at the wife, nor directed against her, nor did it in any way impinge upon her; and therefore, deplorable though it was, it did not amount to cruelty in law. In so deciding he cited *Evans v. Evans*,[54] and purported to follow *Kaslefsky v. Kaslefsky*.[55] Thus in *Eastland* v. *Eastland, (supra),* the Court of Appeal laid down for the first time that the nature of the conduct which impinges upon the complaining spouse is also an important ingredient of cruelty.

In all these cases it was held that in order to establish cruelty, some mental element is necessary. In other words, there must be an actual intent to hurt or inflict misery on the other spouse. But a slightly wider rule was adopted after *Lang* v. *Lang*.[56]

CONSTRUCTIVE DESERTION

Lang v. Lang was an Australian case on constructive desertion. The husband treated the wife cruelly. There were a series of constant disturbances and acts of violence on his part. There were slaps and punches which he administered to the petitioner on the face and the body. He struck her on occasions with a ruler and with a cane and with a slipper. He habitually placed her across his knee and administered punishment in

53. [1954] P. 403.

54. (1790) 1 Hag. Con. 35.

55. [1951] P. 38.

56. [1955] A.C. 402.

that way. He twisted her arms behind her back and so caused her pain, and on one occasion he held her in that position for nearly an hour. The husband professed to have taken advice from a psychiatric friend as to how he could improve his relations with his wife, and to have been advised to try 'caveman stuff'. On two occasions at least he dragged her by the hair into the bathroom and held her under the cold shower. He abused her and he constantly called her a bitch, and there were nightly disturbances created by him which destroyed his wife's rest. She told him on a number of occasions that if he continued that conduct she would have to leave him, as that conduct was affecting her health. Before she finally left and filed a petition, he planned and carried out what she referred to as the 'Rape of Lucrece'; in the words of the trial judge he "forced sexual intercourse on her in circumstance of calculated and revolting indignity." He told her that he was going to "use her for the same purpose whenever he wanted to and as often as he wanted to." She left the matrimonial home and petitioned for the dissolution of the marriage. As cruelty was not a ground of dissolution of marriage under the Victorian law, she had to establish constructive desertion, *i.e.* that she was forced to leave the matrimonial home on account of her husband's cruelty.[57]

The Privy Council was here concerned with the distinction between intention and desire, and with ascertaining the legal effect where an intention to bring about a particular result co-exists with a desire that that result should not ensue. They held that where a husband's conduct towards his wife was such that a reasonable man would know that in all probability it would result in the departure of the wife from the matrimonial home, that, in the absence of rebutting evidence, was sufficient proof of an intention on his part to disrupt the home; and the fact that he nevertheless desired or requested her to stay did not rebut the intention to be inferred from his acts, namely, that he intended to drive her out.

This test has been applied in English cases on divorce on the ground of cruelty. In *Waters v. Waters*[58] the wife's complaints were of extreme boorishness on the part of her husband, of his unbearable taciturnity, of his deliberate refusal to co-operate in the running of the home and finance and of a very marked degree of personal uncleanliness persisted

57. The following are the provisions of the Marriage Act, 1928 (19 Geo. 5, No. 3726) of the State of Victoria in Australia which govern the relevant transactions:

"(75) Any married person who at the time of the institution of the suit has been domiciled in Victoria for two years and upwards, may present a petition to the court praying on one or more of the grounds in this section mentioned that his or her marriage with the respondent may be dissolved — (b) on the ground that the respondent has during three years and upwards been an habitual drunkard, and either habitually left his wife without means of support, or habitually been guilty of cruelty towards her ... (d) on the ground that within one year previously the respondent . . . has repeatedly . . . assaulted and cruelly beaten the petitioner; ... If in the opinion of the court the petitioner's own habits or conduct induced or contributed to the wrong complained of ... such petition may be dismissed." By section 77 of the same Act, a wife may present a petition for dissolution of marriage, *inter alia,* on the grounds *of* adultery coupled with cruelty, and under sections 63 & 64, a decree of judicial separation may be granted, *inter alia,* on the ground of cruelty.

