Section 3(d) of the Divorce Act 1968: COMMON LAW CODIFIED OR A STATUTORY DEFINITION?

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I. INTRODUCTION

"There is more to modern marriage than merely abiding by a standard of sexual fidelity. The obligation of husband and wife to love and cherish one another, as expressed in the marriage ceremony, should be observed by each of the parties and recognized in law. 'Cruelty' by one spouse towards the other is a violation of this elementary undertaking." [1]

The new Divorce Act 1968 [2] now makes provision for cruelty as a ground for dissolution of marriage throughout Canada. [3] This comment deals with the law of cruelty with particular reference to its interpretation under the new act. [4]

Section 3(d) states:

> Subject to section 5, a petition for divorce may be presented to a court by a husband or wife, on the ground that the respondent, since the celebration of the marriage . . .
>
> (d) has treated the petitioner with physical or mental cruelty of such a kind as to render intolerable the continued cohabitation of the spouses. [5]

This new divorce legislation was the work of a Special Joint Committee of both Houses of Parliament. [6] They were requested to inquire into and report upon divorce in Canada and the social and legal problems relating thereto. The committee did not believe it necessary to define cruelty in the new act [7] and were content to leave it "to the good sense of Canadian Judges

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[1] REPORT OF THE SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS ON DIVORCE at 105, (1967) [hereinafter cited SPECIAL JOINT COMMITTEE REPORT].

[2] Can. Stat. 1968 c. 24.

[3] Previously cruelty was a ground for divorce only in Nova Scotia.

[4] *Supra* note 2.

[5] Can. Stat. 1968 c. 24, § 3(*d*).

[6] On March 15, 1966, the House of Commons passed a resolution appointing a Special Joint Committee of the Senate and the House of Commons to inquire into and report upon divorce in Canada and the social and legal problems relating thereto. On March 23, 1966, the Senate passed a resolution to unite with the House of Commons in a Special Joint Committee to look into the same matters.

[7] SPECIAL JOINT COMMITTEE REPORT at 106.

guided as they are by the experience gained already in our own court and those of the U.K." [8]

By this statement the committee would seem to be referring to English decisions handed down since the passing of the Matrimonial Causes Act of 1857; [9] decisions based on Canadian law in which cruelty was defined as a ground for judicial separation; cruelty as a ground for divorce in Nova Scotia; and the statutory definitions of cruelty in Alberta and Saskatchewan. [10] These statutory definitions include not only cruelty in the traditional sense but also conduct of such a nature that the petitioner could not reasonably be expected to live with the person causing the cruelty.

For purposes of interpreting section 3(d), three questions should be answered:

(a) Does the word "cruelty" itself have the same meaning as in the cases prior to the new divorce legislation or does it take on a new meaning under the act?

(b) What effect, if any, does the phrase "of such a kind as to render intolerable the continued cohabitation of the spouses" have on the word "cruelty"?

(c) What effect do the adjectives "physical" and "mental" have in modifying "cruelty"?

II. Cases Prior to the New Divorce Act

Prior to the new Divorce Act [11] cruelty was a ground for divorce only in Nova Scotia. In most of the other provinces, it was only a ground for judicial separation. [12] Since the basis of the law of cruelty in Canada is found in English and Colonial statutes, Canadian courts tend to follow English decisions in this area very closely. [13]

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[8] *Id.* at 107. *Quaere*: Is this too much to expect of judges? The new Divorce Act reflects a complete change of policy concerning divorce. Cases which are not clearly within the meaning of cruelty may be badly decided if well defined guidelines are not set out. This is bound to lead to a rush of appeals or decisions without adequate reasons. The few cases decided after the passing of the Divorce Act, 1968, have very scant judgments and in some cases amount to no more than the judge saying "I think this conduct amounts to cruelty." For an analysis of these cases see Part III.

[9] 20 & 21 Vict., c. 85.

[10] Domestic Relations Act, Alta. Rev. Stat. c. 89, § 7(2) (1955); Queen's Bench Act, Sask. Rev. Stat. c. 73, § 25(3) (1965).

[11] *Supra* note 2.

[12] Ontario is the exception.

