Cases and Materials on Family Law

Volume 1, Section B

Edited by Simon Fodden

Contributors Christine Boyle
Ian Bushnell
Simon Fodden
Alan Grant
Winifred Holland
Jay McLeod
Graham Parker
Edward Veitch
Fred Zemans

1976 Draft Edition

Cases and Materials on Family Law

Volume 1, Section B

Edited by Simon Fodden

Contributors Christine Boyle
Ian Bushnell
Simon Fodden
Alan Grant
Winifred Holland
Jay McLeod
Graham Parker
Edward Veitch
Fred Zemans

1976 Draft Edition

CHAPTER VI

CHAPTER VI

REASONS ACCEPTABLE TO THE STATE

One is not entitled to a divorce simple because one wishes it, nor simply because the marriage has proved a failure. Similarly, a party to a marriage is not entitled to financial support from his or her spouse simply because it is needed and the spouse has available resources. In the case of divorce and to a lesser degree in the case of financial support there must be reasons for these actions which are acceptable to the state. Not only must there be "good reason" before the relief sought is granted, but as well the conduct of the petitioner must be free from certain blemishes which might cause the court to refuse the relief even though there is otherwise "good reason" for the action.

This Chapter introduces a number of these grounds for action known as matrimonial offences (such as adultery, cruelty, desertion) and bars to relief (such as condonation, collusion, connivance). It is convenient to deal with them in the context of divorce; for they are all relevant to the law of divorce. While each of these concepts has a core meaning common to its use in every legal cause, the actual context in which it occurs will alter this core meaning somewhat. For example, the meaning of cruelty, condonation, and collusion have been statutorily altered by the Divorce Act or by the courts' interpretation of that Act.

The basic nature of the grounds and bars which are common to many matrimonial causes is dealt with, then, in this Chapter; and in particular the law of divorce is explored in some detail. In Chapter VIII the grounds and bars will re-appear in the context of actions for financial support, and there they will be discussed only insofar as their meaning is altered. In turn, to avoid repetition, those aspects of divorce known as corollary relief (custody and maintenance) are dealt with in Chapters VII and VIII where the focus is on custody and support after family breakdown.

In examining the law of divorce one must ask not only what the limits of the grounds are but also what are the justifications for limiting divorce. These are not idle speculations: the law of divorce was radically altered in Canada by the Divorce Act in 1968 and it appears that further alteration is in the offing.

Law Reform Commission of Canada,
Report on Family Law, (1976), pp. 16-17, 24-25, 29.

> The philosophy and practice of the law in dealing with the family in difficulty is conducive to and reinforces the assumption of an accusatory and adversary stance by each spouse. The traditional way to avoid the grave economic and personal injuries that can be

suffered under the divorce law has been to inflict them on the other spouse. The law provides efficient adversarial weapons with which to do this, as well as to use the occasion of divorce to gain revenge or reparations for such things as rejection, accumulated hostility and disappointed expectations. The limitations created by the adversary relationship prevent the state from taking any constructive or positive approach to husbands and wives with serious marital problems. Marriage, as the major institutional foundation of our society, is primarily supported by laws and legal policies that emphasize the triumph and vindication of one spouse rather than the reconciliation of both. This impairs the ability of the legal system to deal with family breakdown as a continuum in which there could be, with timely and appropriate assistance and adjustment, viable intermediate alternatives for family survival and renewal. The legal system should provide a means to preserve families as well as to dissolve marriages.

The adversary system, however, is inherently inconsistent with the harmonious resolution of family disputes. It should not be made available, as it is now, as an extension of the destructive capacity of spouses who disagree over their personal relationship. The policy of the law and its institutions should be to help spouses in trouble to reach mutual understanding and sympathy for each other's point of view and feelings and, where divorce becomes unavoidable, to promote fair and constructive arrangements respecting finances, property and children. The legal approach to the family in difficulty should be humane and where possible, healing. Instead, it is one of Canada's great self-inflicted wounds.

