

ENGLISH MATRIMONIAL CRUELTY LAW IN NIGERIA: DEAD OR ALIVE?

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The Nigerian Matrimonial Causes Decree of 1970¹ suggests far-reaching innovations in Nigeria's matrimonial cruelty law. Of particular interest is its divergence from English matrimonial provisions, which, until 1970, had been incorporated automatically into the Nigerian law. Although the 1970 Decree marks the beginning of a separate body of matrimonial law in Nigeria, the influence of English jurisprudence is likely to continue, particularly with respect to matrimonial cruelty. To what extent that influence will now be felt in Nigeria has not yet been made clear by the courts. It would seem desirable that Nigerian matrimonial cruelty law develop somewhat independently of the English law because of obvious cultural and social differences. Simply put, conduct that may constitute cruelty in England may be no more than an accepted mode of behavior in Nigeria, and perhaps, vice versa.

This article will examine the 1970 Decree, particularly by comparing it with the English Divorce Reform Act of 1969,² to which it bears a close resemblance. In turn, the English and Nigerian case law respecting matrimonial cruelty will be considered. By way of introduction, a brief discussion of the Nigerian statutory provisions, now superseded by the 1970 Decree, and the English divorce law to which the Nigerian statute conformed may prove useful.

THE IMPACT OF ENGLISH MATRIMONIAL LAW IN NIGERIA

The English Matrimonial Causes Act of 1965³ provided that "a petition for divorce may be presented . . . on the ground that the respondent has since the celebration of the marriage treated the petitioner with cruelty."⁴ Before the enactment of the 1970 Decree, the divorce law of England was incorporated into the Nigerian law by virtue of the

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¹Matrimonial Causes Decree 1970 (Decree No. 18 of Mar. 17, 1970), 57 Official Gazette Extraordinary A 61 (Supp. No. 15, 1970) [hereinafter cited as 1970 Decree].

²Divorce Reform Act 1969, c. 55 (effective Jan. 1, 1971).

³Matrimonial Causes Act 1965, c. 72.

⁴*Id.* § 1(a)(iii), at 1581. Cruelty was first made a ground for divorce under the Matrimonial Causes Act 1937, 1 Edw. 8 & 1 Geo. 6, c. 57, § 2. This provision was later to be found in the Matrimonial Causes Act 1950, 14 & 15 Geo. 6, c. 25, § 1(1)(c). Prior to the 1937 statute, cruelty had been a ground only for *divortium a mensa et thoro*, which was merely judicial separation.

Regional Courts (Federal Jurisdiction) Act of 1958⁵ which provided:

The jurisdiction of the High Court of a region in relation to . . . matrimonial causes shall, subject to the provisions of any laws of a region so far as practice and procedure are concerned, be exercised by the court *in conformity with the law and practice for the time being in force in England.*⁶ (emphasis added)

Section 16 of the High Court of Lagos Act⁷ contains a similar provision, applicable to the Federal Territory of Lagos.⁸

The foregoing provisions made it incumbent on the Nigerian courts to administer matrimonial causes "in conformity with the law and practice for the time being in force in England."⁹ In *Taylor v. Taylor*,¹⁰ the West African Court of Appeal construed this phrase to mean that "the law and practice in Nigeria change as the law and practice in England change."¹¹ Two distinguished writers have observed that the phrase "for the time being in force" had a timeless effect, so as to bring into Nigeria all future laws which the English Parliament might enact.¹² In effect, the English Matrimonial Causes Acts of 1950,¹³ 1963,¹⁴ and 1965¹⁵ applied in Nigeria as did English cases dealing with matrimonial matters.¹⁶

The English Divorce Reform Act of 1969¹⁷ would have automatically become the law of Nigeria by virtue of the "incorporation clauses" but for the provision in the 1970 Decree which specifically states:

After the commencement of this Decree a matrimonial cause shall not be instituted otherwise than under this Decree; and if a matrimonial cause has been instituted before the commencement of this Decree but

⁵[1958] Laws of the Federation of Nigeria and Lagos, c. 177.

⁶*Id.* § 4, at 3207.

⁷[1958] Laws of the Federation of Nigeria and Lagos, c. 80.

⁸Lagos is now a state.

⁹In *Odiase v. Odiase*, [1965] N.M.L.R. 196, 198 (W. Nigeria), J. Fatayi Williams observed: "[b]y the provisions of section 4 of the Regional Courts Federal Jurisdiction Act, Parliament . . . not only conferred jurisdiction in matrimonial causes on the High Court . . . it also provided for the laws to be administered by the court in respect thereof." In addition, *see Adeoye v. Adeoye*, [1961] 1 All N.L.R. 792 (N. Nigeria); and *Omole v. Omole*, [1960] N.R.N.L.R. 19 (N. Nigeria 1959).

¹⁰[1935] 2 W.A.C.A. 348 (W. Afr.).

¹¹*Id.* at 349.

¹²A. KASUNMU & J. SALACUSE, *NIGERIAN FAMILY LAW* 12 (1966) [hereinafter cited as A. KASUNMU].

¹³Matrimonial Causes Act 1950, 14 & 15 Geo. 6, c. 25.

¹⁴English Matrimonial Causes Act 1963, c. 45.

¹⁵English Matrimonial Causes Act 1965, c. 72.

¹⁶In *Harrison Obafemi v. Harrison Obafemi*, [1965] N.M.L.R. 447 (Lagos), for example, J. Omolulu held that the English Matrimonial Causes Act of 1963 applied in Nigeria by virtue of the High Court of Lagos Act [1958], Laws of the Federation of Lagos and Nigeria, c. 80, § 16.