[13] Cruelty was recognized as a ground for judicial separation in the English Matrimonial Causes Act of 1857, and was to be granted on principles "as nearly as may be conformable to those followed by the English Ecclesiastical Courts before 1857." British Columbia and the Prairie Provinces have adopted the substantive law of England as to separation, as it existed in 1858, in the case of British Columbia and 1870 for the Prairie Provinces, but Alberta and Saskatchewan have passed Provincial acts purporting to govern judicial separation which include a new definition of cruelty as a ground. The law of cruelty in Nova Scotia is based on the English law as it existed in 1866, whereas New Brunswick's and Newfoundland's goes back to the English law of 1791

A. *Russell v. Russell*

The word "cruelty" has a specific legal meaning in England. The definition contained in the *Russell v. Russell*[14] decision is the accepted one.[15] In this case the Earl and Countess Russell were married in 1890, separated shortly after, cohabited again for a short time, then went their separate ways. The countess commenced a separation action on the ground of cruelty. She charged that her husband had engaged in an unnatural act with one Mr. R. This charge was refuted and subsequently withdrawn at trial, and the earl was, therefore, acquitted of the charge of cruelty. In 1891 the countess made a statement to the newspapers to the effect that she had letters supporting her charge that the earl was guilty of homosexual acts. The countess refused to withdraw her public accusations but did not produce any evidence to support them. In 1894 she brought an action in Divorce Court for restitution of conjugal rights. The earl counterpetitioned for a judicial separation on the ground of cruelty. In the decison of the Court of Appeal the jury's finding of cruelty was reversed; this decision was affirmed by the House of Lords by a five-to-four majority.

The Matrimonial Causes Act of 1857[16] gave the civil courts jurisdiction to hear matrimonial cases, but section 22 of the act directs them to give relief on principles and rules as nearly as may be comformable to the principles and rules on which the ecclesiastical courts had theretofore acted and given relief. The House of Lords examined these ecclesiastical decisions in the *Russell* case. Their difference of opinion centres around an interpretation of Lord Stowell's decision in *Evans v. Evans.*[17] Lord Stowell says that "the causes must be grave and weighty, and such as to shew an absolute impossibility that the duties of married life can be discharged. In a state

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and 1857 respectively. Ontario does not grant judicial separation, but its courts will grant relief in a separate and independent proceeding for alimony, on grounds which include cruelty. Prince Edward Island had no judicial separation until 1945.

Some Canadian Cases which follow the English cases on cruelty: Desabrais v. Desabrais, [1928] 2 W.W.R. 394, [1928] 3 D.L.R. 549 (Sask.) (applies the *Russell v. Russell* definition); Timms v. Timms, 15 B.C. 39, at 40, 13 West. L.R. 636, at 638 (1910) (the question of cruelty is one of fact); Lovell v. Lovell, 13 Ont. L.R. 569 (1907) (conduct operating upon the mental condition may amount to cruelty); Cole v. Cole, 19 D.L.R.2d 643, (N.S. Sup. Ct. 1959) (exhaustive review of the cases on mental cruelty); Diamond v. Diamond, 38 W.W.R. (n.s.) 153 (Man. Q.B. 1962) (legal cruelty is judge made law; English authorities reviewed); Newton v. Newton, 34 Man. 190, [1924] 2 W.W.R. 840 (historical background and interpretation of the phrase legal cruelty); White v. White, 69 D.L.R.2d 60 (N.S. Ct. for Divorce & Matrimonial Causes 1968) (considered *Gollins v. Gollins* in finding that intent to injure is not a necessary element of cruelty); Hutton v. Hutton, 40 Mar. Prov. 135, at 136 (N.S. Ct. for Divorce and Matrimonial Causes 1957) (the essence of cruelty is the danger to the health of the petitioner); Clattenburg v. Clattenburg, 36 Mar. Prov. 38, [1955] 2 D.L.R. 272 (N.S. Ct. for Divorce and Matrimonial Causes) (law of cruelty in Canada and England is the same; need for future protection must be proved).

[14] [1897] A.C. 395.

[15] Gollins v. Gollins, [1964] A.C. 644, at 669, [1963] 2 All E.R. 966, at 975 (1963); Jamieson v. Jamieson, [1952] A.C. 525, at 544, [1952] 1 All E.R. 875, at 882.