We share the concerns sometimes expressed about the possibility of frivolous or hasty divorce, but the law for the many should not be dictated by the failings of the few. Most persons have a deep-seated interest in establishing and maintaining a structured, permanent family relationship. This will continue to be the fundamental element of family stability regardless of the content of the laws governing dissolution of marriage. Beyond giving scope for the operation of realistic measures designed to support or help re-establish family stability—something the present law does not conceive to be within its province—the law can only ensure that ending a marriage is a solemn and considered step.

It is not just important but vital to society that spouses with family problems do their best to work them out. The present law, unfortunately, does nothing in this regard beyond the negative coercion provided by a punitive divorce process. It also tends to cause people to avoid admitting to themselves that they have problems and facing them, until it is too late. Given the importance of maintaining the stability of the family, we suggest that there are

alternatives that are clearly superior to the present law for realizing this object at a far lower social and individual cost. We also suggest that this interest not be satisfied at the expense of another of equal importance: the public interest in the individual lives of those spouses, parents and children unfortunate enough to be members of a family that disintegrates. Both these interests deserve to be secured and advanced. This cannot be accomplished without substantial changes in the law dealing with dissolution of marriage.

The essential elements of a viable marital relationship between a husband and a wife are not defined, created, regulated or preserved by law. We refer to such things as trust, cooperation, affection, tolerance, respect, emotional support, psychological stability, sexuality and generosity. The laws governing marriage presuppose their existence and are only appropriate when they are present. Where they have disappeared, substantial harm, not only to individuals but also to the community, can result when family members are required to continue to rely on such laws for the definition of the rights and obligations of each spouse and the relationships between parents and children.

The Commission recommends:

1. The only basis for dissolution of marriage should be the failure of the personal relationship between husband and wife. (Referred to in these recommendations as "marriage breakdown".)

2. The doctrines of "matrimonial offence", "matrimonial fault", "collusion", and "connivance" should be inapplicable in all future marriage breakdown cases.

3. Marriage breakdown should be non-justiciable, conclusively established by the evidence of one spouse.

4. All adversarial pleadings should be removed from the law of dissolution of marriage; the dissolution process should be commenced by either or both spouses filing with the court a simple and non-accusatory notice of intent to seek dissolution.

5. Dissolution of marriage should be a ministerial act of the court, established in a formal but not adversarial hearing.

6. A husband and wife should not be required to separate or live apart as a condition of participating in the dissolution process; nor should remaining together prejudice any right or otherwise adversely affect the legal position of either spouse.

7. The doctrine of "condonation" should be inapplicable in all future marriage breakdown cases.

8. The court should have power to make temporary orders respecting:

(a) financial provision for a needy spouse and children;

(b) custody, care and upbringing of and access to children;

(c) non-molestation of a spouse and children;
(d) rights of use and occupation of the matrimonial home (including use of its furnishings); and
(e) the prevention of the disposition, removal from the jurisdiction or encumbrance of any asset in which a non-owner spouse may have an interest upon a final order of economic readjustment upon dissolution.

In order to illustrate the sequence of the basic features of the proposed process within a framework of fixed times, we set out the following table:

Time	Basic Steps in the Process
Initiation of the process	A notice of intent to seek a dissolution is filed by a spouse.
Immediately where children are involved or where a temporary order is sought	The court is required to hold an assessment conference on the situation respecting children; and has power to hold an assessment conference where a temporary order is sought.
Not sooner than six months after filing	Where the spouses are unable to reconcile but are able to agree on justiciable issues (economic readjustment and matters concerning children) either may apply for dissolution. A hearing is held and following establishment of marriage breakdown, conclusively established by the evidence of at least one spouse, the marriage is dissolved.
Not sooner than six months after filing	Where the spouses are unable to reconcile and do not agree on justiciable issues, either may apply for adjudication. The court, after assessment, either tries the justiciable issues, following which the case proceeds to dissolution, or postpones trial to allow continued attempts to reach agreement on matters in dispute.
Twelve months after filing	Where the spouses are still unable to reconcile or agree on justiciable issues, either may require a trial of the issues or dissolution as the case may be.
One month after adjudication or the decision to proceed to dissolution	A dissolution hearing is held and following establishment of marriage breakdown, conclusively established by the evidence of at least one spouse, the marriage is dissolved.