¹⁷Divorce Reform Act 1969, c. 55.

not completed, it shall be continued and dealt with only in accordance with the provisions of this Decree prescribed in that behalf.¹⁸

It should be pointed out, however, that prior to the 1970 Decree the importation of the English law had always been subject to some restriction. For example, section 16 of the High Court of Lagos Act¹⁹ provided that the English law should be applied "subject to the provisions of this Act."²⁰ The Lagos High Court in *Elumeze v. Elumeze*²¹ observed that the phrase shows that the law and practice in England were not to be accepted in toto, but only insofar as there were no other provisions applicable and, in any case, subject to the High Court of Lagos Act. The court then went further to explain that section 16 of the High Court of Lagos Act was made subject to section 90 of that Act, which provides:

[N]othing in this Act and . . . nothing in rules of court made under this Act, shall affect the mode of giving evidence by the oral examination of witnesses or the rules of evidence. . . .²²

The effect of section 90, according to C. J. Taylor, was that the Nigerian rules of evidence were not to be affected by English law imported by virtue of section 16 of the High Court of Lagos Act.²³ Subject to these limitations, however, the English matrimonial laws and rules had, until 1970, always applied with equal force in Nigeria.

THE PRESENT STANDARD FOR DISSOLUTION OF MARRIAGE IN ENGLAND AND NIGERIA

Under both the Nigerian Matrimonial Causes Decree of 1970²⁴ and the English Divorce Reform Act of 1969,²⁵ the old grounds for divorce have been abolished, and the dissolution of a marriage will now be granted solely "upon the ground that the marriage has broken down irretrievably."²⁶ Although the concept of fault (cruelty) as a specific and

¹⁸1970 Decree § 1(1), 57 Official Gazette Extraordinary A 61, at A 63 (Supp. No. 15, 1970) (Nigeria).

¹⁹[1958] Laws of the Federation of Nigeria and Lagos, c. 80, at 1581.

²⁰The Regional Courts (Federal Jurisdiction) Act 1958, [1958] Laws of the Federation of Nigeria and Lagos, c. 177, § 4, contained a similar phrase: "subject to the provisions of any laws of a region so far as practice and procedure are concerned. . . ."

²¹Suit No. HD/41.64 (Lagos, April 10, 1967) (unreported).

²²High Court of Lagos Act, [1958] Laws of the Federation of Nigeria and Lagos, c. 80, § 90, at 1608.

²³*Elumeze v. Elumeze*, Suit No. HD/41.64 (Lagos, April 10, 1967) (unreported).

²⁴1970 Decree (Decree No. 18 of Mar. 17, 1970), 57 Official Gazette Extraordinary A 61 (Supp. No. 15, 1970).

²⁵Divorce Reform Act 1969, c. 55.

²⁶1970 Decree, § 15(1), 57 Official Gazette Extraordinary A61, at A68 (Supp. No. 15, 1970); Divorce Reform Act 1969, c. 55, § 1, at 1603.

sufficient ground for divorce is now dead, it would nevertheless appear that the concept will continue to rule us from its grave, as do the old English forms of action. Under the Nigerian Decree and the English Act, the court hearing a petition for divorce shall not hold the marriage to have broken down irretrievably unless the petitioner satisfies the court as to the existence of one or more facts, which include:

that since the marriage the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent²⁷

This provision simply adopts the definition of matrimonial cruelty formulated in the landmark English case of *Gollins v. Gollins*.²⁸ In that case Lord Pearce observed that conduct in order to be cruel must be such that the petitioner "should not [reasonably] be called on to endure it."²⁹

It follows that under section 15(2)(c) of the 1970 Decree,³⁰ the concept of matrimonial cruelty is preserved, and its proof is still important; what has changed is the effect of such proof. A marriage may not necessarily be dissolved solely because one spouse has been cruel to another. Yet the proof of cruelty may be crucial in showing the marriage to have broken down irretrievably. Although section 16(1) of the 1970 Decree³¹ prescribes some instances in which the Nigerian courts must hold that the petitioner has met the test of intolerable behavior in section 15(2)(c),³² it also specifically provides that the instances given are merely examples "without prejudice to the generality of section 15(2)(c)." In other words, the court is called upon to consider any other conduct by the respondent so intolerable that the petitioner cannot reasonably be expected to endure it. It is clear, then, that the Nigerian cases which have defined matrimonial cruelty will continue to be relevant.

²⁷1970 Decree, § 15(2)(c), 57 Official Gazette Extraordinary A 61, at A 68 (Supp. No. 15, 1970). Divorce Reform Act 1969, c. 55, § 2(1)(b), is identical in its language, except that it omits the phrase, "since the marriage."

²⁸[1964] A.C. 644 (1963).

²⁹*Id.* at 695; see *Le Brocq v. Le Brocq*, [1964] 1 W.L.R. 1085 (C.A.). There Lord Justice Harman said that "the conduct complained of must be something which an ordinary man—or a jury . . . —would describe as 'cruel.'" *Id.* at 1089. The *Le Brocq* formulation was impliedly followed in the Nigerian case, *Oshin v. Oshin*, Suit No. I/270/1964 (W. Nigeria, Nov. 4, 1966) (unreported). For a more complete discussion of the *Le Brocq* decision in connection with *Gollins*, see pp. 108-109 *infra*.

