"It's not you… and it's not me, either":
The case for no-fault divorce[1] in England and Wales

Introduction

The Court of Appeal's unanimous decision in *Owens v Owens* [2017] EWCA Civ 182[2] ('*Owens*') 'underlines [the] urgent need for no-fault divorce'[3] in England and Wales.

Mrs Owens' petition for divorce was dismissed by His Honour Judge Tolson QC at first instance because the learned judge held that whilst the marriage had broken down, Mrs Owens failed to prove, within the meaning of section 1(2)(b) of the Matrimonial Causes Act 1973, that her husband had '… behaved in such a way that [she] cannot reasonably be expected to live with [him]'.[4]

Mrs Owens sought to appeal the decision but this was refused, albeit unenthusiastically, by the Court of Appeal comprising Sir James Munby[5] ('the President'), Lady Justice Hallett and Lady Justice Macur.[6] The justices recognised that the ruling left Mrs Owens trapped in a 'wretchedly unhappy marriage'[7] but were unable to interfere with the decision of the lower court because it was not wrong.[8] The President said that in these circumstances, the question of whether in 2017, the law is in a remotely satisfactory condition, inevitably arises.[9]

---

[1] References to divorce in this essay will apply equally to the dissolution of civil partnerships.
[2] The judgment can be accessed online here: <http://www.bailii.org/ew/cases/EWCA/Civ/2017/182.html>.
[3] Resolution, <http://www.resolution.org.uk/news-list.asp?page_id=228&page=1&n_id=345> accessed 25 September 2017; see also Nigel Sheppard, 'Speech to National Conference' (31 February 2017) <http://www.resolution.org.uk/news-list.asp?page_id=228&n_id=348> accessed 26 September 2017.
[4] *Owens v Owens* [2017] EWCA Civ 182.
[5] President of the Family Division.
[6] Judgment was handed down on 24 March 2017.
[7] *Owens* (n 4) [84] (the President).
[8] Pursuant to the CPR, r 52.21(3)(a).
[9] *Owens* (n 4) [2].

Argument

This essay seeks to answer that question in the negative. Section 1 of the Matrimonial Causes Act 1973 is desperately out of date. It is submitted that it is wrong that in this day and age someone should be stuck in a loveless marriage because the behaviour on the divorce petition was not deemed 'unreasonable' enough.[10] This apparent unfairness has been curbed somewhat over the years by the legal profession, but what has developed, as highlighted by the decision in *Owens*, is a large gap between how the law on divorce operates in theory and how it operates in practice. The resulting, unsatisfactory, position is that '… the law which the judges have to apply and the procedure which they have to follow are based on hypocrisy'.[11] It is submitted that urgent reform is required to bring some 'intellectual honesty'[12] to the process.

This essay will examine the current law and procedure, explore how the decision in *Owens* reinforces the argument for reform, propose that a no-fault procedure be introduced and suggest how it could operate.

Context

The sole ground for divorce in England and Wales is that '… the marriage has broken down irretrievably'.[13] To establish this ground, the petitioner must satisfy the court of at least one of five 'facts' and the court must conduct an inquiry into the facts alleged by the petitioner and the respondent[14] and be satisfied on all the evidence that the marriage has broken down irretrievably.[15]

The Matrimonial Causes Act 1973, section 1(2) sets out the five 'facts' as follows:

[10] *Sheppard* (n 3).
[11] *Owens* (n 4) [94] (the President).
[12] ibid.
[13] Matrimonial Causes Act 1973, s 1(1).
[14] ibid s 1(2).
[15] ibid s 1(4).

(a) that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;

(b) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;

(c) that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition;

(d) that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition … and the respondent consents to a decree being granted;

(e) that the parties to the marriage have lived apart for a continuous period of at least five years immediately preceding the presentation of the petition …

The main focus of this essay is the 'fact' relied upon by Mrs Owens, known colloquially as 'unreasonable behaviour' at (b). It is of relevance that pursuant to (d), parties can divorce by consent, and without blame, after two years' continuous separation.

Since October 2015, Professor Liz Trinder has led research[16] ('Finding Fault') into the use of fault in divorce petitions.[17] In 2014 there were 110,949 divorces by 'facts proven' granted in England and Wales and 60.7%[18] of those petitions were fault-based.[19]

[16] Can be accessed at <http://findingfault.org.uk/> accessed 25 September 2017.

