

## Accreditation to go with No-Fault Divorce Article

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# Fault v No fault divorce

## AN OVERVIEW.

### 1.1 Divorce legal history

Historically, divorce law has relied very heavily on the petitioner establishing fault on the respondent's part e.g. to obtain a divorce before 1670, it had to be proved to the ecclesiastical courts (who followed canon law) that the marriage had never happened legally and under the Matrimonial Causes Act 1857:

1. The only ground for obtaining a divorce was the Respondent's adultery;
2. The Petitioner had to show that he/she was free from guilt; and
3. The court had to be satisfied that there was no connivance/collusion between the parties.

There have been attempts to erode the requirement of proving fault, e.g. the 1857 Act<sup>1</sup> allowed a petitioner to obtain a divorce based upon the fact that the respondent was incurably of unsound mind and had been continuously under care and treatment for at least 5 years preceding the presentation of the petition, meaning that divorce was available owing to misfortune with "*a serious inroad (having) been made into the offence principle.*"<sup>2</sup>

The retention of the matrimonial offence as the basis of divorce law came under increasing attack, ultimately resulting in divorce laws being modernised by the 1969 Act<sup>3</sup> which introduced the term "*irretrievable breakdown*" which is very difficult to define and prove. However, it is generally a result of fault where events may have escalated to the point where there is no salvation left for the marriage.

The emphasis on fault continues to be seen in the current law, where people have divorced and there has been much blame placed on one of the parties due to his/her actions.

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<sup>1</sup> Matrimonial Causes Act 1857

<sup>2</sup> "Principles of Family Law" Cretney, Judith Masson, Rebecca Bailey-Harris, Rebecca Probert, 8<sup>th</sup> Edition, 2008, Sweet & Maxwell Ltd, at p.283

<sup>3</sup> Divorce Law Reform Act 1969: Otherwise known as the 'Casanova's Charter', a phrase coined by Baroness Summerskill.

## **1.2 More recent attempts at reform.**

Further criticism of the emphasis on fault was seen in The Law Commission's Report: "The Ground for Divorce"<sup>4</sup> which proposed that divorce should no longer require proof of one of the "facts" set out in the 1969 Act<sup>5</sup>, with breakdown of marriage being inferred from the fact that one year had elapsed since either party had formally signified their wish to divorce. This period was intended for consideration of the practical consequences resulting from a divorce and to reflect upon whether the breakdown of the relationship was irreparable. According to the Commission<sup>6</sup>, the law should concentrate on bringing parties to an understanding regarding the practical reality of divorce.

The Law Commission's recommendations were enacted in the Family Law Act 1996, the intention being to introduce no fault divorce over a "*process of time*". Irretrievable breakdown remained the ground for divorce which was only established if:

- (i) A statement had been made by one or both of the parties to the effect that one or both of them considered that the marriage had broken down;
- (ii) A period for "reflection and consideration" had taken place and had ended;
- (iii) A further declaration had been made at the end of the process to the effect that, having reflected on the breakdown and considered the requirements regarding the parties' arrangements for the future, the person making the statement believed that the marriage could not be salvaged.

The period for reflection and consideration in the end was nine months commencing with the 14<sup>th</sup> day after the day on which the original statement was received by the court. This period was extended by a further period of 6 months where the party not making the statement asked for that extension or where there was a child of the family under the age of 16 at the time the final application for the divorce order was made.

There was a requirement to attend an information meeting before filing the initial statement of marital breakdown. The attendance had to be no less than three months before making the statement.

The combination of the requirement to have an information meeting and the period for reflection and consideration meant that the earliest time for a divorce was twelve months and two weeks, extending to fifteen months and two weeks where one party objected or there was a child under 16.

The 1996 Act<sup>7</sup>, was intended to re-focus parties from blame to co-operative, responsible dispute resolution, aimed at achieving continuous relations and reflection. The Act

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<sup>4</sup> "The Ground for Divorce" (Law Com No. 192 (1990)) published in November 1990.

<sup>5</sup> Divorce Reform Act 1969

<sup>6</sup> "The Ground for Divorce" (Law Com No. 192 (1990)) published in November 1990.