³⁰1970 Decree, § 15(2) (c), 57 Official Gazette Extraordinary A 61, at A 68 (Supp. No. 15, 1970). An excerpt from this provision accompanies note 27 *supra*.

³¹*Id.* at A 69.

³²Section 16(1)(a), for example, provides that the standard of unreasonable behavior of section 15(2)(c) is met if, since the marriage, the respondent has committed rape, sodomy, or bestiality.

THE RESPONDENT'S CONDUCT

According to the cases, matrimonial cruelty is that conduct of an individual which causes danger to the life, limb, or the physical or mental health of that individual's spouse, or causes a reasonable apprehension of such danger. This rule was established in England³³ and was followed in the Nigerian decision of *Mgbakor v. Mgbakor*.³⁴ In *Mgbakor* the petitioner alleged that respondent-husband refused to pay her medical expenses or to care for her sick baby. The petitioner also alleged that the respondent's conduct caused the death of the baby and the petitioner's mental strain, both of which contributed to the petitioner's serious illness. Holding the respondent's conduct to constitute cruelty, the trial judge said that "legal cruelty is conduct of such a character as to cause danger to life, bodily or mental, or as to give rise to a reasonable apprehension of such a danger."³⁵ In *Mehlhoff v. Mehlhoff*,³⁶ the principle was stated another way:

To constitute cruelty, the misconduct on the part of the offending spouse must be so grave and weighty as to cause injury to the health of the other spouse or as to give rise to a reasonable apprehension of such injury.³⁷

It has been observed that the court in *Johnson v. Johnson*³⁸ found the respondent's conduct not to constitute cruelty because no injury to health or the threat of such injury was proved by the wife.³⁹ Conduct which causes injury nevertheless may not be cruel unless it is weighty and grave, a matter to be decided objectively.⁴⁰ Thus, whether the respondent's conduct is weighty and grave may be partly determined by the respondent's awareness, either actual or constructive, that injury to the other spouse would result.⁴¹ Moreover, the respondent's awareness must take into account any susceptibilities peculiar to the injured spouse. As Justice Reynolds observed in *Mgbakor v. Mgbakor*,⁴² "the conduct must be judged up to a point by a reference to the victim's

³³See, e.g., *Russell v. Russell*, [1897] A.C. 395, 401, 405.

³⁴[1959] E.N.L.R. 37 (E. Nigeria).

³⁵*Id.* at 38.

³⁶Suit No. 1/225/1965 (W. Nigeria, April 29, 1966) (unreported).

³⁷*Id.*

³⁸[1961] L.L.R. 11 (Lagos).

³⁹A. KASUNMU, *supra* note 12, at 135.

⁴⁰See, e.g., *Gollins v. Gollins* [1964] A.C. 644, 695 (1963); P. BROMLEY, *FAMILY LAW* 94-95 (3d ed. 1966).

⁴¹See p. 104 *infra* concerning respondent's intention.

⁴²[1959] E.N.L.R. 37 (E. Nigeria).

capacity for endurance insofar as that capacity is or ought to have been known to the guilty spouse."⁴³

Additionally, to establish cruelty it must be clearly proved that the petitioner's injury was caused by the conduct of the respondent. A case in point is *Olukoya v. Olukoya*,⁴⁴ where the petitioner established injury to health, but failed to show that respondent's refusal to have sexual intercourse was the cause thereof. The petition was denied on the ground that legal cruelty cannot be inferred.⁴⁵ Nor will injurious conduct, although grave and weighty, constitute cruelty if the conduct was perpetrated with the consent of the complaining spouse. For example, in *Thompson v. Thompson*⁴⁶ the husband, with his wife's consent, inflicted minor wounds upon her in the course of a ritual. In the words of the court:

[The petitioner] consented to this pagan and superstitious nonsense because she wished to show her love for the respondent. If she suffered headaches and pains she has herself to thank for agreeing to this "juju" affair. The doctrine *volenti non fit injuria* would operate to bar her complaint.⁴⁷

While no exhaustive list can be compiled of acts or conduct which amount to cruelty, one thing is certain: conduct to be grave and weighty must not come within what Lord Asquith described as the "ordinary wear and tear of married life."⁴⁸ However, it is not difficult to prove cruelty where the acts take the form of physical violence resulting in injury. In *Barker v. Barker*,⁴⁹ for example, the court said that "[t]here are some injuries which speak for themselves. If a woman has a head

⁴³*Id.* at 39; see *Waters v. Waters*, [1956] P. 344, 356 (Lord Merriman, P.): "[O]ne had to take the whole story . . . having regard to the character and susceptibilities of the parties"

The rule here bears a close resemblance to the "thin skull" principle of tort law. The classic statement of that principle is in *Dulieu v. White & Sons*, [1901] 2 K.B. 669, 679: "If a man is negligently run over or otherwise negligently injured in his body, it is no answer to the sufferer's claim for damages that he would have suffered less injury, or no injury at all, if he had not had an unusually thin skull or unusually weak heart."

⁴⁴[1961] W.N.L.R. 209 (W. Nigeria).

⁴⁵*Id.* Causation was apparently more easily established in *Sheldon v. Sheldon*, [1966] P. 62 (where the husband's persistent refusal of sexual intercourse was held to be cruelty) and in *Odiase v. Odiase*, [1965] N.M.L.R. 196 (W. Nigeria) (where refusal of sexual intercourse and long absences from home were held to be cruelty).

⁴⁶[1961] 1 All N.L.R. 496 (Lagos).