[17] The aim of the research is to explore how the current law on the ground for divorce and civil partnership dissolution operates in practice and to inform debate about whether and how the law might be reformed. See <http://findingfault.org.uk/about-finding-fault-divorce-law-in-practice-in-england-and-wales-project/> accessed 25 September 2017.

[18] Catherine Fairbairn, 'No-fault divorce', The House of Commons Briefing Paper, Number 01409 (11 April 2017) 4, para 1.2.

[19] Reference will be made to 'adultery' at (a) and 'unreasonable behaviour' collectively as the fault-based 'facts'; as both require the respondent to have done something wrong.

Theory versus practice

The use of fault

In theory, the statistics suggest that in 60.7% of cases the respondent had either committed adultery or 'behaved unreasonably'.

In reality, two years is too long for many separating couples to conclude financial and children arrangements[20] so, to circumvent that requirement, a considerable number[21] of petitions filed are based on unreasonable behaviour. These petitions can be issued immediately *but* the petitioner is forced to place blame on the respondent.

This 'blame culture' introduces a degree of discord and unpleasantness into divorce proceedings from the beginning.[22] In many cases the divorce is just the catalyst for proceedings regarding the home, finances and children and the current focus on fault runs the risk of making it harder for parties to reach agreements on these important matters.

Consequently, it has become common practice for solicitors to draft petitions based on unreasonable behaviour using wording they have agreed with the other side, who will not defend the petition.[23] This is done not only to ensure the divorce goes through, but to try not to aggravate matters further. As noted by the President:

[20]Resolution briefing, No Fault Divorce Bill (4 December 2015) <http://www.resolution.org.uk/site_content_files/files/resolution_briefing_no_fault_divorce_bill_hc_2r_december_2015.pdf> accessed 26 September 2017.

[21] 47.4% of petitions were based on 'unreasonable behaviour' see *Fairbairn* (n 18) 4, para 1.2.

[22] Nicholas Longford as quoted by Resolution in 'Family lawyers call for radical overhaul of divorce laws' (21 March 2009) <http://www.resolution.org.uk/news-list.asp?page_id=228&n_id=5> accessed 26 September 2017.

[23] This practice is encouraged by The Law Society's Family Law Protocol, ed 4, 2015, para 9.3.1 and Resolution <http://www.resolution.org.uk/site_content_files/files/code_of_practice_full_version_web.pdf> accessed 26 September 2017. The President said this was an observation only and not a criticism.

> The challenge for the divorce lawyer is therefore to draft an anodyne petition … to minimise the risks that if the petition is too anodyne it may be rejected by the court whereas if it is not anodyne enough the respondent may refuse to cooperate.[24]

Therefore, it can be said that what is written in the petition does not need to have anything to do with the reality of why the petitioner seeks a divorce. This is confirmed by the fact that 43% of respondents to the fault-based petitions said that '… the fact used was not closely related to their view of the 'real' reason for the separation'.[25]

The consequence is that we have divorce by consent for those unable or unwilling to wait for two years by means of a consensual, collusive manipulation of section 1(2)(b).[26]

The statutory duty to inquire

With regard to procedure, The Matrimonial Causes Act 1973, section 1(3) states:

> … it shall be the duty of the court to inquire, so far as it reasonably can, into the facts alleged by the petitioner and into any facts alleged by the respondent.

In theory, this is suggestive of an inquisitorial approach in all cases.

In practice, petitions are only scrutinized for around five minutes.[27] Finding Fault discovered that despite the statutory mandate to inquire, it was almost universal amongst the District Judges and Legal Advisors interviewed, that their inquiry was simply to satisfy themselves that

[24] *Owens* (n 4) [93].
[25] 'Finding Fault?' interim research findings', 1 <http://findingfault.org.uk/wp-content/uploads/2017/03/Finding-Fault-interim-research-findings.pdf> accessed 25 September 2017.
[26] *Owens* (n 4) [94] (the President).
[27] *Finding Fault* (n 25) 2.

the basic ingredients of one of the five grounds had been pleaded; there is no investigation into whether the fact was true and/or causative of the breakdown.[28]

Further, the procedure followed differs depending on whether a petition is defended or not.