<sup>7</sup> Family Law Act 1996 Part II

promised a “New Way” of resolving conflict, reducing stress and damage to parties. In its final form, the Act was unsatisfactory, meaning that “*the baby of no fault divorce (was) thrown out with the bathwater of all of the other provisions*”<sup>8</sup>. It was never implemented and was subsequently repealed. No full explanation of the Government’s decision has ever been given, “*but it has been suggested that the failure of couples to opt for mediation in preference to legal representation on the scale apparently expected was significant, whilst the fact that many of those attending pilot information meetings chose a solicitor as their main path through divorce was manifestly not what the Government wished to hear.*”<sup>9</sup> In consequence, the current law continues to require the Petitioner to prove fault on the part of the other party

## **2.1 Arguments in favour of a no-fault divorce.**

Many arguments have been put forward by academics/other professionals in favour of a no-fault divorce, summarised as follows:-

**2.1.1 Why should a person have to prove to anyone (other than himself/spouse) that a marriage has ended?** If people do not wish to remain married, they should be free to bring its “empty shell” to an end without having to cite anachronistic reasons. Making divorce available only on proof of fault does not lead to happier marriages but to parties separating, although legally married, “*or to cantankerous divorce. After all ‘no statute, no matter how carefully and cleverly drafted, can make two people love each other*”<sup>10, 11</sup>

**2.1.2 How dare the state dictate whether a marriage has/has not come to an end?** It is paternalistic for the state to prevent adults from doing what they want. It can be argued that the only people who know whether a marriage has/has not come to an end, is the couple themselves.

**2.1.3 The law cannot really decide who is truly to blame for the break-up.** As often the only witnesses are the couple, it is practically difficult to discover the facts of the case. Even if all the facts are known, the court may still not be in a position to allocate blame. Bainham<sup>12</sup> suggests that many people are of the view that for “*a very large number of people, the obligation of lifelong fidelity to one partner was at best an impossible dream*”.

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<sup>8</sup> “Getting no fault Divorce back on the Agenda: What should the ground for Divorce be?”, Nigel Shepherd, Issue 128 Resolution’s ‘Review’, September 2007, at p.23.

<sup>9</sup> “Principles of Family Law” Cretney, Judith Masson, Rebecca Bailey-Harris, Rebecca Probert, 8<sup>th</sup> Edition, 2008, Sweet & Maxwell Ltd, at p.311

<sup>10</sup> “Family Law”, Jonathan Herring at p.129, 4<sup>th</sup> Edition, Pearson Education Limited.

<sup>11</sup> Lord Chancellor’s Department (1995: para. 3).

<sup>12</sup> (2002 C : 177) - referred to in “Family Law”, Jonathan Herring, 4<sup>th</sup> edition, Pearson Education Limited, at p.130.

**2.1.4 It is not the place of the courtroom to explore issues of blame “especially at the tax payer’s expense”<sup>13</sup>.** This argument has financial and privacy connotations.

**2.1.5 Long/malicious allegations in a divorce Petition based on “unreasonable behaviour” make a bad situation much worse.** Parties are less likely to agree on other important issues, e.g. residence/contact/property division. It is in divorcing couples/children/wider society’s interests to resolve such issues as amicably/quickly as possible. Divorce is hugely traumatic, as seen in a typical situation where the divorce is a long-winded/painful process, without the law piling on the misery. Taking the bitterness out of divorce could help children and save money for the tax payer.

**2.1.6 The reason for divorce is almost invariably irrelevant to the real/important issues which need addressing** –i.e. children above all else and the financial consequences. To prolong the antagonism is unnecessary. It may even be unhelpful/illogical to try and apportion blame, e.g. a spouse who commits adultery may not be the one to blame for the separation. It could be as a result of the other spouse’s behaviour.

**2.1.7 “People who feel ‘wronged’ consider that they can walk away without the need to co-operate or are so obstructive that no long-term good can come of any agreement reached or order made.”<sup>14</sup>** If a person feels that he/she has been blamed more than the spouse, this may reduce co-operation. Removing fault could reverse this trend of non co-operation.