⁴⁷*Id.* at 498. The introduction by one spouse of "juju" into the home *without* the consent of the other, however, has been held to be cruelty. *David v. David*, Suit No. HD/46/63 (Lagos, July 11, 1966) (unreported).

⁴⁸*Buchler v. Buchler*, [1947] P. 25, 45 (1946).

⁴⁹[1949] P. 219 (1948).

broken with a hatchet, one does not have to call a doctor to say that it has caused danger to life, limb or health, bodily or mental.”⁵⁰

It is not necessary, however, that actual violence or injury always occur. An accumulation of minor acts, not individually sufficient to constitute cruelty, may be considered cruel conduct.⁵¹ In the Nigerian case of *Williams v. Williams*,⁵² the Supreme Court observed:

Cruelty is in its nature a cumulative charge and so an accumulation of minor acts of ill-treatment causing or likely to cause the suffering spouse to break down under strain constitutes the offence; thus cruelty may consist in the aggregate of the acts alleged in a petition and each paragraph need not allege an independent act of cruelty.⁵³

The court further observed that even in the absence of physical violence, medical evidence is not essential where there is an obvious injury:

While it is desirable that medical evidence should be called where the petitioner relies on actual injury in proof of cruelty, it is not *sine qua non* to the proof of legal cruelty which is necessary to warrant a dissolution of marriage. To hold otherwise would indeed amount to abandonment of duty of the court in preference to medical opinion. The court should consider the entire evidence before it and although no specific instance of actual violence is given in evidence, it should be able on any objective appraisal of the evidence before it, to say whether or not the conduct of the respondent is of such character as is likely to cause or produce reasonable apprehension of danger to life, limb or health on the part of the petitioner.⁵⁴

An interesting question is whether conduct which constitutes cruelty in England would necessarily constitute cruelty in Nigeria. Professors Kasunmu and Salacuse have observed:

Nigerian courts have hitherto followed the English cases rigidly in deciding whether or not a conduct is so grave and weighty as to amount to cruelty. It is, however, submitted that the local culture, values and social conditions must be taken into consideration in deciding whether a particular conduct is grave and weighty. If this is done, the occasional chastisement of a wife might not necessarily amount to cruelty since such conduct by the husband, so long as it is reasonable, is tolerated.⁵⁵

⁵⁰*Id.* at 224 (Lord Merriman, P.).

⁵¹*Udom v. Udom*, [1962] L.L.R. 112, 121 (Lagos) (Coker, J.).

⁵²*Suit No. SC/339/1965* (Sup. Ct. Nigeria, Jan. 14, 1966) (unreported).

⁵³*Id.*

⁵⁴*Id.*: *accord*, *Mehlhoff v. Mehlhoff*, *Suit No. I/225/1965* (W. Nigeria, April 29, 1966) (Agoola, J.M.) (unreported).

⁵⁵A. KASUNMU, *supra* note 12, at 134.

This approach is well-reasoned, and it is gratifying to note that some Nigerian cases have already adopted this attitude. In *Animashaun v. Animashaun*⁵⁶ the court held that "[c]ruelty in the law of divorce means cruelty in the ordinary and natural meaning of the law. The conduct complained of must be something which an ordinary man or jury would describe as cruel."⁵⁷ The "ordinary man" here can only be the ordinary man in Nigeria—an objective test.

The *locus classicus* on this point is the case of *Oyinlola v. Oyinlola*.⁵⁸ There the Ibadan High Court examined the situation of the respondent's bringing friends to visit without first notifying or consulting with his wife. In response to the wife's petition for divorce, Justice Somulu declared:

[T]his complaint seems to me to be rather childish indeed and the petitioner in raising it does not seem to take into consideration the reality of life in this country to the effect that friends and relations often come into the house either on a brief visit or fairly long stay without previous notice It will be an extreme of bad manners to turn them back or out; and to insist that they must give prior notice is to lay [the] householder open to a charge of arrogance and callousness or what you like. It is only the process of education that can help to modify this attitude in the people and until that change comes, it is my view that all people in this part whether married or not must put up with it as best as they can. It may be inconvenient or an embarrassment, but to make it a charge in a matrimonial suit is to exhibit an attitude of prudery which I find difficult to understand in a woman of the background of the petitioner. What does she want? *She wants to live the life of a European in Africa*, and demand that her visitors should give prior notice and fix time for it.⁵⁹

The *Oyinlola* decision confirms the view that a determination of what behavior constitutes matrimonial cruelty must take into account all the circumstances surrounding the marriage, particularly the general habit and social custom of the people.

THE RESPONDENT'S INTENTION

Until recent years the English and Nigerian decisions held that cruelty could not be established unless there was evidence that the respon-

⁵⁶[1966] N.M.L.R. 186 (Lagos).

⁵⁷*Id.* at 187; *accord*, *Obayemi v. Obayemi*, [1967] N.M.L.R. 212 (Sup. Ct. Nigeria); *Addy v. Addy*, Suit No. CAW/21/67 (Ct. App. W. Nigeria, Feb. 13, 1968) (unreported); *Oshin v. Oshin*, Suit No. 1/270/1964 (W. Nigeria, Nov. 4, 1966) (unreported).

⁵⁸Suit No. 1/293/62 (W. Nigeria, May 13, 1963) (unreported).

⁵⁹*Id.*

dent's conduct arose from specific intent to harm the petitioner.⁶⁰ However, actual intent was not required; the respondent's unreasonable indifference to the consequences of his injurious conduct was sufficient.