In practice, a petition is not treated as defended unless an answer is filed by the respondent.[29] It is accepted that it is practically impossible to adequately test the facts if the respondent decides not to do so, *but* even when the respondent indicated an intention to defend or denied the contents of the petition, the court ignored their rebuttals.[30] The unfairness created by this disparity is poignantly highlighted by the President in *Owens* when he remarked that he could not help but think that had the petition not been defended then it would have gone through without being challenged by the court.[31]

Consequently, the vast majority of petitions proceed both by 'consent' and without any real judicial interrogation. It is easy to see how this 'systemic collusion'[32] could cause confusion for respondents, particularly those who are unrepresented due to unavailability of legal aid, who do not understand why blame has been inaccurately attributed to them nor why the court did not listen to their side of the story.

The effect of *Owens*

At its simplest, the effect of the decision is that Mrs Owens is unable to divorce her husband using one of the fault-based 'facts'. She can, however, wait until five years have passed and

[28] ibid 1.
[29] ibid 2.
[30] ibid.
[31] *Owens* (n 4) [93].
[32] Hamish Dunlop, 'Unreasonable Behaviour in the Modern Divorce it's all your Fault' (10 August 2017), 11 <https://www.3pb.co.uk/content/uploads/Owens-Lecture-Notes-August-2017.pdf> accessed 26 September 2017.

petition under section 1(2)(e)[33] or may petition sooner should her husband consent.[34] In the meantime, she may not remarry, nor obtain a final financial order.

At face value, it appears that the impact on future cases will only be small as *Owens* concerned a contested divorce and less than 1% of divorces are similarly defended.[35] The residual 'undefended' cases[36] proceed under the Family Procedure Rules' special procedure, basically unchallenged.[37] However, there is a real risk following *Owens* that this may not continue.

Firstly, the allegations on Mrs Owens' petition can be described as 'unremarkable' and 'a very typical … set of particulars designed not to paint the husband as a despicable rogue but still setting out the unhappiness and sadness that [she] was experiencing'.[38] It is entirely possible that, following *Owens*, particularly in cases where it is not known whether or not the petition will be defended, similar allegations will no longer be enough to get a petition through. Some solicitors may now consider it prudent to make stronger allegations against the respondent. Anecdotal evidence since *Owens* suggests that petitions are being drafted based on behaviour with more acrimonious allegations than previously.[39] Clearly, this could result in increased hostility and tension between the petitioner and respondent. Whilst the effect of any continuing conflict between the parties on their children was untested in *Owens*, as the parties' children were adults, it can be assumed that any impact would have been negative.

[33] Though her husband may defend this by disputing that there has been five years continuous separation or that the dissolution of the marriage will result in grave financial or other hardship to him and that it would in all the circumstances be wrong to dissolve the marriage, as per the Matrimonial Causes Act 1973, s 5(2).
[34] Pursuant to the Matrimonial Causes Act 1973, s 1(2)(d).
[35] *Finding Fault* (n 25) 1.
[36] Within the meaning of the Family Procedure Rules 2010, r 7.1(3).
[37] The majority of cases proceed in accordance with r 7.20(2)(a) and the hearing before the judge only lasts a matter of seconds and the judge merely pronounces the making of the decree nisi (*Owens* (n 4) 25).
[38] David Emmerson, 'Unreasonable behaviour' (7 April 2017) New Law Journal, 167 NLJ 7751, 9.
[39] John Bolch, 'The return of acrimony to divorce proceedings' (7 June 2017) <http://www.marilynstowe.co.uk/2017/06/07/return-acrimony-divorce-proceedings/> accessed 26 September 2017.

Secondly, as arrangements cannot be finalised until the decree nisi is granted, it is entirely possible that respondents may rely on *Owens* and choose to defend petitions in order to avoid their financial obligations. As there is a large degree of ambiguity into what divorcing couples can expect to pay and receive, there is much to argue for.[40] It is possible that the law has armed Mr Owens with the powerful weapon of giving or withholding consent to be deployed against Mrs Owens when reaching other agreements, such as finances.[41] This could place future petitioners in a very vulnerable position for a number of years.

Furthermore, more judicial time would be required to consider an increased number of defended petitions; which is in direct conflict with recent reforms[42] targeted at freeing up that time.