**2.1.8 Unnecessarily traumatic, costly and lengthy court proceedings can be the outcome of lack of co-operation between parties.** Having to cite allegations can inflame a difficult situation. Research<sup>15</sup> has shown that 78% of people agree with the view that it is not divorce itself that harms children, but continued parental conflict with increased animosity. The existing law helps to promote a climate of acrimonious divorce.

**2.1.9 Feelings of injustice as remnants of allegations designed to end a marriage can affect the future relationships of each party/their children.** The current system lacks the opportunity for a Respondent to question/contest allegations of “unreasonable behaviour”/adultery. Many Respondents may agree that a marriage has irretrievably broken down but dispute the facts. The only legal avenue available is to defend the Petition with proceedings being transferred to the High Court, increasing legal costs and the extreme unlikelihood of legal aid being available. It is difficult enough for parties going through a divorce without additional financial pressures and emotional pain.

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<sup>13</sup> Rasmusen (2002), surveys the range of legal remedies there may be to penalise adultery, apart from denying divorce – referred to in “Family Law”, Jonathan Herring, 4<sup>th</sup> edition, Pearson Education Limited, at p.128.

<sup>14</sup> The ‘Traditional Family’ and the Law, Penny Booth, [2005] Fam Law 482, 1<sup>st</sup> June, 2005 at p.483

<sup>15</sup> The National Centre for Social Research British Social Attitudes Report 2007/2008 – cited in ‘Resolution’ Review Issue 143, November 2009 at p.7.

*“For a respondent of ample financial means, there is a choice...(for others who have) little or no money, that decision will be taken by others, as legal aid will almost certainly be denied as there is no value in the proceedings...”*<sup>16</sup>

**2.1.10 The current archaic divorce process encourages parties to blame each other in order to achieve a quick and easy divorce which, according to Lord Justice Wall “actually undermines marriage”.**<sup>17</sup> Marriage is a big commitment, and for it to end so quickly after the exchange of vows for life, could be said to undermine marriage. The current divorce process, being focused on exposing blame to ensure a ‘quick’ divorce, actually serves to prolong matters.

**2.1.11 A simple, uncontested divorce (adultery or “unreasonable behaviour”) allows parties to divorce in haste, repent at leisure.** Such proceedings can take as little as 3-6 months to conclude during which time there is no requirement for parties to meet/discuss issues regarding financial/property matters, let alone resolve them, leaving parties feeling *“confused, embittered more than they otherwise might be and without having thought through the consequences”*.<sup>18</sup>

**2.1.12 The current system pushes people into making allegations, causing unnecessary distress, undermining efforts to move forward in a civilised and dignified manner.** Where a couple may have decided to opt for a dignified, child-centred and speedy divorce, it is illogical for them to be told that it is necessary to concoct a fault-based divorce Petition effectively blaming the other party for the marriage failing. It is time to stop the divorce process becoming something of a ‘game’. *“There needs to be a bigger focus on how to help couples extricate themselves from the marriage as amicably and elegantly as possible”*.<sup>19</sup>

**2.1.13 The current system is illogical, when considering that, in all but the most serious situations, the reason for a divorce makes no difference whatsoever to decisions regarding children/money.** The priority should be to move on without looking back in order to save people from becoming entrenched in the future on matters which are of mere historical interest. A civilised society should have a civilised divorce system, encouraging people to look forward. Couples should be free to quickly achieve financial certainty following a marital break down, achievable by having a mutual consent option/no-fault divorce without a substantial waiting period.

**2.1.14 There is no requirement for people to cohabit/ be in a relationship with each other for two years before they marry.** Therefore, why impose such a time period before allowing

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<sup>16</sup> “Whose divorce is it anyway – The Human Rights Aspect”, Roger Kay Storrar Cowdry, [2004] Family Law 892, 1<sup>st</sup> December, 2004, at p. 898.

<sup>17</sup> BBC News Channel, 26/08/2006 <http://news.bbc.co.uk/1/hi/uk/5288274.stm>

<sup>18</sup> “Whose divorce is it anyway – The Human Rights Aspect”, Roger Kay Storrar Cowdry, [2004] Family Law 892, 1<sup>st</sup> December, 2004, at p. 899.