[16] 20 & 21 Vict., c. 85.

[17] 1 Hagg. Cons. 1, 35 (1790).

of personal danger no duties can be discharged; for the duty of self-preservation must take place before the duty of marriage . . . but what falls short of this is with great caution to be admitted." [18] He goes on to say that the older cases insert danger to life, limb, or health as a ground upon which the court has consented to a separation and the court has never been driven off this ground.

The view of the dissenting Lords is that the test supplied by Lord Stowell is whether the circumstances must show an impossibility of discharging the duties of married life, and that the condition of personal danger or bodily injury is only an illustration of what satisfies the test. Interpreting Lord Stowell's judgment in this light, they are willing to grant the earl relief because the conduct is grave and weighty and renders the performance of marital duties impossible even though he has not suffered any danger to life, limb, or health or an apprehension of it.

The majority interprets Lord Stowell as meaning that nothing short of conduct causing physical or mental injury or an apprehension of it will be considered legal cruelty. Lord Herschell adds that the law as such may be inadequate, but it is for the legislature and not the courts to change it. [19] Since there was no injury to physical or mental health the earl's action failed.

B. *Intention in the Matrimonial Offence*

Matrimonial offences, as criminal offences, imply fault and intent. A violation of certain elementary principles of the marriage contract entitles the offended party to terminate the marital contract. In lengthy judgments in *Gollins v. Gollins* [20] and *Williams v. Williams*, [21] the House of Lords concluded that intent is not a necessary element in the matrimonial offence of cruelty.

The offending spouse in the *Gollins* case was incorrigibly and inexcusably lazy. His wife was forced to work to provide necessities for the family and to pay off his debts. Her worry over financial problems seriously affected her health. The court found that the husband did not intend to injure his wife, but was so selfish that he closed his mind to the consequences. In spite of this lack of intent, it was held that the matrimonial offence of cruelty had been committed. If an offender knows that the effect of his acts would amount to injury to mental or bodily health, but is merely indifferent to these consequences, he should not be allowed to raise the defence of lack of intent.

The decision in the *Williams* case goes even further. In this case the offending spouse suffered from a mental abnormality. A decree of divorce was granted even though the offender was incapable of forming intent. Only in situations where conduct would be cruel if aggravated by the intention to hurt is intent important. In these situations the acts themselves without intent would not be of sufficient degree to constitute cruelty. As a result

[18] *Id.* at 37.
[19] *Supra* note 14, at 460.
[20] [1964] A.C. 644, [1963] 2 All E.R. 966 (1963).
[21] [1964] A.C. 698, [1963] 2 All E.R. 994 (1963).

of these two decisions, what is now important is only the conduct and not the state of mind. An important policy decision was made in the *Williams* case. Unlike the *Gollins* situation, the insane spouse could be divorced for conduct he had no control over. The court decided that it is of paramount importance to grant the injured spouse relief from an intolerable position.

C. *Recurrence of the Cruel Conduct*

The question of whether relief will be granted if there is no probability of recurrence of the cruel conduct in the future has yet to be conclusively answered. When cruelty was only a ground for separation, its main purpose was to protect the petitioner. It may be argued that the need for future protection is a necessary element of cruelty otherwise there is no need for separation of the spouses. On the other hand, if an offence has been committed, relief should be granted regardless of the possibility of recurrence of the conduct. This latter view is more in line with the purpose of cruelty as a ground for dissolution of marriage. Its purpose has changed from granting protection, to granting relief from an injury suffered.

The Court of Appeal in *Meacher v. Meacher* [22] rejects the first argument. Lord Justice Morton feels that a requirement of a possibility of future acts of cruelty would be adding an element that the Matrimonial Causes Act of 1937 [23] does not require. This act merely states that a divorce will be granted on the ground that since the celebration of the marriage the respondent has treated the petitioner with cruelty. [24] Lord Merriman and Lord Tucker criticize this case in *Jamieson v. Jamieson.* [25] They say that the Matrimonial Causes Act of 1937 [26] adopts the concept of cruelty as a ground of divorce and this concept includes the idea of protection from future harm.