Where the court finds that the conduct complained of was pursued with an actual intention to injure the other spouse, no further inquiry is necessary. But such an intention may in a proper case be inferred, where for instance, the conduct complained of is persisted in (a) after warning that it is having an adverse effect on the other spouse, or (b) in circumstances in which any reasonable person would appreciate that it was likely to injure the other spouse.⁶¹

The importance accorded the respondent's intent created serious difficulties. Professor Bromley has hypothesized:

Suppose that a husband savagely assaults his wife during a fit of insanity when he is not in control of his actions, or makes his wife mentally ill by ignoring and humiliating her, not out of malice but as a result of selfishly pursuing his own interests to the exclusion of hers. Looked at from the wife's point of view, there can be said to be cruelty in both cases; looked at from the husband's there is no conscious intention to harm in either.⁶²

The conflict evidenced by Professor Bromley's observation had to be resolved by the House of Lords in two appeals which arose in 1963: *Gollins v. Gollins*⁶³ and *Williams v. Williams*.⁶⁴

In *Gollins*, the wife discovered shortly after the marriage ceremony that her husband was deeply in debt and unable to support her. Although she loaned him considerable sums over a period of 14 years, the husband was continually in debt, and she was troubled by creditors and bailiffs. The wife finally informed her husband that she could not bear the burden of his debts and warned him to no avail that if he did not find a job she would have to institute proceedings against him.

In *Williams*, the husband was mentally ill and began to hear voices telling him that his wife was committing adultery. He made repeated accusations against her, followed her about the house and sometimes climbed into the loft to look for the men. This conduct injured the wife's

⁶⁰E.g., *Williams v. Williams* [1963] P. 212, 227 (C.A. 1962). There Lord Justice Willmer declared that "as with a criminal offense, so in the case of cruelty there must be an element of *mens rea*."

⁶¹*Gollins v. Gollins*, [1964] P. 32, 51 (C.A. 1962) (Willmer, L.J.); accord, *Mgbakor v. Mgbakor*, [1959] E.N.L.R. 37 (E. Nigeria); *Kaslefski v. Kaslefski*, [1951] P. 38 (C.A. 1950).

⁶²P. BROMLEY, *supra* note 40, at 94.

⁶³[1964] A.C. 644 (1963).

⁶⁴[1964] A.C. 698 (1963).

health, and she petitioned for divorce. The commissioner in the court below was prepared to find cruelty but for the *M'Naghten* Rule.⁶⁵

The judgments in *Gollins* and *Williams* were delivered on the same day. After reviewing the law of matrimonial cruelty in detail, the court decided in favor of the petitioners in both cases. The rule emerged that "if the respondent's conduct injures the petitioner's health or is likely to do so, it will amount to cruelty if it is grave and weighty and such that the petitioner cannot reasonably be expected to tolerate it."⁶⁶

Since the judgments in *Gollins* and *Williams*, it is clear that the respondent's malevolent intention need not be shown where his alleged conduct is clearly intolerable. Where the respondent's conduct is not intolerable per se, his "state of . . . mind is material and may be crucial."⁶⁷ This means that the malevolent intent of the offender, while not essential, may be a relevant factor in assessing whether particular conduct is sufficiently grave and weighty to amount to cruelty. But the doctrine that conduct, in order to be cruel, must be aimed at the other party has disappeared. Lord Justice Salmon observed in *Le Brocq v. Le Brocq*:⁶⁸

I do not consider *Gollins v. Gollins* as having altered the law, save that it gave the *quietus* to the doctrine that conduct in order to be cruel must be "aimed at" the party complaining. It still remains the law that "cruelty" means "cruelty" in the real sense of that word.⁶⁹

A similar view of the ramifications of *Gollins* and *Williams* is that

[t]he old norms of "grave and weighty conduct" and "injury to health" have been retained. What has been jettisoned is the prescribing of any particular state of mind in the offending spouse. In future, the attitude of mind will go only to the gravity and weight of the conduct complained of, and not stand on its own feet as a separate requisite of cruelty. But where there is actual intention to injure or foresight that conduct will have injurious consequences, such states of mind may in

⁶⁵See *id.* at 700. The Rule was set out in *M'Naghten's* case, 8 Eng. Rep. 718 (H.L. 1843). There it was held that in order "to establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong." *Id.* at 722.

⁶⁶P. BROMLEY, *supra* note 40, at 94-95.

⁶⁷See *Gollins v. Gollins*, [1964] A.C. 644, 667 (1963) (Reid, L.J.). Lord Reid had taken the view more than ten years previously that "a malevolent intention while not essential to cruelty is a most important element where it exists." *King v. King*, [1953] A.C. 124, 125 (1952).

⁶⁸[1964] 1 W.L.R. 1085 (C.A.).

⁶⁹*Id.* at 1097.

a proper case so colour a spouse's behavior as to remove it from the spectrum of the ordinary wear and tear of married life.⁷⁰

Despite the foregoing observations, the scope of *Gollins* and *Williams* is not free from doubt. Another writer has given both judgments controversial, but perhaps sensible, interpretations.⁷¹ She states that *Gollins* represents a substantial step toward establishing the rule that any conduct, however brought about, is cruel if it causes injury to health or the apprehension of injury.⁷² In other words, the nature of the act does not matter, only its result. Commenting on *Williams*, she observes that since the decision, insanity is no defense to a charge of cruelty. Even if the acts complained of were a direct result of severe mental illness, they will still constitute cruelty if they caused injury, or apprehension of injury, to the other spouse.⁷³ In effect, divorce on the ground of cruelty is for the protection of the innocent, and the "guilt" of the offending party is irrelevant.⁷⁴