58. [1956] P. 344.

in, despite the wife's protests, to the point of nausea. Lord Merriman P. cited *Lang* v. *Lang, (supra),* and said:[59]

> But although these observations were directed to cases of constructive desertion I know of no reason why precisely the same considerations should not be applied to mental cruelty. If a reasonable man (if I may paraphrase) would know — and this husband did know — that continuance in the course of conduct complained of would have an injurious effect on his wife's mental health, what more is necessary? In what way does that differ from the test which Lord Normand adopted in *Jamieson* v. *Jamieson*,[60] that the spouse must either intend to hurt the victim or at least be unwarrantably indifferent as to the consequences to the victim? It seems to me that essentially the two phrases convey the same idea, and I do not think that there is any reason here for distinguishing between the two charges which are made.[61]

The language of *Lang* v. *Lang* [62] was again echoed in the judgment of the Court of Appeal delivered by Hodson L.J. in *Wright* v. *Wright*.[63] In this case, the wife petitioned for a decree of dissolution of marriage on the ground of her husband's cruelty, the cruelty consisting of the husband's punishment of a child of the marriage by beating it over the head and ears with unnecessary brutality to which he knew his wife was averse, and which the judge found affected her health. There was no evidence that the husband had any express intention to injure his wife's health. Hodson L.J. said:[64]

> . . . where the wife is relying upon ill-treatment of the child by beating, she must prove facts from which the court should infer that the husband knew or must have known that his conduct would or would be likely to injure his wife's health.

He then said:[64a]

> The husband knew that the wife was averse to his conduct, neurotic and anaemic as she was, and must have known that it was likely to cause injury to her health, as it did. We agree with the judge in finding that cruelty was established.

At this juncture the relevant propositions of law so far on cruelty may be propounded as follows:—

I. The conduct complained of must be such as to cause danger to health (bodily or mental) or a reasonable apprehension thereof — *(Russell* v. *Russell)*.[65]

59. *Ibid*., at pp. 361-362.

60. [1952] A.C. 525 at p. 535.

61. The two charges were constructive desertion and cruelty.

62. [1955] A.C. 402.

63. [1960] P. 85.

64. *Ibid*., at p. 98.

64a. *Ibid*., at p. 99.

65. [1897] A.C. 395.

II. The conduct on the part of the offending spouse must be in some sense aimed at or directed against the complaining spouse — *Kaslefsy v. Kaslefsky*.[66]

The conduct which is 'aimed at' a spouse consists of actions or words:—

(1) which are actually or physically directed at that spouse, or

(2) which, though not actually or physically directed at that spouse, are done or said with intent to injure him or to inflict misery on him. Conduct coming within the first category need not be accompanied by an intent to injure and will include nagging,[67] and sulking,[68] and excessive demands by one spouse on the time and attention of the other.[69] The second category may include such conduct as, for instance, arises from an addiction to drink, gambling or crime. Conduct of that sort, which clearly results from a defect of temperament, will not be regarded as legal cruelty unless an intent to injure is proved to exist.[70]

III. Any conduct, if persisted in against the wishes of the other spouse, must be cruelty if it caused injury to health provided that a reasonable person would have known that such injury was probable — *Lang* v. *Lang*.[71]

In these circumstances, the court presumes the existence of an intent to injure the other spouse or to inflict misery on him. Since this test was laid down, the court has shown itself ready to draw this presumption in a number of cases as follows:—

(1) Husband continuing criminal activities in spite of wife's remonstrances — *Woodlard* v. *Woodlard*.[72]

(2) Indecent assault by husband on child of the marriage — *Cooper* v. *Cooper*.[73]

(3) Indecent assaults by husband on step-daughter — *Ivens* v. *Ivens*.[74]

66. [1951] P. 38.

67. *Usmar* v. *Usmar* [1949] P. 1.

68. *Lander v. Lander* [1949] P. 277.

69. *Squire* v. *Squire* [1949] P. 51.

70. See The Royal Commission on Marriage and Divorce, (1956) (Cmd. 9678) para. 124.

71. [1955] A.C. 402.

72. [1954] 3 W.L.R. 855.

73. [1955] P. 99.

74. [1955] P. 129.