A brief historical survey of the application of divorce law to Ontario tends to emphasize how recent a phenomenon we are considering.

Prior to 1857 there was no such thing as judicial divorce in England. If a man sought to divorce his wife he was required to follow a long and expensive procedure. First, on finding that his wife has committed adultery, he obtained from

the Ecclesiastical Court a church-sanctioned separation from his wife - the so-called divorce a mensa et thoro (literally "from bed and board"). He then took an action against the adulterer for criminal conversation. Finally he promoted a private Act of Parliament which, on being passed into law, formally dissolved his marriage.

In 1857 judicial divorce was first introduced into England, the action of criminal conversation was abolished, and the Ecclesiastical Court lost its jurisdiction in matrimonial causes. The grounds upon which divorce was permitted were narrow. A husband could divorce his wife only for adultery. A wife could divorce her husband for sodomy, bestiality or rape. If a wife wished to divorce her husband on grounds of adultery she was required to prove, in addition to the adultery, that the husband had committed incest, bigamy, cruelty or desertion for two years or more. This double standard remained until 1923 when a wife was finally permitted to divorce her husband for adultery.

In Ontario, from Confederation, it was possible to undertake the passing of a private Act of Parliament to effect a divorce. Nova Scotia, on the other hand, derived jurisdiction for judicial divorce from a pre-confederation statute and the prairie provinces introduced the law of England as at 1857. On entry into the union, it will be noticed that the Dominion Parliament which had the constitutional power to act in the field of divorce under s.91(26) of the B.N.A. Act, refrained, at this stage, from taking any legislative initiative.

In 1925 Dominion legislation in Canada removed the "double standard" whereby a wife had to prove adultery plus the other grounds mentioned above, but this brought no relief, at that time, to people from Ontario who were still without any form of judicial divorce.

In 1930 the Dominion Parliament enacted the Divorce Act (Ontario) which introduced judicial divorce into Ontario for the first time. The grounds for divorce were delineated as those provided by the law of England of 1870 as amended by the 1925 Dominion legislation removing the "double standard" for wives. Thus, in Ontario, from 1930, a husband could divorce his wife for adultery and a wife could divorce her husband for adultery, rape, sodomy or bestiality.

By the Divorce Jurisdiction Act 1930 (Can.) a wife who had been deserted in Ontario by her husband was permitted to petition for divorce in Ontario on any of the four grounds mentioned above, i.e. the act overcame the unity of domicile theory which would otherwise have prevented the Ontario court from assuming jurisdiction in the wife's case since she was not domiciled in the province but had the domicile of her deserting husband wherever that might be. N.B. The act did not make desertion, as such, a ground for divorce.

This then was the background of the passing of the Divorce Act 1967-68 by the Dominion Parliament. Prior to this, as we have seen, only matrimonial offences were grounds for divorce in Ontario. This approach led to much criticism. Its connotation of one side "winning" and the other side "losing" failed, it was said, to take account of the fact that it was marriage itself which was defeated by divorce and that human relations were too complex to allow blame to be neatly affixed to one or other party. The opponents of the "matrimonial offence" concept suggested that it would be more realistic to make the sole criterion for a divorce the fact that the marriage in question had permanently broken down. Thus when the function and substance of the marriage had departed all that was required of the law was to slough off the empty shell which remained in as humane a manner as possible.