It would appear to follow from this reasoning that a nymphomaniac who makes incessant sexual demands upon her husband is cruel. Similarly, one should think that *Gollins* supports the conclusion that a husband's impotence which impairs the normal sexual activity between the spouses amounts to cruelty. Lord Justice Salmon took quite a different view, however, when he stated:

Nor do I consider that *Gollins v. Gollins* and *Williams v. Williams* would compel me to hold that true impotence by itself can ever amount to cruelty. As I understand the speeches in *Gollins v. Gollins* conduct to be cruel must still be inexcusable. It is manifestly impossible to say that a man who is impotent has no good excuse for not having sexual intercourse with his wife. . . . There is . . . nothing in the actual decision [*Williams v. Williams*] which would bind us to hold that impotence which is not the husband's fault and is necessarily involuntary could be a basis for cruelty.⁷⁵

In contrast to Lord Salmon's observation is the case of *P. (D.) v. P. (J.)*⁷⁶ which applied *Gollins* and *Williams* and held correctly that a wife's refusal to have marital intercourse constituted cruelty, even when her

⁷⁰Brown, *Cruelty without Culpability or Divorce without Fault*, 26 MODERN L. REV. 625, 643-44 (1963).

⁷¹M. PUXON, *THE FAMILY AND THE LAW* 120, 124-25, 134 (1967).

⁷²*Id.* at 120.

⁷³*Id.* at 124.

⁷⁴See *id.*

⁷⁵*Sheldon v. Sheldon*, [1966] P. 62, 78 (C.A.).

⁷⁶[1965] 2 All E.R. 456 (Div.).

refusal was due to psychological inhibitions which the offending spouse could not overcome.⁷⁷

As evidenced by the foregoing interpretations and discussion, there has been some difficulty in defining the scope of the rule laid down in *Gollins* and *Williams*. *Le Brocq v. Le Brocq*⁷⁸ dispelled some of the confusion. There the Court of Appeal considered a troublesome phrase taken from the *Gollins* opinion. The Commissioner in *Le Brocq* had quoted Lord Pearce in *Gollins* as describing cruel conduct to be such that the petitioner ought not to "have been called on to continue to endure it."⁷⁹ It would appear from Lord Pearce's opinion, however, that the language is more accurately quoted, "ought not [reasonably] to be called on to endure it."⁸⁰ That the language of Lord Pearce had been taken out of context apparently went unnoticed, but the court made it clear that reasonableness was the standard for determining cruel conduct:

[I]n this case the Commissioner was deceived by the decision of the majority in *Gollins v. Gollins*. . . . [T]he words which the Commissioner cited from Lord Pearce's speech do seem to me to set the ball rolling down that slippery slope which may end in the last resort in absurdity. If everything which the wife cannot be expected to put up with is to amount to cruelty, I do not know what conduct we may not come to in the end. It seems to me that there must be *cruel* conduct which she must not be expected to put up with before we get to that position. . . .⁸¹

⁷⁷*Id.* at 463.

⁷⁸[1964] 1 W.L.R. 1085 (C.A.) There the husband's silent and morose nature and lack of interest in family life were found not to be cruelty. The Commission in the court below had found cruelty on these facts. *Id.* at 1085, 1088.

⁷⁹*Id.* at 1088, citing [1964] A.C. at 695.

⁸⁰[1964] A.C. at 695. The paragraph from which the quotation was taken reads as follows:

I agree with Lord Merriman whose practice in cases of mental cruelty was always to make up his mind first whether there was injury or apprehended injury to health. In the light of that vital fact the court has then to decide whether the sum total of the reprehensible conduct was cruel. That depends on whether the cumulative conduct was sufficiently weighty to say that *from a reasonable person's point of view* after a consideration of any excuse which this respondent might have in the circumstances, the conduct is such that this petitioner ought not to be called on to endure it. (emphasis added)

It will be recalled that the Nigerian Matrimonial Causes Decree of 1970 (1970 Decree) essentially reenacts the *Gollins* definition of cruelty as a ground for the dissolution of marriage. *Supra* notes 27-29 and accompanying text.

⁸¹*Le Brocq v. Le Brocq*, [1964] 1 W.L.R. 1085, 1092 (C.A.) (Harman, L.J.); *accord*, *Oshin v. Oshin*, Suit No. 1/270/1964 (W. Nigeria, Nov. 4, 1966) (unreported) (Fatayi-Williams, J.). There it was said that "[a]ll things considered . . . the conduct with which the petitioner could not be expected to put up could not constitute cruelty unless it was cruel conduct in the natural meaning of those words."

It is clear, then, under *Gollins* and *Le Brocq* that although the requirement of intent to injure has been eliminated from the test for cruelty, the conduct complained of nevertheless must be found objectively to constitute cruelty.

Gollins v. Gollins AND THE NIGERIAN COURTS

The Nigerian Supreme Court recently considered at length the *Gollins*⁸² and *Williams*⁸³ decisions in the case of *Obayemi v. Obayemi*:⁸⁴

[I]t is not disputed that the House of Lords in *Gollins v. Gollins* made it clear that the proof that the conduct was aimed at the other spouse was not an essential requirement of cruelty but that [cruelty is established] without an intent to injure if the inexcusable conduct of one spouse . . . reduced the other to ill health . . . whilst *Williams v. Williams* . . . established that the test of whether one spouse treated another with cruelty was wholly objective.⁸⁵

In support of its position, the court cited *Le Brocq*,⁸⁶ wherein Lord Harman explained that the word "cruel" is not used in any esoteric sense; there need not be physical force, but the conduct complained of must be something which an ordinary man or a jury would describe as "cruel."⁸⁷ In *Obayemi* the Supreme Court, having warned that it was not suggesting that the entire law of cruelty is now to be found in *Gollins v. Gollins*, ruled that the test to be applied objectively is "whether this wife has been cruel to this husband,"⁸⁸ a matter to be decided only after all the facts have been taken into account.