This results in a situation where the ratio of a Court of Appeal decision is contrary to dicta expressed by the House of Lords in another case. Also, since the cases of *Gollins v. Gollins* [27] and *Williams v. Williams* [28] the policy of protection of the offended spouse has been revitalized. This seems to indicate that the House of Lords may overrule the *Meacher v. Meacher* [29] decision.

D. *Physical-Mental Injury to Health*

The English definition of cruelty incorporates the idea of harm to health. There must be "danger of life, limb, or health bodily or mental, or a reason-

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[22] [1946] P. 216, [1946] 2 All E.R. 307 (C.A.).
[23] 1 Edw. VIII & 1 Geo. VI, c. 57 (1937).
[24] *Id.* § 176(c).
[25] [1952] A.C. 525, at 542-47 (Lord Merriman) and 551 (Lord Tucker), [1952] 1 All E.R. 875, at 883-85 (Lord Merriman) and 888 (Lord Tucker).
[26] 1 Edw. VIII & 1 Geo. VI, c. 57 (1937).
[27] *Supra* note 20.
[28] *Supra* note 21.
[29] *Supra* note 22.

able apprehension of it."[30] Injury to mental health is often referred to as "mental cruelty,"[31] and to bodily health as "physical cruelty." By putting the adjectives "mental" or "physical" in front of the noun "cruelty" nothing is added since the definition of cruelty already includes the "mental" as well as the "physical" aspect.[32] The only purpose in modifying the noun is to describe the conduct as causing injury to mental or bodily health and not to alter the definition of cruelty. Since the same definition of cruelty was used by Canadian courts[33] the phrases "mental cruelty" and "physical cruelty" do not change the legal definition in Canada but merely describe the conduct[34] causing the injury.

E. *Statutory Definition*

Alberta and Saskatchewan have a statutory definition of cruelty.[35] There, cruelty is danger to life and limb or health and conduct that is grossly insulting and intolerable, or is of such a character that the petitioner could not reasonably be expected to live with the other after he or she has been guilty of such conduct. Cruelty under the statute is different from the common-law meaning in that it is not confined to conduct that creates a danger to life, limb or health.

The case of *Bell v. Bell*[36] was a case in which the wife was subjected to physical threats and accusations of infidelity. The court found that this conduct was of such a nature that the wife could not reasonably be expected to continue to endure, and this was all that was necessary under the Alberta Domestic Relations Act[37] to constitute cruelty.

In *Lovett v. Lovett*[38] the wife was ready, willing and able to cohabit with her husband and he, although able to do so, continually refused and neglected to support her and the children. Even though there was no injury to health or apprehension of it, the court held that the conditions of the Alberta act were satisfied, The husband's conduct was of such a kind that she could not reasonably be expected to be willing to live with him. There was no mention of physical or mental injury to health.

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[30] *Supra* note 14, at 462.

[31] The following are examples of mental cruelties: association of husband with other women, Campbell v. Campbell, [1940] P. 90 (C.A. 1939); McInroy v. McInroy, [1946] Ont. 587 (1945); Carpenter v. Carpenter, [1955] 2 All E.R. 449 (Divorce Ct.); (refusal of sexual intercourse or use of contraceptives against the wishes of the other spouse); Forbes v. Forbes, [1956] P. 16 (1955); Knott v. Knott, [1955] P. 249; Lauder v. Lauder, [1949] P. 277 (C.A. 1948).

[32] Lauder v. Lauder, [1949] P. 277, at 287. Lord Merriman refers to "mental cruelty" as a colloquial not a legal phrase.

[33] *Supra* note 13.

[34] This conduct can be both physical conduct and conduct affecting the nervous system (mental). *See* Burns v. Burns, [1944] Ont. 561, MacDonald v. MacDonald, [1954] Ont. 521.

[35] ALTA. REV. STAT. c. 89, § 7(2) (1955); SASK. REV. STAT. c. 73, § 25(3) (1965).

[36] [1945] 2 W.W.R. 614 (Alta. Sup. Ct.).

[37] ALTA. REV. STAT. c. 89, § 7(2) (1955).

[38] [1944] 3 W.W.R. 17 (Alta. Sup. Ct.), *aff'd* [1944] 3 W.W.R. 607 (Alta.).