<sup>19</sup> “Finding fault with fault”, David Thompson of Charles Russell, “Family Law”, No. 42 Edition, December 2004/January 2005 at p.20.

couples to divorce, unless they allege blame? The current divorce system is out of touch with the complexities of today's society.

**2.1.15 It could help save marriages** - assuming any future reform proposals include the general principle that the institution of marriage is to be supported (by giving a strong emphasis on mediation and providing for a period for reflection and consideration).

**2.1.16 A 'no-fault' divorce need not make divorce easier or undermine marriage.** The provision of information/a set 'cooling-off period' could be a pre-condition of commencing divorce proceedings so that couples are well-equipped to make better-informed choices regarding the future. This could save marriages. Even if it did not, people should feel that they have participated in the process as a result of informed choice allowing them to *"divorce well' and would lead to a happier and more liberal, right-thinking society"*.<sup>20</sup>

**2.1.17 There is a human right to divorce.**<sup>21</sup> People have freedom of choice, and to force someone to remain married against their wishes is an infringement of their right to marry/right to family life. However, The European Convention does not include a right to divorce.<sup>22</sup>

**2.1.18 Divorce is a significant social and legal problem.** Statistics show<sup>23</sup> continuing high levels of divorce in Great Britain<sup>24</sup>. In 2003, there were 166,700 divorces granted (including annulments for which no breakdown was given, although the number of annulments *"is likely to have been less than 1,000"*<sup>25</sup>). Statistics showed an increase of 3.7% from 2002 (a third successive annual increase, representing the highest number of divorces since 1997). In 2002, statistics showed 32,874 divorces based on adultery, 66,480 based on 'behaviour' and 681 based on desertion<sup>26</sup>. Therefore divorce granted on 'behaviour' represented 45.1% of the total with those granted on 'behaviour' and adultery representing 67.4% of the total - meaning that over 2/3 of divorces granted in England and Wales in 2002 were based on facts having *"connotations of blame and guilt, and where proceedings can be commenced in haste, without thought for the consequences of the breakdown and the legal ending of the marriage. Taken as a whole, these statistics make a compelling case for reform"*.<sup>27</sup>

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<sup>20</sup> "Finding fault with fault", David Thompson of Charles Russell, "Family Law", No. 42 Edition, December 2004/January 2005 at p. 19.

<sup>21</sup> Bradley (1998)-referred to in "Family Law", Jonathan Herring, 4<sup>th</sup> edition, Pearson Education Limited, at p.129

<sup>22</sup> European Court of Human Rights –Johnston v Ireland (1986) 9EHRR.

<sup>23</sup> "Whose divorce is it anyway – The Human Rights Aspect", Roger Kay Storrar Cowdry, [2004] Family Law 892, 1<sup>st</sup> December, 2004, at p.893, (statistics published online at [www.statistics.gov.uk](http://www.statistics.gov.uk) by the Office for National Statistics on 28<sup>th</sup> August 2003 for 2002, and on 31<sup>st</sup> August 2004 for 2003).

<sup>24</sup> To include Scotland

<sup>25</sup> "Whose divorce is it anyway – The Human Rights Aspect", Roger Kay Storrar Cowdry, [2004] Family Law 892, 1<sup>st</sup> December, 2004, at p.893.

<sup>26</sup> 35,476 based on 2 years separation plus consent and 11,896 based on 5 years separation

<sup>27</sup> "Whose divorce is it anyway – The Human Rights Aspect", Roger Kay Storrar Cowdry, [2004] Family Law 892, 1<sup>st</sup> December, 2004, at p.893.

### **3. Arguments in favour of a fault-based divorce.**

Various arguments have been put forward, the first of which revolves around moral issues/fabric of society:-

**3.1 It is morally right that someone should admit to it being their fault that a marriage has ended.** If fault was removed from divorce law, the law sends out a message that adultery, “unreasonable behaviour”, and desertion no longer matter, with an innocent spouse being unable to get justice. Psychologists argue that blame is a psychologically crucial part of the divorce process<sup>28</sup> with that being one of the key reasons for a long-winded divorce.