(4) Refusal of husband to allow wife to have child, coupled with practice of *coitus interruptus* — *Knott v. Knott*.[75]

(5) Refusal of wife to allow conception of a child — *Forbes v. Forbes*.[76]

(6) Deception of wife aggravated by subsequent conduct — *Carpenter v. Carpenter*.[77]

(7) Persistent drunkenness — *Baker v. Baker*.[78]

Before considering more recent decisions on cruelty it might be useful to make comparisons with other systems of law on cruelty.

COMPARISON WITH MUSLIM AND BURMESE LAW

At Mohammedan law the husband's right to divorce the wife at will, which is an essential element of the marriage contract, makes comparisons with other systems difficult. But, while the husband has also the right to chastise the wife without causing serious injury (which is, in India and Egypt, abrogated by statute[79]), the wife can claim the protection of the court against his cruelty. Yet it is only the *Maliki* school which recognizes cruelty as giving the wife a right to ask for dissolution of the marriage. The practice appears to be to appoint two arbitrators, one from each side of the family, to determine who is at fault and it would seem that what constitutes cruelty must be regarded as a question of fact. Analogy to other branches of the law would suggest that the criterion will probably be objective and the right which the Sharia gives to the husband, to administer such chastisements as does not cause fracture, wound or serious bruise, would suggest that English and Burmese wives can complain of cruelty earlier than their Mohammedan sisters.[80]

In Burma, there are provisions in the texts of the *Dhammathats*,[81] recognising the husband's power of moderate chastisement with a split bamboo or a length of rope.[82] Even in the early British period it was thought that striking the wife only once, or pulling the wife by her hair and abusing her were not sufficient grounds for a divorce. But the husband's power of moderate chastisement of the wife is not tolerated by

75. [1955] P. 249.

76. [1955] 1 W.L.R. 531.

77. [1955] 1 W.L.R. 669.

78. (1955) 105 L.J. 426 at p. 554.

79. The Egyptian Law on Family Rights, 1929, art. 6.

80. A. Gledhill, "Cruelty as a Ground for Divorce at Burmese Buddhist Law", (1950) 13 Bulletin of the School of Oriental and African Studies 437.

81. A Dhammathat, according to Kinwun Mingyi the compiler of the Digest of Burmese Buddhist Law, is a collection of rules which are in accordance with custom and usage, and which are referred to in the settlement of disputes relating to person and property. See Kinwun Mingyi's *Digest,* Vol. 1, s. 2.

82. Kinwun Mingyi's *Digest on Dhammathats,* (Rangoon, 1909), ss. 223, 273.

Burmese courts,[83] and hence a physical assault by him may be a matrimonial fault. In *Maung Kywe v. Ma Thein Tin*,[84] the parties had several quarrels, but the wife alleged that there was cruelty on one occasion. She had seized a bag of onions and tried to wrench it from her husband, who had overpowered and struck her. It was held that a single assault by the husband on the wife, provoked by the wife, was not a sufficient ground for the granting of a divorce to the wife, when the character and habits of the husband were not of a nature to suggest any likelihood of a repetition of the offence. Sir John Baguley remarked:[85]

> Cruelty really depends on the state of mind of the person inflicting pain, rather than the actual infliction of the pain. Naturally, a series of assaults which result in pain would warrant the deduction that the person inflicting that pain was indifferent to the pain that was being inflicted; but if an assault is regarded as a single act of cruelty, the assault must in itself be such as to warrant the assumption that the person committing it was indifferent to, or pleased with, the pain he was inflicting. . . . "there must be at least evidence of such ill-treatment as shows that the husband is a man of violent tendencies", to which I would add that the ill-treatment is likely to occur. A divorce is given, not to punish a husband for an assault; that is provided for by the criminal law, but to enable the wife to free herself from a bond which bids fair to become intolerable.

This was, however, the first recognition of the mental attitude of the offender as an essential element in cruelty. This case was decided before *Astle* v. *Astle*.[86] So Baguley J.'s view cannot have been influenced by English decisions. It is submitted that delight in another's pain is much the same criterion as that laid down in *Squire* v. *Squire*.[87]

In *Daw Pu* v. *Maung Tun Kha*[88] it was sought to draw a distinction between ill-treatment and cruelty. In this case, the wife had been assaulted and abused on several occasions by her husband so that she was unable to live with him and the question was whether she was to be deprived of his property rights. Baguley J.'s definition of cruetly,[89] was adopted and enlarged. Mya Bu J. said:[90]

> There is a distinction between mere ill-treatment or personal violence and cruelty. In order to constitute cruelty, ill-treatment in the shape of physical violence or infliction of mental pain must be done with indifference to or delight in pain caused to the sufferer.