III. Decisions Subsequent to The Divorce Act, 1968

The decisions in which section 3(d) has been construed may be divided into two groups. The leading example in one group is the decision of Mr. Justice Tyrwhitt-Drake in the case of *Delaney v. Delaney*[39] decided in the Supreme Court of British Columbia. The decision of Chief Tritschler of Manitoba in *Zalesky v. Zalesky*[40] in the Manitoba Court of Queen's Bench represents the other line of thought on the interpretation of this problem.

Mr. Justice Tyrwhitt-Drake confines the issue to two alternatives, one being whether Parliament meant to clarify the definition of cruelty as stated in the *Russell v. Russell*[41] decision or whether it meant to take an entirely new approach to the subject. In the *Delaney* case the respondent was constantly drunk. Much of the time he was separated from his family by reason of his being in the Air Force. When he was with his wife, he was abusive and ill-mannered. On one occasion the petitioner's brother was dying under distressing circumstances. He refused to return home to comfort her. The Air Force was notified and returned him home on compassionate grounds. The respondent stayed home four days, during which time he was continually drunk and abusive in the midst of the bereaved family. When the petitioner was bearing her second child, he never visited her or displayed any interest whatsoever. She even had to leave the hospital after two days to get his check from the paymaster. During her third pregnancy, the petitioner was in such a nervous state by reason of her husband's conduct that she had a miscarriage. Through the guidance of the marriage counsellor a reconciliation was effected, but the respondent reverted to his old ways. The petitioner then left him. She had also been treated by a doctor for a nervous disorder after the miscarriage.

It was found that the respondent's conduct was of sufficient gravity to meet the common-law test for cruelty found in the *Russell* case. However, the judge goes on to discuss the Divorce Act 1968 in connection with a possible new definition of cruelty. He begins by examining the words "physical or mental" which are placed before the word "cruelty." Their purpose is either to alter the definition of cruelty or to clarify it. Since cruelty embraces injury to mental as well as physical health,[42] the words "mental" and "physical" can only refer to conduct injurious to mental health or in the case of "physical," conduct injurious to bodily health; they cannot import a wider definition to the word cruelty than already exists.

The word cruelty, he says, already has a meaning in law as defined in *Russell v. Russell*, but what is the effect of the phrase "cruelty of such a kind as to render intolerable the continued cohabitation of the spouses?" According to Tyrwhitt-Drake it can have one of two meanings. Either it can mean that something more than the *Russell v. Russell* definition of cruelty

[39] 66 W.W.R. (n.s.) 275, 1 D.L.R.3d 303 (B.C. Sup. Ct. 1968).
[40] 67 W.W.R. (n.s.) 104, 1 D.L.R.3d 471 (Man. Q.B. 1968).
[41] *Supra* note 14.
[42] By the definition of cruelty in *Russell v. Russell.*

is required, or that the court is required to redefine cruelty based on future intolerability rather than past conduct. He criticizes the second possibility as being a strained interpretation. He feels that to effect this interpretation, one would have to substitute the word "conduct" for "cruelty." Since "cruelty" already had a meaning in law when the new legislation was passed, he is reluctant to deviate from it. Also, to ascertain future intolerability, "[c]ourts might be obliged, in some cases, to exercise a degree of prophetic insight with which . . . few Judges are endowed, and certainly none at liberty to employ." [43]

Tyrwhitt-Drake adopts the first possibility. He says the phrase adds a further requirement to the *Russell v. Russell* definition. It has the effect of requiring a petitioner to adduce such evidence of cruel conduct as will enable the court to conclude that, on the balance of probabilities, continued cohabitation will be intolerable. [44] In effect, he is relying entirely on the common-law definition of cruelty plus a further requirement with regard to the intolerability of future cohabitation. He states that this further requirement adds no new difficulty of proof since "future possibilities can only be a matter of inference from past conduct in any event." [45]

Mr. Justice Tritschler in *Zalesky v. Zalesky* [46] takes a new approach in analysing section 3(d). In this case the petitioner was a pleasant, attractive, cheerful, independent person of robust mental and physical health. Both she and the respondent worked. During the small amount of time they spent together they were constantly arguing. These arguments centred around such things as driving the car and watching television. There were two physical attacks alleged. The judge thought the petitioner was colouring the events and that they were much less significant than she made them out to be. It was found that the parties were incompatible, and the marriage had broken down, but this was not enough to establish cruelty. Such trivial grievances over a fifteen-year period are not grounds for divorce even under the new act.