**3.2 “...As a society, we cannot afford serial marriage.”<sup>29</sup>** Easier divorce should be discouraged thereby minimising the four main consequences of divorce, summed up by Dr L.F. Lowenstein<sup>30</sup>:-

1. Diminishing of the father`s role in the family.
2. Poor impact on the children.
3. Emotional problems for a number of persons involved.
4. Reduced living standard.

Easier divorce could accelerate the breakdown of the traditional family structure, with many consequences to society. Children can be left disadvantaged in many major aspects, making it more difficult for them to live fulfilling/successful lives. The fact that their father may live in a different house to their mother destroys any sense of normality that children were once used to. If children have suffered from unstable parenting, they are more likely to divorce themselves and end up repeating the cycle of unstable parenting. In 1998, the Joseph Rowntree Foundation<sup>31</sup> concluded that children from divorced families have a higher probability of: being in poverty; becoming sexually active/pregnant or a parent at an early age; have poor housing; being poorer when they are adults; more likely to suffer depressive symptoms, e.g. high levels of smoking and drinking, drug use during adolescence and adulthood and needing medical treatment; have behavioural problems; perform less well at school; leave school/home when young. Studies have shown that divorce is associated with harm to children, including educational attainment, increased incidence of drinking and drug use, psychological harm, poorer employment chances and greater likelihood of

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<sup>28</sup> Day Sclater and Piper (1999) referred to in “Family Law”, Jonathan Herring, 4<sup>th</sup> edition ,Pearson Education Limited, at p.127.

<sup>29</sup> “Divorce – A Disaster?”, Baroness Ruth Deech, [2009] Fam Law 1048, 1<sup>st</sup> November 2009 at p.1051.

<sup>30</sup> “Parental Alienation – Causes and Associated Features of Divorce as Seen by Recent Research,” Ludwig F. Lowenstein Ph.D, Southern England Psychological Services, Journal of Divorce and Remarriage, Vol. 42(3/4), 2005, p.153 – 171 at p.158, 159.

<sup>31</sup> “Divorce and Separation: The outcomes for children”, Rodgers B. And Pryor J. Foundations series, JRF, June 1998.

suffering from a relationship breakdown themselves later on<sup>32</sup>. Even apparently amicable divorces result in greater stress to children<sup>33</sup>. There is also a risk of physical harm from the future living arrangements of parents. Children are at far greater risk of abuse from step-fathers and their mother`s boyfriends than from their natural parents.<sup>34</sup>

*“The appalling levels of social breakdown in Britain require reforms that will strengthen stable family life not undermine it. Marriage, as the family norm, which leads to the best outcomes for adults and children, should be championed and supported. No-fault divorce would achieve the very opposite to that which is best for British society”.*<sup>35</sup>

**3.3 Marriage is the only economic contract everyone may break on a whim without being liable for any damage to other people who are involved.** Under the 1996 Act<sup>36</sup>, *“it would have been easier to get out of a marriage than a hire purchase agreement.”*<sup>37</sup>

**3.4 “Easy divorce and the access to financial benefit attached to ending a marriage gives the state-sanctioned message that marriage can be treated lightly.”**<sup>38</sup>

According to Baroness Young<sup>39</sup>: *“No-fault divorce lowers marriage to something of less value than a television licence. There would be no punishment for breaking a marriage, whether you made a promise in Church or a contract in a register office. But if you don`t pay for a television licence you can go to jail.”*<sup>40</sup>

**3.5 As a society, we cannot afford to make divorce any easier by removing ‘fault’.** *“...Unduly easy divorce sends the message that marriage can be treated lightly, that it is not something to work at, but is instead disposable”*<sup>41</sup> with divorce being a cause for celebration as evidenced by the rising popularity of *“congratulations on your divorce”* greeting cards/divorce celebration parties. This shows a) lack of respect for marriage; b) lack of concern as to the effect of divorce on children. It is time for divorce to be made harder which calls for the retention of a ‘fault-based’ divorce as a minimum.