It is submitted that, on the facts of this case as represented, such an intention could only be imputed to the husband by application of the rule

83. S. C. Lahiri, *Burmese Buddhist Law,* (Calcutta, 1939), at p. 83; U May Oung, *Leading Cases on Burmese Buddhist Law,* (Rangoon, 1926), at p. 109.

84. (1929) 7 Ran. (I.L.R.) 790.

85. *Ibid*., at p.p. 794-795.

86. [1939] P. 415.

87. [1949] P. 187; see also A. Gledhill, op. *cit.* footnote 80 *supra,* at pp. 433, 441.

88. [1946] Ran. (B.L.R.) 123.

89. In *Maung Kywe v. Ma Thein Tin, (supra).*

90. *Daw Pu* v. *Maung Tun Kha,* [1946] Ran. (B.L.R.) at pp. 130-131.

that a man is presumed to intend the natural consequences of his own acts, which presumption would almost inevitably be rebutted by his conduct in defending the petition.

The law on that subject in Burma is still developing, but the present position may be briefly summarized:[91]

1. Cruelty as a ground for divorce is only available to the wife.

2. If the cruelty complained of comprises physical violence, the effect upon the wife must be such as would afford ground for a successful criminal prosecution.

3. If it consists of mental pain, it must have been caused without reasonable excuse, and the wife must have been seriously hurt.

4. The physical or mental pain must have been caused either malignantly, or at least with the husband's knowledge that his conduct was calculated to cause pain, and with his indifference to that knowledge.

THE SCOPE OF INTENTION

We turn now to the exact scope of intention, which has been determined in *Gollins* v. *Gollins*[92] The wife obtained a maintenance order in January 1961 on the ground of her husband's wilful neglect to provide reasonable maintenance for herself and the two children of the marriage. The husband never paid more than a trivial amount of the maintenance ordered. In April, 1961, the wife consulted a doctor, who found that she was suffering from a moderately severe anxiety state attributable to her financial and mental difficulties. The wife then applied for a non-cohabitation order on the ground of her husband's persistent cruelty. The husband did not at any time do any physical harm to the wife, nor was she at any time short of money; her complaints were that she had to work in order to pay the sums due under the mortgage and to keep herself and the children, and that the husband had involved her in his debts. In 1960 she had told him that she could not stand the strain of his debts any longer. The Magistrates found persistent cruelty proved and inserted a non-cohabitation clause in the previous maintenance order. The essential reasons for their decision in favour of the wife were that the husband should have known, as was the fact, that his conduct was having a serious effect on the wife's health; that any reasonable man would have appreciated this; and that the husband must have known that a continuance in his course of conduct would have such an effect. The Divisional Court allowed the husband's appeal, holding, *inter alia,* that the husband's conduct was not actuated by a desire to injure or cause pain and misery, or in any sense aimed at the wife. While necessarily impinging on her life it did not positively invade her sphere of living or make the discharge of the duties of married life virtually impossible. Above all it could not be stigmatised by the word 'cruelty' in its ordinary meaning.

91. See A. Gledhill, *op. cit.* footnote 80 *supra,* at pp. 441-2.

92. [1963] 3 W.L.R. 176 (H.L.).

This judgment attempted to limit the operation of *Lang* v. *Lang*[93] and followed the authority of *Kaslefsky v. Kaslefsky*,[94] and implied that *Eastland* v. *Eastland*[95] was correctly decided. It also established the subjective test of matrimonial cruelty. However, the Court of Appeal reversed this judgment by a majority and allowed the wife's appeal. Willmer L.J., said that the ultimate question to be decided in cruelty cases was one of fact. The conduct complained of must be such as to cause danger to health (bodily or mental) or a reasonable apprehension thereof. The conduct of the offending spouse must be in some sense aimed at or directed against the petitioner. There must always be some element of intention, which, however, could be inferred. If these requirements were satisfied, the question whether the conduct complained of did or did not amount to cruelty was one of fact in all the circumstances. Cruelty is a serious charge and it is always necessary to consider the personality of the two spouses and the physical and mental susceptibilities of the innocent spouse. There was abundant material to justify the justice's finding of cruelty. Harman L.J., dissenting, said that he agreed with the Divisional Court that the husband's conduct, however reprehensible, could not properly be stigmatized by the word cruelty. That was the beginning and end of the matter. There was no direct evidence that the husband sought to injure his wife nor even that he knew that his conduct might be injurious to her health.