In analysing cruelty, Mr. Justice Tritschler does not look at the individual phrases of section 3(d), but interprets it as a whole. He makes it clear that he has not been hampered by the definition found in the line of cases which follow the test set forth in the *Russell* case. He says:

> There is now no need to consider whether conduct complained of caused "danger to life, limb, or health, bodily or mentally, or a reasonable apprehension of it" or any of the variations of that definition to be found in the *Russell* case.
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> In choosing the words "physical and mental cruelty of such a kind as to render intolerable the continued cohabitation of the spouses" Parliament gave its own fresh complete statutory definition of the conduct which is a ground for divorce under s. 3(d) of the Act. [47]

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[43] *Supra* note 39, at 279, 1 D.L.R.3d 303, at 307.
[44] *Supra* note 39, at 280, 1 D.L.R.3d 303, at 308.
[45] *Id.* at 280, 1 D.L.R.3d 303, at 308.
[46] *Supra* note 40, at 105, 1 D.L.R.3d 471, at 472.
[47] *Id.* at 105, 1 D.L.R.3d 471, at 472.

He does not disregard the old cases entirely. He adopts the old view that cruelty will still remain a question of fact and each case must be decided individually. In determining cruelty under the new definition, one must still examine the whole history of the marriage. The question is still "whether this conduct by this man to this woman or vice-versa is cruelty." [48]

These two cases interpret section 3(d) differently. *Delaney v. Delaney* held that a petitioner must prove cruelty which satisfies the *Russell* definition and in addition to that it must be of such a kind as to render intolerable the continued cohabitation of the spouses. This definition implies that the new Divorce Act did not change the requirements of cruelty but merely made the old definition a matrimonial offence for which a dissolution can be secured. *Zalesky v. Zalesky* adopts a definition that is different than the one in *Russell*. It interprets the new Divorce Act not only as broadening the grounds for divorce to include cruelty, but also liberalizes the definition of cruelty to cover situations where intolerability of continued cohabitation exists. These two definitions are not reconcilable. Either one or the other must be used, or a third test developed.

Subsequent cases are of little help in establishing a definition for cruelty under the new act. Mr. Justice Gregory in *Paskiewich v. Paskiewich* [49] states that he will follow *Zalesky v. Zalesky* rather than *Delaney v. Delaney*, but gives no reason. In *Herman v. Herman* [50] the respondent was in a mental hospital. He beat the petitioner some twenty times, cursed her and called her filthy names. Mr. Justice Dubinsky, of the Nova Scotia Supreme Court, considers both the *Delaney* case and the *Zalesky* case and concludes that the facts before him amount to cruelty under section 3(d). His judgment only confuses the state of affairs since the two cases he considered are irreconcilable. He simply analyses the two cases in question and concludes that the facts before him amount to cruelty under section 3(d). In *Galbraith v. Galbraith* [51] the respondent's conduct was not in issue. [52] The Manitoba Court of Appeal leaned towards the *Zalesky* case. It held that there is no necessity for physical or mental harm, actual or apprehended in section 3(d) of the new Divorce Act. They see intolerability of future cohabitation as the key to the new act. In *N. v. N.* [53] the respondent killed his two sons with an axe and cut his own wrists. The petitioner suffered from extreme shock which adversely affected her health and underwent a personality change. Her psychiatrist testified that the killing, in her case, was cruelty of such

[48] *Id.* at 105, 1 D.L.R.3d 471, at 472.

[49] 2 D.L.R.3d 622 (B.C. Sup. Ct. 1968).

[50] 3 D.L.R.3d 551 (N.S. Sup. Ct. 1969).

[51] 69 W.W.R. (n.s.) 390 (Man. 1969), *followed in*, Chouinard v. Chouinard (yet unreported, N.B.C.A. 1969).