As is often the case with legislation which must, for its successful passage through Parliament, succeed in being some things to all persons, the Divorce Act was somewhat compromised. It retains elements of both approaches: s.3 sets out "matrimonial offences" upon which a divorce may be granted and s.4 sets out those situations in which a divorce will be available since a permanent breakdown of the marriage will be deemed to have occurred. The grounds for divorce in Canada to day may therefore be summarized as follows:-

Matrimonial Offences (s.3)

(a) Adultery
(b) Rape, bestiality, sodomy, homosexual acts
(c) Bigamy
(d) Cruelty

Permanent Marital Breakdown (s.4)

(a) Imprisonment
(b) Addiction
(c) Disappearance
(d) Non-consummation
(e) Living separate and apart.

This act brings judicial divorce to the Provinces of Quebec and Newfoundland for the first time.

Before turning to a fuller discussion of substantive grounds for divorce, it is important to turn briefly to the questions of jurisdiction and recognition of foreign decrees of divorce. The first is an obvious preliminary matter: without jurisdiction a court cannot begin to consider a case. The second is important generally, (since many people in Canada have obtained divorces elsewhere) and specifically as a matter preliminary to a divorce action in Canada since before one can

obtain a divorce one must be provably married. If a foreign decree is recognized here, there may be no recourse to our divorce courts and no opportunity for corollary relief.

Earlier in this casebook we looked briefly at the question of the validity of marriages which had connections with more than one legal system. Among other things we found that the concept of domicile had been developed by the law as a means of identifying the legal system which should be applied to certain aspects of a person's status, e.g., whether a person had, in law, the capacity to enter into a marriage. We also found that domicile had been a useful, though not exclusive, determinant of the question whether a court would hold that it had jurisdiction to decide whether a marriage was void or voidable or to recognize such decisions by courts in other jurisdictions.

From an historical point of view, this concept of domicile was also useful to the courts as a means of determining whether a court would take jurisdiction over a divorce case or recognize a decree of divorce granted by a court in another jurisdiction. Thus it became clear law that since jurisdiction that was based on domicile, then, provided a divorce was granted by the court of the country where a person was domiciled, that would be a logical basis for recognition. (Le Mesurier, [1895] A.C. 516).

These proved, however, to be particularly narrow rules (a) in their own right and (b) because of the unity of domicile theory of the common law whereby a married women was held, by operation of the law, to have the same domicile as her husband. Because of these two rules, a deserted wife could not be validly divorced from her husband unless the decree was granted by the court of the country where her husband was domiciled. Thus, the narrow jurisdiction/recognition rule and the unity of domicile theory led to a number of limping marriages, i.e., situations where a divorce granted in one jurisdiction would not be recognized by another so that parties were "married" in one jurisdiction and "not married" in another.

Over the years, therefore, there have been a number of initiatives which have occurred, some operating prospectively and some, because of the declaratory principle of the common law, in effect operating retrospectively.

Jurisdiction Matters

In addition to jurisdiction based on the domicile of the husband, the following were recognized:-

(i) By the Divorce Jurisdiction Act 1930 (Can.), a wife who had been deserted in Ontario by her husband was permitted to petition for divorce in Ontario on any of the grounds mentioned in the federal Divorce Act

(Ontario), viz., adultery, rape, sodomy or bestiality.

N.B.: Desertion by the husband (previously domiciled in Ontario) was not a ground for divorce, but a circumstance used by the Divorce Jurisdiction Act to trigger the wife's release from the jurisdictional straitjacket of the unity of domicile theory under which the wife would have not to petition in the place where the deserting husband was domiciled (wherever that might be!)

(ii) By the Divorce Act R.S.C. 1970, c.D-8, ~~D-5~~ 6(1)~~(b)~~, which came into effect on July 1, 1968, a wife, for the purposes of establishing the jurisdiction of the court, is given the right to acquire a domicile different from that of her husband. Thus, even though a husband is not domiciled in Canada, his wife can still commence divorce proceedings here (if she has a Canadian domicile) in the court of the province in which she resides. In addition, the wife may acquire a foreign domicile for the purpose of divorce. (see generally, Divorce Act, s.6(1)). It should also be noted that in establishing jurisdiction for divorce purposes the legislation now speaks of a Canadian domicile (ss. 5 and 6) as opposed to a relevant provincial domicile.