Thus, in the Court of Appeal, it was held that an intention was necescessary to establish cruelty. The subjective test is substituted for the objective test. It may be argued that, if some objective standard were fixed, such as that of conduct which no reasonable man should be expected to endure, injustice would be done where conduct did not measure up to the standard set and yet was serious enough to injure the health of a person of delicate physique or susceptible temperament.[96] However, the House of Lords affirmed that decision. But there was no unity of judicial opinion, their Lordships being divided, three to two. Lord Reid, Lord Evershed and Lord Pearce delivered opinions in favour of dismissing the husband's appeal, while Lord Morris of Borth-y-Gest and Lord Hodson were in favour of allowing it.

Lord Reid said[97] that in matrimonial cases the courts were not concerned with the reasonable man as they were in cases of negligence. They were dealing with this man and this woman and the fewer *a priori* assumptions that were made about them the better. In cruelty cases one would hardly even start with a presumption that the parties were reasonable people because it was hard to imagine any cruelty case ever arising if both the spouses thought and behaved as reasonable people. The time had come to decide whether or not intention really was a necessary

93. [1955] A.C. 402.

94. [1951] P. 28.

95. [1954] P. 403.

96. See The Royal Commission on Marrigae and Divorce (1958) (Cmd. 9678), para. 130.

97. [1963] 3 W.L.R. 176.

element in cruelty. Briefly, if the conduct complained of and its consequences were so bad that the petitioner must have a remedy, then it did not matter what was the state of the respondent's mind. In other cases the state of his mind was material and might be crucial. His Lordship said that he was dealing with a spouse normal in mind and health who has been reduced to ill-health by the inexcusable conduct of the other spouse, persisted in although that spouse knew the damage which he was doing. These matters must be clearly proved. They had been proved in this case and plainly established persistent cruelty. In this case *Kaslefsky* v. *Kaslefsky*[98] and *Eastltmd v. Eastland*[99] were disapproved. *Lang* v. *Lang*,[1] on the other hand, was approved to the extent, that the maxim that a man must be taken to intend the natural consequences of his actions was in line with the law in cases of cruelty.

The *Gollin's* case clarifies the law of cruelty to a great extent. The presence of an intention to injure on the part of the allegedly cruel spouse is no longer an essential element of cruelty; knowledge that he is injuring the health of the other spouse is, however, material. Knowledge of inflicting injury or hurt is thus substituted for an intention. However, the conduct complained of must be grave and weighty and it must be much higher than the ordinary wear and tear of married life.

STATE OF RESPONDENT'S MIND

Another problem which is linked with that which has just been discussed, is how far the respondent can plead that his conduct was due to mental illness.[2] Although the matrimonial relief on the grounds of cruelty is designed to protect the injured spouse, it is to some extent a punishment upon the other for a matrimonial offence, and therefore the court needs to be satisfied that the respondent has intended to cause injury, or has been recklessly indifferent when he has known or ought reasonably to have known what effect or likely effect he would produce upon the petitioner's health. The petitioner must prove that the respondent has committed wilful and unjustifiable acts inflicting pain and misery upon him or her and causing injury to health.[3] If a spouse is insane within the meaning of the *M'Naghten* rules, so that he does not know the nature and quality of his act, or if he does not know that it is wrong, then he cannot be guilty of a wrong. If it is argued that divorce is matrimonial relief granted to an injured spouse, then mental disorder in the other is irrelevant. If, on the other hand, it is agreed that divorce is a form of sanction or punishment on the spouse who deliberately or recklessly injures the other, then mental disorder becomes very relevant.[4]

98. [1951] P. 38.

99. [1954] P. 403.

1. [1955] A.C. 402.