[52] This was an appeal from a motion to strike out an allegation of cruelty. In a divorce action prior to the new Divorce Act, the husband counterpetitioned for divorce on the ground of cruelty. Both the petition and counterpetition were dismissed. The husband then brought an action for divorce on the ground of cruelty under the new act and the wife pleaded res judicata.

[53] 4 D.L.R.3d 639 (B.C. Sup. Ct. 1969).

a kind as to render intolerable the continued cohabitation of the petitioner with the respondent.

IV. CONCLUSIONS

Society's concept of cruelty is constantly changing. Conduct tolerated a hundred years ago is not acceptable today. When the case of *Russell v. Russell* was decided in 1897 it was recognized that the test for cruelty was outdated. [54] In that case Lord Herschell said it was up to the legislature to change it. Many generations later a new Divorce Act was passed in Canada.

The *Delaney* interpretation of this new act rejects a liberal definition of cruelty and chooses to follow a test which was recognized as inadequate in 1897. It adopts in a modern statute all the shortcomings of the law as it existed seventy-one years ago. If a situation arose today where a wife charged her husband with committing a homosexual act, and persisted in her accusations publicly, via the news media, even after the allegation was refuted in a court of law, the parties would have to remain married if there was no physical or mental harm, even though continued cohabitation of these parties would be impossible. The court in *Delaney v. Delaney* failed to recognize that suffering may be acute without physical or mental symptoms.

On the other hand the *Zalesky v. Zalesky* interpretation liberalizes the definition of cruelty. It eliminates the element of injury to health or an apprehension of it. In *Zalesky* it is enough if the conduct is "of such a kind as to render intolerable the continued cohabitation of the spouses." This interpretation recognizes that conduct *can* be cruel without resulting in physical or mental injury. Moreover, the test can be expanded or contracted to meet the changing pressures of society, for what is tolerable conduct in one generation may be intolerable conduct in another.

Look at other situations where injustice is done by following the *Delaney* case. If a wife persistently nagged, quarrelled, and falsely charged her husband with infidelity in front of his employer and friends, [55] what would be the outcome under these two cases? If the *Delaney* decision was followed a remedy would only be granted if mental or physical injury to health or an apprehension of it was shown. The court, if following the *Zalesky* line of reasoning, would merely look to see if continued cohabitation was intolerable. People who possess strong physical and mental facilities would not be forced to live the life of a martyr. Sexual deviations, refusal to have sexual relations, or even demands for excessive sexual intercourse may develop into a situation where continued cohabitation is intolerable, without actual physical or mental harm. The *Zalesky* test would supply a remedy, which the *Delaney* test could not.

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[54] *Supra* note 14, at 460.

[55] Mainwaring v. Mainwaring, 57 B.C. 390, [1942] 1 W.W.R. 728, [1942] 2 D.L.R. 377.

The interpretation of section 3(d) is a question of policy. The purpose of this section is to provide relief from an intolerable condition. Forcing people to live together under intolerable circumstances produces an unwanted effect on spouses and children of the marriage as well. Twentieth century marriage requires more than physical security. The basic undertaking of the spouses is to love and cherish one another. Conduct which renders cohabitation intolerable is a breach of this fundamental undertaking, regardless of whether physical or mental harm is inflicted, and the parties should have a fair way of terminating the marital relationship. Refusing to grant a remedy forces the parties to live a single life until a divorce can be secured on other grounds, or until forced into an illegal or immoral relationship. The law must correspond with reality; a remedy must be provided. In determining if conduct is cruel, judges should disregard the narrow and antiquated requirements of physical or mental injury. They should be concerned with balancing the values of freeing the parties from an unbearable relationship to pursue individual happiness, with the value of stabilizing the family as the fundamental unit of society by forcing a marriage to continue as a relationship in law alone. The solution is a compromise which turns solely on the question whether the conduct has rendered intolerable the continued cohabitation of the spouses. If it has, a marriage in law alone is not worth preserving. [56]

[56] I would refer to the yet unreported New Brunswick Court of Appeal decision of *Chouinard v. Chouinard.* In this case Mr. Justice Limerick would agree that bodily hurt or reasonable apprehension of it is no longer applicable to the consideration of cruelty under the new Divorce Act and the words "of such a kind as to render intolerable the continued cohabitation of spouses" broaden rather than restrict the definition of cruelty.