Similarly, in the case of *Addy v. Addy*,⁸⁹ the court considered the recent English decisions at length and pointed out that the question to be answered only after a thorough survey of the situation was this: "Has the respondent treated the other [party] with cruelty?"⁹⁰ An important consideration in answering that question, according to the court, was whether the respondent's alleged cruel conduct was in response to some provocative behavior by the petitioner.⁹¹ The court then emphasized that

⁸²*Gollins v. Gollins*, [1964] A.C. 644 (1963).

⁸³*Williams v. Williams*, [1964] A.C. 698 (1963).

⁸⁴[1967] N.M.L.R. 212 (Sup. Ct. Nigeria).

⁸⁵*Id.* at 215-16.

⁸⁶*Le Brocq v. Le Brocq*, [1964] 1 W.L.R. 1085 (C.A.).

⁸⁷*See id.* at 1089; *accord*, *Animashaun v. Animashaun*, [1966] N.M.L.R. 186 (Lagos).

⁸⁸[1967] N.M.L.R. at 216.

⁸⁹Suit No. CAW/21/67 (Ct. App. W. Nigeria, Feb. 13, 1968) (unreported).

⁹⁰*Id.*

⁹¹*Id.*; *see* *King v. King*, [1953] A.C. 124, 134 (1952). There Lord Norman observed:

When a husband and wife have reached the stage of unending accusations and recrimina-

a man and his wife take each other for better or for worse; only after a survey of all the incidents in light of the entire history of the marriage can a judge conclude whether or not cruelty has been established.⁹²

In the light of these decisions, it is clear that *Gollins* and *Williams* are law in Nigeria. But it is interesting that at least two Nigerian cases appear nevertheless to have followed the old rule. In *James v. James*⁹³ the Ibadan High Court observed:

When one spouse, out of selfishness denies the other sexual life or refuses to take measures that would make the other enjoy sexual life with the other, that is not itself cruelty. It will be cruelty, however, if there is no reasonable excuse for the act of that spouse and the action of that spouse is done with a desire to inflict misery on the other.⁹⁴

In the other case, *Ade-Hall v. Ade-Hall*,⁹⁵ Chief Justice Morgan, after holding that cruelty had not been proved, observed: "I think that the failure to bring food home on one occasion without any evidence of a deliberate intention to punish the petitioner cannot be regarded as legal cruelty."⁹⁶

Both *James* and *Ade-Hall* were decided three years after *Gollins v. Gollins*, and both decisions still regarded intention as a *sine qua non* to the proof of cruelty. It is submitted that both decisions were given *per incuriam*.⁹⁷

STANDARD OF PROOF OF CRUELTY

The English Matrimonial Causes Act of 1965⁹⁸ requires that the court be "satisfied on the evidence that the case for the petition has been proved."⁹⁹ In *Davis v. Davis*¹⁰⁰ the Court of Appeal held that this provi-

tion, the wife's satisfaction in inflicting pain may be the reflex of the bitterness and pain suffered by her and it is especially likely to occur when there have been former real affection and a strong bond of physical attraction between the parties.

⁹²*Addy v. Addy*, Suit No. CAW/21/67 (Ct. App. W. Nigeria, Feb. 13, 1968) (unreported); *accord*, *Sobowale v. Sobowale*, Suit No. I/4/67 (W. Nigeria, Feb. 15, 1968) (unreported). In *Sobowale* Justice Ayoola found that cruelty had been proved after "[t]aking all the incidents together to form a composite picture and judging them in relation to the surrounding circumstances of [the] case"

⁹³Suit No. I/24/66 (W. Nigeria, June 17, 1966) (unreported).

⁹⁴*Id.* (Kayode Eso, J.).

⁹⁵Suit No. I/105/65 (W. Nigeria, March 16, 1966) (unreported).

⁹⁶*Id.*

⁹⁷No reference was made to *Gollins* in either case. It is noteworthy, however, that both cases were decided before *Addy* and *Obayemi*.

⁹⁸Matrimonial Causes Act 1965, c. 72.

⁹⁹*Id.* § 5(3), at 1584.

¹⁰⁰[1950] P. 125 (C.A. 1949).

sion did not require that matrimonial cruelty be proved as strictly as is a crime.¹⁰¹ Notwithstanding the holding, Lord Justice Bucknill appeared to suggest the contrary by the following statement:

[Section 4 of the Matrimonial Causes Act, 1937] requires that the court should be "satisfied, on the evidence that the case for the prosecution has been proved." I understand that to mean that, if there is any reasonable doubt at the end of the case, then the burden of proof has not been discharged and the decree ought not to be granted.¹⁰²