2. For further discussions see P. M. Bromley, *op. cit*., at p. 99.

3. Alec Samuels, *Law for Social Workers,* (London, 1963), at p. 62.

4. *Ibid*., at p. 63.

This problem arose in *Williams* v. *Williams*,[5] the facts of which were very much different from those of *Gollins* v. *Gollins*.[6] In *Williams* v. *Williams,* the husband began to display symptoms of mental disorder in 1954 and later that year was admitted as a certified patient to a mental hospital. He remained there until his return to the matrimonial home in March, 1959, having been regraded to voluntary status in October, 1958. In May, 1959, the wife presented a petition for divorce on the ground of cruelty, her principle complaint being that her husband persecuted her by unjustly accusing her of misbehaviour with other men. At the trial medical evidence was given that the husband, who had been re-admitted to hospital in December, 1959, was suffering from *paranoid schizophrenia*, that he knew what he was doing when he made the accusations against his wife, but did not know that they were wrong. Thus he came within the second limb of the *M'Naghten* rules, and in *Palmer* v. *Palmer*,[7] it was held that such a state of mind was a complete defence to a charge of cruelty. Mr. Commissioner Gallop, Q.C., accordingly dismissed the petition and the Court of Appeal upheld that decision. It was, however reversed by the House of Lords.

Two arguments were raised in the House of Lords. Firstly, that an insane person could not be held to have treated the petitioner with cruelty since he was incapable of forming the intention. Secondly, that the law provides an adequate remedy for insanity. If the respondent is insane, the remedy lies in his restraint and not in his release;[8] in the majority of cases where serious cruelty has been inflicted, the respondent will be by the time of the trial under detention and after five years the petitioner may be able to obtain a divorce.[9] Lord Reid said that it would be wrong to take the *M'Naghten* Rules as a test. The choice was between two clear-cut alternatives — either insanity was a defence or it was not. Ultimately, the answer must depend on the meaning one gave to the word 'cruel'. The law could not take cruelty in its ordinary or popular meaning, because that was too vague. It must be decided what, if any, mental state was a necessary ingredient. The alternatives were that either no mental element was essential or that the respondent must at least be blameworthy. For the reasons set out by the majority in the case of *Gollins* v. *Gollins*[10] their Lordships were bound to hold that neither intention to hurt, nor knowledge that the act done is wrong or hurtful is an essential ingredient. The House of Lords took the view that divorce is for the protection of the innocent, and hence mental disorder in the other is irrelevant. A decree should be pronounced against such

5. [1963] 3 W.L.R. 215 (H.L.).

6. [1963] 3 W.L.R. 176 (H.L.).

7. [1955] P. 4.

8. Relying on *Hall* v. *Hall* (1864) 3 Sw. & Tr. 347 at p. 349.

9. Matrimonial Causes Act, 1950, section 1(1)(d); a petition for divorce may be presented either by the husband or the wife on the ground that the respondent — is incurably of unsound mind and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition. See also M. Puxon, *op. cit.*, at pp. 991-992.

10. [1963] 3 W.L.R. 176 (H.L.).

an abnormal person simply because the facts are such that the character and gravity of his acts were such as to amount to cruelty. If that was right for an abnormal person, it applied to an insane person.

CONCLUSION

From what has been said, it is clear that cruelty is not a crime. It follows accordingly that matrimonial proceedings are not similar to criminal proceedings. The House of Lords confirmed this view and has thought fit to do away with the notion of offence. In deciding a cruelty issue, it looks to the quality of the conduct complained of rather than to the state of mind which accompanies it. This is because the intention to injure is no longer an essential element in cruelty and the important principle to be kept in mind in such cases is, as the House of Lords has said, the protection of the innocent rather than the punishment of the trangressor.[11] Furthermore, the test whether one spouse has treated the other with cruelty is wholly objective.

There are two tests of cruelty as the law now stands.[12] Firstly, is the conduct complained of sufficiently grave and weighty to be considered cruel? The conduct complained of must be, taking into account their respective temperaments and characters, sufficiently grave and weighty to justify a finding of cruelty, if injury to health or reasonable apprehension of injury to health can be proved. Secondly, has the conduct complained of caused injury to health or reasonable apprehension of such injury?