**3.6 No-fault divorce is unknown in Christian theology. Jesus taught that adultery is a basis for divorce.**<sup>42</sup> Some Christians believe that in I Corinthians<sup>43</sup>, Paul allows for desertion as a

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<sup>32</sup> “Divorce – A Disaster?”, Baroness Ruth Deech, [2009] Fam Law 1048, 1<sup>st</sup> November 2009 at p.1051.

<sup>33</sup> “Between two worlds: The inner lives of children of divorce”, E. Marquardt, Three Rivers Press, 2005, referred to in Divorce – A Disaster?”, Baroness Ruth Deech, [2009] Fam Law 1048, 1<sup>st</sup> November 2009 at p.1051.

<sup>34</sup> “Divorce – A Disaster?”, Baroness Ruth Deech, [2009] Fam Law 1048, 1<sup>st</sup> November 2009 at p.1051.

<sup>35</sup> Iain Duncan Smith, <http://www.ansglican-mainstream.net/category/divorce/>

<sup>36</sup> Family Law Act 1996

<sup>37</sup> Marriage and Family, Divorce, <http://www.christian.org.uk/resources/theology/apologetics/marriage-and-family/divo...> at p.4.

<sup>38</sup> “Divorce – A Disaster?”, Baroness Ruth Deech, [2009] Fam Law 1048, 1<sup>st</sup> November 2009 at p.1050.

<sup>39</sup> Former Tory leader in the House of Lords.

<sup>40</sup> “No-fault divorce reforms scrapped,” Mail Online, <http://www.dailymail.co.uk/news/article-15724/No-fault-divorce-reforms-scrapped.html> at p.1.

<sup>41</sup> Iain Duncan Smith, <http://www.ansglican-mainstream.net/category/divorce/> at p.9

<sup>42</sup> Mathew 19:9

single 'ground' for divorce. Both of these are clearly 'grounds' for 'fault'. The Westminster Confession<sup>44</sup> teaches that adultery and desertion are the only grounds for divorce and that the innocent party is free to remarry.

**3.7 "...It is the law's responsibility to uphold society's values and to discourage conduct which damages society."**<sup>45</sup> Where one spouse is at fault, the law should declare the wrongdoing and punish the same, if appropriate.<sup>46</sup>

**3.8 There is less incentive to enter a high-stakes relationship when a person knows that the other party will always be able to disregard/abandon his commitment without facing legal obstacles/social condemnation.** Rowthorn (1999)<sup>47</sup> argues that a no-fault divorce system "*undermines the notion of commitment that is key to the nature of marriage*".<sup>48</sup> Scott<sup>49</sup> stated: "*each spouse, knowing the other's commitment is enforceable, receives assurance that his or her investment in the relationship will be protected.*" Reece<sup>50</sup> suggested: "*it could be argued that no-fault divorce denies the parties the opportunity of engaging in a long-term committed project, fully immersing themselves in the marriage, confident that the other party cannot (without good reason) withdraw from the marriage*". However, the whole point of a fault-based divorce is to evict one person from the marriage due to their actions.

**3.9 Restricting divorce would encourage marriages and make them more secure and rewarding.** A couple will feel less inclined to 'invest' in a marriage when it can be dissolved for no reason at all.

Other wider concerns have been identified :-

**3.10 The divorce rate rises once it becomes easier to divorce.** Historically, the divorce rate has been linked to the ease of divorce/changes in divorce law. After the 1857 Act<sup>51</sup>, there were 24 divorces; at the end of World War I, there were a few thousand. In 1923, equal divorce rights were given to men/women and the rate rose to 60,000 by the end of World War 2. Following the 1969 Act<sup>52</sup>, the rate increased to 119,000 in 1972 and 165,000 in 1993. In 2007, the annual rate reduced to 128,000 owing to increased cohabitation and later age of marriage (with there being a correlation between later age of marriage and less

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<sup>43</sup> Corinthians 7:15

<sup>44</sup> Chapter XXIV

<sup>45</sup> "Family Law", Jonathan Herring, 4<sup>th</sup> edition, Pearson Education Limited, at p.128.