Reform

There have been several attempts to reform the law. The closest we came was Part 2 of the Family Law Act 1996 which aimed to introduce no-fault divorce to reduce bitterness and the damaging impact of divorce.[43] Parties were required to attend 'information meetings' to encourage reconciliation but, following a series of unsuccessful pilot schemes, the Government in 2001 concluded that the provisions were 'unworkable'.[44]

The most recent attempt to introduce no-fault divorce was in 2015 when Mr Richard Bacon introduced the 'No Fault Divorce Bill' to Parliament.[45] The Bill proposed to insert another

[40] Nicholas Longford as quoted in 'Family lawyers call for radical overhaul of divorce laws' (21 March 2009) <http://www.resolution.org.uk/news-list.asp?page_id=228&n_id=5> accessed 26 September 2017.

[41] As warned by The Law Commission in 'Family Law The Ground for Divorce' (LAW COM. No. 192, 31 October 1990), 13, p. 3.13.

[42] For an examination of these reforms see: Sarah Hughes, 'Divorce & dissolution' (4 August 2017), New Law Journal, <https://www.newlawjournal.co.uk/files/article_files/009_nlj_7757_specialist_hughes.pdf> accessed 26 September 2017.

[43] 7 Bill 131-EN 2012-13 paragraph 140 <https://publications.parliament.uk/pa/bills/cbill/2012-2013/0131/en/2013131en.htm> accessed 29 September 2017.

[44] *Fairbairn* (n 18) 6 para. 2.

[45] The Bill can be read here: <https://publications.parliament.uk/pa/bills/cbill/2015-2016/0077/cbill_2015-20160077_en_1.htm> accessed 26 September 2017. It only made it to the first reading. The debate notes can

'fact' into the Matrimonial Causes Act 1973[46] which would allow for the court to immediately grant a decree nisi on receipt of a joint petition[47] from the separating parties. There would then be a wait of one year before the decree absolute.

To its credit, the amendment would have provided an 'honest' way for parties who agree that they want to divorce, to do so simply by stating that the marriage had broken down irretrievably and crucially, without having to blame one another.

However, the Bill did not go far enough, as even with this additional 'fact', it can be assumed that Mrs Owens would still not get her divorce given her husband's unwillingness to agree to it.

Therefore, it is argued with Resolution[48] and Finding Fault that parties should be able to petition jointly or unilaterally. Resolution suggest a procedure whereby one or both parties can give notice that the marriage has broken down irretrievably and then after six months, if one or both parties is sure they are making the right decision, the divorce will be finalised.[49] Finding Fault endorse a single system of notification of intent to divorce, again with a waiting period of six months.[50]

It is submitted that no-fault divorce should be introduced by the retention of 'irretrievable breakdown' as the sole ground for divorce but the removal of the five 'facts'. It is accepted that this no-fault procedure would not completely eradicate negative emotions associated with

be found here: <https://publications.parliament.uk/pa/cm201516/cmhansrd/cm151013/debtext/151013-0002.htm#15101362000001> accessed 26 September 2017.

[46] And the Civil Partnership Act 2004.

[47] The petition would have attached to it a statement from each party, signed freely and independently, stating that the relationship has irretrievably broken down.

[48] Resolution describe themselves as an organisation of 6,500 family lawyers and other professionals in England and Wales, who believe in a constructive, non-confrontational approach to family law matters.

[49] Resolution, 'End the blame game', <http://www.resolution.org.uk/endtheblamegame/> accessed 25 September 2017.

[50] 'The need for divorce reform' (12 January 2015), <http://findingfault.org.uk/the-need-for-reform/> accessed 26 September 2017.

divorce, but at least it would not actively encourage feelings of injustice and recrimination, which run the risk of affecting the parties' ability to reach agreements about children matters and finances.[51]

It has long been recognised that an objective of the law is to support marriages which are capable of being saved,[52] but it can be said that the current law actually works against this. This is because those who wish to be divorced either have to make allegations against each other, which may destroy any lingering chance of saving the marriage or they have to live apart for a lengthy period of time, which may encourage them to part when they may actually have been able to resolve their difficulties had they stayed together.[53]

It would be beneficial to introduce a waiting period because this would give parties the opportunity to resolve the practical consequences of the divorce before the divorce is in fact finalised. However, it is submitted that separation during this period should not be compulsory. In addition to the point made in the above paragraph, requiring parties to be physically separated could prove discriminatory to those who, for financial or other reasons, cannot arrange to live apart and parties may be forced to perjure themselves by stating that they have been separated for the requisite period when they have not.[54] A period of 'consideration and reflection'[55] is preferable, during which the parties can separate, live together or alternate between the two without stopping the clock.