Section 5(1)(b) speaks to provincial jurisdiction: the petition must be filed in a province in which the petitioner or the respondent has been "ordinarily resident" for at least one year "immediately preceding the presentation of the petition". In addition that person must have "actually resided" in the same province "for at least ten months of that period". For each of these two requirements, two factors are important: What is the quality of residence required? And how is the prescribed period calculated? "Ordinarily resident", being the more lenient of the two requirements, seems to have provoked less dispute. In Hardy v. Hardy (1970) 7 D.L.R. (3d) 307 (Ont. H.C.) such tests were set forth as: "Where did this petitioner regularly, normally or customarily live in the year preceding the filing of the petition?" and "Where was his real home in that period?" These are insufficiently precise to have much analytical utility. On the other hand, they are sufficiently flexible to permit a court to take jurisdiction when it is sensible to do so. The period is calculated backwards from the time of the presentation of the petition, and maybe for more but not less than one year.

It is sufficiently clear from the cases that it is not necessary to be physically in a province to be considered "ordinarily resident" there. However, in the Hardy case, the words "actually resided" were said to require physical residence in the province. More difficult still is the dispute over which ten months may be considered as meeting the requirements of the

latter branch of the rule. The Hardy case stands for the proposition that the ten months must be in the one year prior to filing. But in the case of Doucet v. Doucet (1974) 4 O.R. (2d) 27 (L.J.H.C.) the court was unable to accept that proposition for it would mean the husband petitioner would be unable to obtain a divorce anywhere in the world (without waiting ten more months). Thus the court ruled that the ten month period could be located at any time within the total period of ordinary residence, and not just the last year. In doing this the court said it was following Wood v. Wood (1968) 2 D.L.R. (3d) 527 (Man. Q.B.) and Marsellus v. Marsellus (1970) 13 D.L.R. (3d) 383 (B.C.S.C.). This conflict has not yet been resolved.

Indeed, the whole of s.5(1)(b) seems to be little more than a fertile source of trouble, lacking as it does a clear purpose which might guide questions of interpretation. In a recent article Professor Mendes da Costa describes some of the operations of s.5(1)(b) as being "utterly devoid of merit". He goes on to say:

> "The Divorce Act is federal statute. It's main purpose is to provide a Canada-wide law of divorce. Yet, . . . upon change of provincial residence, a spouse who was born in Canada and who has, at all material times, been both domiciled and resident in Canada, may be unable - for want only of a jurisdictionally competent forum - to obtain in Canada the relief of divorce: for there may be no court for any province invested with jurisdiction pursuant to s.5(1)(b); and . . . jurisdiction in such a situation is not vested in the Federal Court.
>
> It seems clear that each legal system must determine for itself, rules that control the jurisdiction of its courts to grant the relief of divorce. The formulation of divorce jurisdiction rules seems, however, to be dependent upon a prior ascertainment of the function and purpose of the remedy of divorce, as this remedy is conceived by the society to which the legal system in question belongs. In the Canadian context, the view is expressed that the function of the remedy of divorce should be to grant relief in relation to those marriages that may be said to form, from time to time, part of the fabric of Canadian society. And so too the view is expressed that the purpose of this remedy should be to stabilize Canadian society and to further this society's way of life. If this view is accepted, it seems to follow that some test must be formulated to connect a marriage with the society of Canada. It is considered that the connecting factor so selected should possess the following characteristics: it should be simple

> and uncomplicated; it should produce a just result and, moreover, a result that is reasonably predictable. And further, once so selected, care should be taken to avoid in the application of this connecting factor, all unnecessary refinements and complexities.
>
> It is considered that s.5(1)(b) performs no useful function and that this provision should, accordingly, be repealed. Indeed, the view is expressed that s.5(1) in its entirely (including the requirement of domicile) should be repealed and that jurisdiction should be made to depend, simpliciter, upon the ordinary residence in Canada of either the petitioner or the respondent."
>
> ("Recent Developments in Family Law:", Four O'Clock Series, Studies in Current Law, Canadian Bar Association, 1975 edition, pp. 14, 15).