<sup>46</sup> Swisher (1997) referred to in "Family Law", Jonathan Herring, 4<sup>th</sup> edition, Pearson Education Limited, at p.128.

<sup>47</sup> Referred to in "Family Law", Jonathan Herring, 4<sup>th</sup> edition, Pearson Education Limited, at p.128.

<sup>48</sup> Lewis (1999: 125) – referred to in "Family Law", Jonathan Herring, 4<sup>th</sup> edition, Pearson Education Limited, at p.128.

<sup>49</sup> 2003: 162 referred to in "Family Law", Jonathan Herring, 4<sup>th</sup> edition, Pearson Education Limited, at p.129.

<sup>50</sup> 2003: 121 referred to in "Family Law", Jonathan Herring, 4<sup>th</sup> edition, Pearson Education Limited, at p.129.

<sup>51</sup> Matrimonial Causes Act 1857

<sup>52</sup> Divorce Reform Act 1969

divorce).<sup>53</sup> Also, "...it is now proven that it is the law and its administration that push the rate up. It has been shown that the introduction of so-called no-fault divorce... has had the effect of increasing divorce by 2 per 1,000 married people in the long term. This was based on an analysis of 18 European States between 1950 and 2003".<sup>54</sup>

"The number of divorces in England and Wales has fallen for a fifth successive year to the lowest rate for 29 years. In 2008, the divorce rate in England and Wales decreased by 2.5% to 11.5 divorcing people per 1,000 married people, compared with 11.8 in 2007".<sup>55</sup> If a reform in the law was to occur, care must be taken to ensure that these figures are not changed.

**3.11 If `fault` is removed, parties are left without an obvious "release valve" to deal with their emotions: parties may feel they have been unable to have closure or privacy on their marriage.** Their own feelings as to the reason for the breakup of the marriage may fester leading to increased bitterness and anger. Some people need an outlet – if no more than being able to have their say – to achieve closure on emotional issues. "...Making allegations of fault can even be cathartic".<sup>56</sup> A no-fault system may make people feel their divorce is on a conveyor-belt with legal issues being dealt with swiftly at the expense of emotional issues being left unresolved. Examples of court cases where there were serious conduct allegations are:-

1. *Armstrong*<sup>57</sup> - Wife shoots husband with his shotgun with intent to endanger life.
2. *Jones*<sup>58</sup> - Husband attacks wife with a razor, inflicting serious injuries rendering wife incapable of working.
3. *Bateman*<sup>59</sup> - Wife twice inflicts stab wounds on husband with a knife.
4. *S*<sup>60</sup> - Husband commits incest with children of the family.
5. *Evans*<sup>61</sup> - Wife incites others to murder the husband.

The above are "*both obvious and gross*" conduct<sup>62</sup> which courts take into account when considering ancillary relief proceedings. It would be contradictory to disallow a party from citing conduct as a "fact" for divorce but to admit such evidence in ancillary relief

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<sup>53</sup> "Divorce – A Disaster?", Baroness Ruth Deech, [2009] Fam Law 1048, 1<sup>st</sup> November 2009 at p.1049.

<sup>54</sup> "Divorce – A Disaster?", Baroness Ruth Deech, [2009] Fam Law 1048, 1<sup>st</sup> November 2009 at p.1050.

<sup>55</sup> "Divorce rate lowest for 29 years", BBC News Channel, 28<sup>th</sup> January 2010: <http://news.bbc.co.uk/1/hi/uk/8485132.stm>

<sup>56</sup> "Family Law", Jonathan Herring, 4<sup>th</sup> edition, Pearson Education Limited, at p.128.

<sup>57</sup> *Armstrong v Armstrong* [1974] SJ 579

<sup>58</sup> *Jones v Jones* [1976] Fam 8.