The ambiguity raised by Lord Bucknill's statement appeared in a subsequent case, *Bater v. Bater*,¹⁰³ decided by the same court. There it was held that the trial judge did not err in directing that the petitioner must prove cruelty beyond a reasonable doubt. However, Lord Justice Denning pointed out, it would have been error if the trial judge had said that cruelty must be proved with the same strictness as a crime.¹⁰⁴ It would appear from the context of Lord Denning's opinion that the concept advanced by both *Davis* and *Bater* is that all cases, civil and criminal, must be proved beyond a reasonable doubt, but that a reasonable doubt is greater in a civil case than in a criminal case.¹⁰⁵ Similarly, Lord Denning's opinion suggests that the standard for proving a minor act of cruelty is less strict than that for proving a graver act of cruelty.¹⁰⁶ The clear implication is that there are degrees of proof within a particular standard. This is the principle which the House of Lords apparently adopted in *Blyth v. Blyth*.¹⁰⁷ The court in that case, however, stated the rule in terms more easily understood than in either *Davis* or *Bater*:

[S]o far as the grounds for divorce are concerned, the case, like any civil case, may be proved by a preponderance of probability, but the degree of probability depends on the subject-matter. In proportion as the offense is grave, so ought the proof to be clear.¹⁰⁸

In Nigeria, there was in fact a double standard of proof for matrimonial causes prior to the enactment of the 1970 Decree.¹⁰⁹ Section 137(1) of the Evidence Act¹¹⁰ provided:

¹⁰¹The trial judge had said that a charge of cruelty must be proved with the same degree of strictness with which a crime is proved in a criminal court. *Id.* at 126 (quoting the lower court).

¹⁰²*Id.* at 127.

¹⁰³[1951] P. 35 (C.A. 1950).

¹⁰⁴*Id.* at 38.

¹⁰⁵*Id.* at 36-38.

¹⁰⁶*Id.*

¹⁰⁷[1966] A.C. 643.

¹⁰⁸*Id.* at 669.

¹⁰⁹1970 Decree, 57 Official Gazette Extraordinary A 61 (Supp. No. 15, 1970).

¹¹⁰Evidence Act, [1958] Laws of the Federation of Nigeria and Lagos, c. 62, § 137(1), at 1285.

If the commission of a crime by a party to any proceedings is directly in issue in any proceedings civil or criminal, it must be proved beyond reasonable doubt.¹¹¹

This language clearly indicates that proof beyond reasonable doubt would apply only in civil cases where the commission of a crime was directly in issue. In all other cases, the proof was to be on the balance of probabilities. Obviously, not all acts of cruelty would amount to the commission of a crime. Hence, proof of cruelty might be either proof beyond reasonable doubt or proof on the balance of probabilities, depending on the facts of a particular case.

Although the English Matrimonial Causes Act of 1965,¹¹² which requires proof only to the "satisfaction of the court,"¹¹³ applied also in Nigeria, it was clearly to be read and applied with section 137(1) of the Evidence Act. Thus, proof to the satisfaction of the Nigerian courts, where a criminal act was at issue, meant proof beyond a reasonable doubt. The problem was that the Nigerian courts had to determine whether or not the alleged cruelty constituted a criminal act before determining the standard of proof to be applied.

The confusion of the "reasonable doubt" language that had arisen in *Davis* and *Bater* was compounded still further in Nigeria by the 1968 decision of *Oyedijo v. Oyedijo*.¹¹⁴ There the Ikeja High Court followed *Davis* and held that the charge of cruelty must be proved to the satisfaction of the court and not with the degree of strictness by which a crime is proved in a court exercising criminal jurisdiction.¹¹⁵ Although this statement of law is consonant with the *Davis* decision, the court apparently overlooked section 137(1) of the Nigerian Evidence Act¹¹⁶ which clearly required proof beyond a reasonable doubt, in the criminal sense of the standard, when an alleged act of cruelty also constituted a crime.

Order was restored to the Nigerian law, however, by the enactment of the 1970 Decree. Section 82(1) provides:

For the purposes of this Decree, a matter of fact shall be taken to be proved if it is established to the reasonable satisfaction of the court.¹¹⁷

The double standard of proof has been eliminated by this provision, and cruelty should now be taken as proved upon the balance of probabilities.

¹¹¹*Id.*

¹¹²Matrimonial Causes Act 1965, c. 72.

¹¹³*Id.* § 5(3), at 1584.

¹¹⁴Suit No. 1K/115/67 (Lagos, Jan. 31, 1968) (unreported).

¹¹⁵*Id.*

¹¹⁶Evidence Act, [1958] Laws of the Federation of Nigeria and Lagos, c. 62, § 137(1), at 1285.

¹¹⁷1970 Decree, § 82(1), 57 Official Gazette Extraordinary A 61, at A 85 (Supp. No. 15, 1970).

CONCLUSION

The foregoing analysis has attempted to provide some insight into the evolution of matrimonial cruelty law in Nigeria. Particular attention has been directed to the English law from which the Nigerian law developed. Heavy emphasis has also been given to the more recent developments in the case law of both countries. With the recent passage of the 1970 Decree and the English Divorce Reform Act of 1969,¹¹⁸ further changes in the law seem imminent. This paper has attempted to analyze some of the possible effects of these acts upon matrimonial cruelty laws. Of particular significance is the fact that the Nigerian courts need no longer look to English law in formulating their decisions. However, while the 1970 Decree marks a divergence from the previous format of rigid adherence to the English matrimonial law, the influence of English law will continue to permeate the structural development of Nigerian law in this area. Hopefully, the influence of English law will continue to wane in recognition of obvious cultural differences respecting the institution of marriage. The Nigerian courts, even at this early stage of self-development, are certainly in a better position to formulate their own principles of law with respect to matrimonial cruelty in Nigeria than are their English counterparts. The 1970 Decree is a significant first step toward this formulation.

¹¹⁸Divorce Reform Act 1969, c. 55.