Recognition Rules

There have been two main sources of recognition rules: (i) common law and (ii) statute. The common law rules that have been developing have tended to be so apprently all-encompassing, that the most recent extensions, if confirmed, appear to cover most of what the statutory initiatives had in mind. For this reason we shall outline the main propositions in the order in which they have come to light, but since judge-made law is expanding the grounds for recognizing foreign divorce decrees (as has been the case of late), it sometimes appears, with the benefit of hindsight, that legislative efforts have been at best niggardly and, at worst, superfluous. But we must remember that the legislature cannot know what the judges are going to declare the common law always to have said!

The first rule of recognition, which was mentioned at the commencement of this note, was that propounded in the Le Mesurier case,

1) Recognition was given to decrees of divorce granted by the jurisdiction where both parties were domiciled at the commencement of the proceedings.

The following rules of recognition were then developed:-

2) Recognition was granted to decrees which would be recognized as valid by the jurisdiction where the parties were domiciled at the time of the divorce (Armitage v. A.-G., [1906] P.135.

3) Recognition was given to a decree granted to a wife in circumstances substantially similar to those in which Canadian courts would have taken jurisdiction under the Divorce Jurisdiction Act 1930 (See Above).

4) Recognition was given, after 1968, to a decree of divorce granted outside Canada by a tribunal or other competent authority that had jurisdiction under that law to grant the decree on the basis of the domicile there of a wife determined as if she were an unmarried adult person (Divorce Act, s.6(2)).

All of these developments have, however, been overshadowed to some extent by a judicial initiative which has since received some support in Canada. In Indyka, [1969] 1 A.C. 33, the House of Lords approved a wider principle of recognition:-

5) Recognition was given to a decree of divorce where it was shown to have been granted by a jurisdiction with which the petitioner had a substantial connection. Since this expression enunciates a principle rather than a statutory definition, no short statement of examples can hope to capture its spirit. This approach has, now, been considered with apparent approval in some Canadian cases, e.g.,

Abbruscato (1973), 12 R.F.L. 257 (Ont. Fam. Ct.)
Bevington v. Hewitson (1974), 47 D.L.R. (3d) 510 (Ont.)
Rowland v. Rowland (1974), 2 O.R. (2d) 161.

N.B.: Because s.6(2) Divorce Act is expressly stated to operate only prospectively, the rule of recognition under the Indyka principle will, on occasion, be very useful to proponents of recognition of an earlier foreign decree.) For a useful comment on the Bevington v. Hewitson case, see J.G. McLeod (1976) 54 Can. B. Rev. 169.

Prior to 1968 Canadian courts, having taken jurisdiction over a case, have applied the law of the forum (or lex fori) to the resolution of the legal issues involved. The Divorce Act is silent on the question of choice of law and it is assumed that it envisages the application of the lex fori. Students of conflict of laws who pursue this subject in more detail elsewhere will find that an alternative exists to the application of the lex fori to each of the major issues in a complex legal-factual situation. This involves a characterization of the facts into the major and subsidiary issues, the conflict of laws analysis of the lex causae of the major issue being applied to all incidental questions. (See generally Schwebel v. Ungar (1964), 48 D.L.R. (2d) 644 (S.C.C.). For our present purposes it is unnecessary for family law students to pursue this particular point further, other than to be aware of the alternative methodologies that are possibly available.