In *Gollin's* case[13] it was held that a husband who neglected to maintain his wife, without any evidence of an intention to hurt, could be found guilty of cruelty. Likewise in *William's* case,[14] a husband who caused his wife sufferings as the direct result of his mental illness was held responsible for cruelty. Similarly, a wife could be injured if her husband was suffering from cancer or from kidney trouble and she could ask for a dissolution of marriage on the ground of cruelty. This concept of cruelty is rather strange. Moreover, the danger of this state of affairs is that cruelty can very easily be based upon incompatibility of temperament, mental disturbance or failure of character. If this danger is to be evaded, a new word may have to be substituted for cruelty.[15]

It is submitted that the concept of cruelty will become wider with the passage of time and the impact of new ideas based on a strictly rational outlook of life, and for this reason, cruelty will always be an uncertain part of the law of divorce. There are very few cases on cruelty

11. See "Current Topics", (1963) 37 Australian L.R. 137 at p. 139.

12. *Noble* v. *Noble* [1964] 2 W.L.R. 349.

13. [1963] 3 W.L.R. 176.

14. [1963] 3 W.L.R. 215.

15. See "Current Topics", (1963) 107 Solicitors' Journal 521.

in this part of the world [16] which indicates the high ideals which the various communities have lived up to. The law should be so framed as to provide the maximum opportunities for mutual adjustment. In this connection, Professor Gledhill has remarked: [17]

> Whether you can help him or her is not a matter in which any advice can be given. When and how you can bring them together must depend on your own judgment and your own nature. I can only say that solicitors who practice in divorce have told me that when they have been able to bring about a reconciliation, the reward has been more gratifying than the fees which came from rich clients. Remember that most humans are lonely, that loneliness increases with age. When sitting in the divorce court myself, I have often thought "If he cannot get on with his wife, what chance has he with his second choice? Better the devil you know than the devil you don't." If sometimes you can repair a broken marriage, you may feel that the career of a divorce lawyer has compensations which the company lawyer, and the constitutional lawyer never dreams of.

Since Divorce does not seem to be a popular institution among Asians, it may be suggested that the problems and the ground for divorce need not necessarily be identical with those prevalent in the West. It ought to be considered that perhaps the doctrine of breakdown of marriage might be suitable to this region. The test should therefore be whether the parties can continue to live together, or whether the marriage has broken down. The court should be required to determine in each case whether the marriage has broken down beyond hope of reconciliation, and only then it should grant a decree of divorce. A procedure, as in Muslim law, may be adopted for reconciliation, *i.e.* to appoint two arbitrators, one from each side of the family, to determine whether there is any hope of reconciliation.

It might be concluded in the words of Sir Carleton Allen: [18]

> I should be sorry to give the impression that cruelly ill-treated spouses should not be protected by the law or that marriages which have degenerated into mere implacable warfare — and there is no hatred like that which can develop between hostile husbands and wives — should be kept in existence; but I believe that the offence of 'cruelty' tends today to be extended beyond its due bounds, and indeed to be abused by some practitioners and their clients, in favour of persons who have not brought to marriage, or have not even tried to understand, what matrimony requires in humanity, sympathy and obligation, if it is to remain a fundamental institution of society.

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16. *E.g.*, according to a report presented to the Delhi School of Social Work, in the year 1955, after the Hindu Marriage Act had been enacted, 17 divorce cases came before the Delhi Courts. In 1956, the first full year, the number was 95. It dropped to 65 in 1957, but in the first seven months of 1958, 44 petitions were filed, which suggests that there would be an increase on the previous year. If these figures are representative of India as a whole it would suggest that the divorce rate in India is ⅓ to ½ of what it is in England. Over half the petitions were dismissed. This is partly explained by the fact that chronic ill-health, sterility, addiction to liquor, ugliness, and other grounds not recognised in statute were pleaded. In England 81% of the cases in which legal aid is granted are matrimonial causes, and 88% of these succeed. See A. Gledhill, "Matrimonial Causes between Hindus", (1961) 1 Jaipur Law Journal 66.

17. *Ibid.*, at p. 78.

18. *Aspects of Justice,* (London, 1958), at pp. 235-6; see also Inglis, *op. cit.*, at p. 239.

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