<sup>59</sup> *Bateman v Bateman* [1979] 2 WLR 377

<sup>60</sup> *S v S* [1982] Fam 183

<sup>61</sup> *Evans v Evans* [1989] 1 FLR 351

<sup>62</sup> *Ormrod, J, in Wachtel v Wachtel* [1973] FAM 78 at 80.

proceedings. This would complicate the law. In some marriages, there is clearly fault, as popularly understood. There is no other area of law where attempts at no-fault have been made to ignore causation and blame. *“To some divorcing spouses justice is served only if the court declares that the other party was the cause of the marriage breakdown.”*<sup>63</sup>

**3.12 “If it works, why fix it?”**<sup>64</sup> The current familiar/fairly straightforward system has been around for some forty years. Solicitors are comfortable with the system and as a profession *“are notoriously against change”*.<sup>65</sup> This may be due to the fact that the current system has arguably worked well and to change the system would be inadvisable, having become a ‘tradition’ as well as the law.

**3.13 It may not be the divorce procedure itself which is the main problem.** Real support and reform is needed for life after the fault-based divorce.

**3.14 All those whose marriages have broken down can easily obtain divorces under the existing law with no need for liberalisation.** There is a danger that no-fault divorce would result in a relaxation of practice/procedure resulting in a *“spiralling process”* and *“yet another increase in divorce.”*<sup>66</sup>

**3.15 “...to suppose that a legal no fault will stop blame is naive. The couple will blame and so will their parents etc.”**<sup>67</sup>

Even if the law discourages parties from asking who is to blame, according to Richards<sup>68</sup> this is unrealistic: *“blame, accusation, and strong feelings of injustice are the norm at divorce and they get in the way of couple making reasonable arrangements about children and money. Neither legal fiction of the lack of fault or imposed orders do anything to relieve the situation, rather the reverse.”*

#### **4. Conclusion and some recommendations**

There is no doubt that ending a marriage, however amicable, is a painful process and is one which has to be handled correctly. Marriages end irrespective of how hard/easy it is to divorce. Whether the existence of blame assists the process and the people caught up within the same in some shape or form, is debatable. Clearly, there are compelling

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<sup>63</sup> Davis Cretney and Collins (1994) referred to in Family Law”, Jonathan Herring, 4<sup>th</sup> edition, Pearson Education Limited, at p.127.

<sup>64</sup> “Finding fault with fault”, David Thompson of Charles Russell, “Family Law”, No. 42 Edition, December 2004/January 2005 at p. 20.

<sup>65</sup> “Finding fault with fault”, David Thompson of Charles Russell, “Family Law”, No. 42 Edition, December 2004/January 2005 at p. 20.

<sup>66</sup> Divorce – A Disaster?”, Baroness Ruth Deech, [2009] Fam Law 1048, 1<sup>st</sup> November 2009 at p.1050.

<sup>67</sup> Andrew Woolley of Woolley & Co Solicitors, 07/01/2010, commented in the Law Society ‘Gazette’. <http://www.lawgazette.co.uk/blogs/news-blog/with-divorce-enquiries-rise-it-time-cha...> at p.2.

<sup>68</sup> 1994, referred to in “Family Law”, Jonathan Herring, 4<sup>th</sup> edition, Pearson Education Limited, at p.127.

arguments supporting both fault and no fault divorce. Whether or not 'fault' should form the basis of a divorce often depends upon individuals' moral stand-point.

It could be said that the current fault-based system is in frequent use but has been eroded over time as society has changed. The difficulty with the current system is that it belongs to a different era. As society has changed and, in particular the concept of family life, the retention of fault within divorce law does seem to be out of place with modern society's expectations. It would therefore seem that the time is ripe for change but not change for the sake of it.

Any reform of the law needs to be carefully and properly thought through. If people are properly educated, they will adjust to the removal of fault in divorce. The important thing is to properly manage people's expectations.

If there is to be a removal of fault in divorce, proper support will need to be available. There should be a mandatory waiting period to avoid people rushing into a divorce. Mandatory counselling and mediation under controlled circumstances could also be implemented, so long as domestic violence is not an issue. Care will need to be taken to ensure that any new system makes provision for there to be an effective outlet for people's emotions. Unless an effective framework is in place within which a no fault divorce can operate, any change may have potentially disastrous counter-productive consequences.



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