Reading: Generally, see:

D. Davies, Power on Divorce 3rd edition, 1976
McDonald & Ferrier, Canadian Divorce Law and Practice

D. Mendes da Costa, "Divorce", in Studies in Canadian Family Law, Mendes da Costa, ed., 1972 (Supplement, 1973)

SECTION ONE: FAULT

a) Grounds for Action

Read s.3 of the Divorce Act

In this examination of fault grounds only adultery and cruelty will be dealt with. The other fault grounds are rarely used: Less than 1% of petitions filed allege fault grounds other than adultery and cruelty. (D. Mendes da Costa, Studies on Canadian Family Law, Supplement 1973, p.71). As you read the following cases, consider whether the view of fault expressed by the Law Reform Commission of Canada (above) or that revealed (below) in the study which led the 1968 Act is the more appropriate.

Report of the Special Joint Committee of the Senate and House of Commons on Divorce, 1967 (Canada), pp. 103, 104

> The advantages of the matrimonial offence idea urged by those favouring its retention are numerous. In the first place, it is a definite system generally understood by the public at large. The parties know that if they restrain their conduct within certain bounds they cannot be divorced; if they transgress they can. It has been argued that this provides security for the marital relationship, especially for the wife past middle age who has lost her youthful charm and whose husband has a roving eve.
>
> Other additional factors are relevant too. Because the present system is definite and well understood, the courts have a real issue to determine: was or was not the alleged offence committed. Thus lawyers can advise clients as to their rights with some degree of confidence.
>
> Furthermore, there seems little doubt that the matrimonial offence concept in some form is widely held by the public. Most briefs that your Committee has received advocating reform, have assumed that this would be the basis of any prospective reform. Few groups have called for its actual abolition although almost everyone has asked that the grounds for divorce be broadened.
>
> While some witnesses before your Committee advised the abandonment of divorce on the ground of offence and the adoption of the marriage breakdown theory, whereby the ground would be the separation of the spouses for a specified period with no reasonable prospect of a resumption of cohabitation, your Committee is of the opinion that the public in general holds that in the case of the major matrimonial offences, such as adultery, cruelty and desertion, the innocent and offended party is entitled to an immediate divorce.

It would be difficult to dispense with the matrimonial offence theory completely. Most people regard marriage as an institution which provides certain specific rights and duties for the spouses in respect of each other. There is a commitment to mutual love, support and assistance; and it provides the social basis for the engendering and raising of children. Marriage is a normal, indeed natural institution in our social and most people partak. The basic pledge in the marriage bond is that the parties will keep exclusively one to the other. Moreover, this is a monogamous society in which we live. A husband can have but one wife and a wife but one husband. Should either a husband or wife depart from the standard of marital fidelity, the other should have the right to a divorce and immediately so, if he or she so wishes. If one partner to a marriage dishonours its basic obligations, the other should have the right to be free of the legal ties. On the other hand, a spouse who is willing to forgive and forget, does not appear in the divorce courts.

Adultery strikes at the root of the institution of marriage and in consequences has from time immemorial, been recognized as a valid ground for divorce in those societies which accept divorce at all. Its retent on as such has not been seriously questioned. Even the advocates of marriage breakdown as the sole ground for divorce, the United Church for example, admit that evidence of adultery creates a special case meriting special treatment.

Adultery

Orford v. Orford
(1921) 49 O.L.R. 15 (H.C.)

This was an action for alimony.

January 5, 1921. CLUTE, J., read a judgment dealing fully with the facts and evidence and the issues presented for determination. He decided against the plaintiff and dismissed the action. Such portions only of the judgment as bear upon two questions of law are reported, as follows:—

The plaintiff came to Toronto from England in 1910, met the defendant in 1913, and was married to him in Toronto on the 26th August of that year. They left for England on their wedding-trip a few days later. On the 5th November, 1913, the defendant sailed from England for Canada, leaving the plaintiff with her parents at their home in Weston-super-Mare. It is admitted that,