38/74

SUPREME COURT OF VICTORIA

RULE v RULE

Harris J

29 July 1974

FAMILY LAW – CONCEPT OF MATRIMONIAL CRUELTY – DEFINITION OF CRUELTY.

1. The issue of cruelty in relation to the law of divorce can only be determined after a review of the whole married life of the parties and the making of an assessment of their frailties and their strength. The same conduct may amount to abominable cruelty in one set of circumstances: to the enjoyable rough and tumble of a happy married life in another.

2. It is now firmly established that in matrimonial causes before a spouse can be found guilty of cruelty certain elements must be present. They may be listed as follows:
(1) the conduct must cause injury or reasonable apprehension of injury to the health of the other party irrespective of whether such result was intended;

(2) the conduct which is alleged to constitute cruelty must be grave and weighty;

(3) the conduct viewed as a whole in the light of all relevant circumstances must be capable of bearing the description of cruelty in the generally accepted use of that word.

HARRIS J: ... Cruelty as a ground for matrimonial relief has been part of the law for a very long time. It was a concept which was developed by the Ecclesiastical Courts long before 1857. In 1897, in *Russell v Russell* (1897) AC 395, the law was succinctly stated by Lord Davey at pp 467-468, where the learned Lord summarised the law established by the Ecclesiastical Courts by saying that:-

> "The general idea which I think underlies all those decisions is that while declining to lay down any hard and fast definitions of legal cruelty, the courts acted on the principle of giving protection to the complaining spouse against actual or apprehended violence, physical ill treatment or injury to health."

In 1952, the House of Lords delivered judgment in another important case dealing with cruelty. In 1952, this description of what constituted cruelty, that is to say, the description given by Lord Davey, was the subject of an important comment by Lord Merriman in *Jameson v Jameson* (1952) AC 525. What Lord Merriman said (at p45) was:

> "When the legal conception of cruelty is described as being conduct of such a character as to cause danger to life, limb or health, bodily or mental, or to give rise to a reasonable apprehension of such danger, it is vital to bear in mind that it comprises two distinct elements;
> First, the ill-treatment complained of, and; secondly, the resultant danger or the apprehension thereof.
> 'Thus it is inaccurate and liable to lead to confusion if the word 'cruelty' is used as descriptive only of the conduct complained of, apart from its effect on the victim."

(see also on the concept of cruelty, *Gollins v Gollins* [1963] UKHL 5; [1964] AC 644; (1963) 2 All ER 966; [1963] 3 WLR 176 and *Williams v Williams* ((1964) AC 698). In 1967 Selby J in the Supreme Court of New South Wales, delivered a carefully considered and extremely valuable judgment in which he analysed the concept of cruelty in the light of the English authorities. The decision is *Ainsworth v Ainsworth* (1967) 10 FLR 396; [1968] 1 NSWR 68. At p398 (FLR) Mr Justice Selby said:

> "The subject of legal cruelty is fraught with difficulty and the application of such of the relevant principles as have been firmly established is most complex, for the court is dealing with human beings in their most intimate relationship and not only can it be said that no two human beings are exactly alike but all react differently according to their personalities and temperaments, the

> state of their health, their upbringing, their beliefs and their environment. There is a singular lack of appropriate appellate authority on the subject in Australia, owing in all probability to the fact that until the coming into operation of the Commonwealth Act it was only in South Australia that habitual cruelty was by itself a ground for dissolution of marriage. But in England a great wealth of authority has developed, particularly since 1937 when cruelty first became ground or divorce."

His Honour then referred to the two cases of *Gollins v Gollins* (*supra*) and *Williams v Williams* (*supra*) as two towering landmarks in the course of this development. After making some comments upon those decisions His Honour said (at p399):

> "It was made abundantly clear in both cases that matrimonial cruelty is not an artificial concept, bearing no relationship to cruelty in the generally accepted connection of that word."

A little later, at p400, His Honour said:

> "Since 1964 the courts in England have repeatedly emphasized the necessity of proving that conduct is grave and weighty and must amount to cruelty in the generally accepted meaning of that word before can be stigmatized as cruel."

In this context His Honour referred to the decision of the Court of Appeal in *Le Brogue v Le Brogue* (1964) 3 All ER 464. After reviewing a number of other authorities, Selby J said (at p402):

> "The courts have consistently declined to attempt to give an exhaustive definition of the legal concept of cruelty and I certainly have no intention of departing from that tradition, but the passages which I have cited indicate that it is now firmly established that in matrimonial causes before a spouse can be found guilty of cruelty certain elements must be present. They may be listed as follows:
> (1) the conduct must cause injury or reasonable apprehension of injury to the health of the other party irrespective of whether such result was intended;
>
> (2) the conduct which is alleged to constitute cruelty must be grave and weighty;
>
> (3) the conduct viewed as a whole in the light of all relevant circumstances must be capable of bearing the description of cruelty in the generally accepted use of that word."

His Honour then added words which are of particular significance to every judge who has to decide a case in which relief is sought on this ground. What he said was:—

> "Simple though these tests appear to be when thus enunciated, it is in their application to the facts before the court at the real difficulty arises. The common law has invented that useful fiction the reasonable man as the yardstick although somewhat elastic by which conduct may in certain circumstances be measured. But the law of divorce recognises neither the reasonable man nor the reasonable woman. The litigants in the divorce court are people and being people are expected to behave unreasonably. This court refuses to accept any standard of conduct against which behaviour can be measured whereby it can be said that the doing of an act which a reasonable man would not have done or failure to do an act which a reasonable man would have done amounts to a matrimonial offence. The relationship between husband and wife is too close and intimate to be tested by arbitrary standards. The vagaries of human nature are immeasurable and the effect of the inter-relationship of one personality with another too unpredictable to be capable of measurement by any yardstick whether the measure be reasonableness, decency or consideration. The issue of cruelty can only be determined after a review of the whole married life of the parties and the making of an assessment of their frailties and their strength. The same conduct may amount to abominable cruelty in one set of circumstances: to the enjoyable rough and tumble of a happy married life in another."