Consideration would need to be given to how long this period should be and what is expected of the parties throughout its duration. The Law Commission recommended that the period needs to be substantial to demonstrate quite clearly that the marriage has irretrievably broken

[51] *Resolution* (n 20) 2.
[52] The broad aim of Part 2 of the Family Law Act 1996 was to encourage reconciliation where possible.
[53] *The Law Commission* (n 41) 5, p.2.17.
[54] ibid 15, p.3.22.
[55] ibid 16, p.3.26.

down[56] and suggest a year. However, it may be sensible just to set a minimum term[57] and allow the parties to control the amount of time they need to try to resolve matters. The time could begin to run from the date the court receives the notification that the relationship has broken down, until a further notification is received, in the form of a declaration, this time stating that it has broken down *irretrievably*.

The benefit of setting only a minimum term would ensure that there is enough time for the exchange of information and proposals, negotiation of matters which can be resolved by agreement and adjudication of those which cannot[58] whilst recognising that some couples may not need or want to access any counselling or support and so do not require a period longer than the statutory minimum.

We learned from the failings of Part 2 of the Family Law Act, that parties need information which is tailored to their individual needs.[59] It is desirable that parties would be made aware of the services available locally and it is possible that the court that receives the initial notification could provide this information to them directly.[60] The aim of the provision of this information is well encapsulated by the 'information statement' proposed by Resolution to confirm that the parties have been given nationally prescribed, but locally targeted, information about counselling, mediation, collaborative law, parenting plans/classes and other local services that can assist them and legal principles (not advice) about children and financial issues.[61]

As recognised by the Law Commission:

---

[56] ibid 17, p.3.35.
[57] Possibly the six month period proposed by both Resolution and Finding Fault.
[58] *The Law Commission* (n 41) 18, p.3.36.
[59] Information Meetings & Associated Provisions within the Family Law Act 1996: Final Evaluation of Research Studies Undertaken by Newcastle Centre for Family Studies, University of Newcastle upon Tyne (September 2000).
[60] *The Law Commission* (n 41) 29, p.5.19.
[61] Geraldine Morris, 'Family: Times they are a-changin', (3 April 2009) New Law Journal, 159 NLJ 494.
[61] ibid.

> It is generally accepted that the law neither can nor should force people to live together or keep alive the empty shell of a marriage which is undoubtedly dead … but it is legitimate to try to avoid the damage done by decisions taken in haste and without full consideration of the consequences.[62]

It is submitted that the law, if reformed in these terms, would do both and importantly, would give Mrs Owens the divorce she is desperate for.

Conclusion

On 8 August 2017 Mrs Owens was granted leave to appeal to the Supreme Court.[63] At the time of writing a hearing has not been listed. Although the new President of the Supreme Court, Lady Hale[64], and other Supreme Court Justices[65] are supporters of no-fault divorce, it seems unlikely that the decision will be overturned[66] given Lady Justice Hallett's forceful reminder that 'It is for Parliament to decide whether to amend section 1 and to introduce "no-fault" divorce on demand, it is not for Judges to usurp their function'.[67]

Unfortunately, a spokesperson has recently confirmed that there are no current plans to introduce no-fault divorce but that the government is considering what further reforms to the family justice system may be needed.[68] It is submitted that the law on divorce is fairly insular,

[62] *The Law Commission* (n 41) 10 p.3.3.
[63] Baroness Hale, Lord Wilson and Lord Hughes [USC 2017/0077].
[64] <https://www.standard.co.uk/news/uk/top-judge-calls-for-rules-which-force-women-to-take-off-veils-when-giving-evidence-in-court-9920224.html> accessed 25 September 2017.
[65] For example, Lord Wilson. See: <https://www.lawgazette.co.uk/comment-and-opinion/at-fault-on-no-fault-divorce/5060088.article> accessed 26 September 2017.
[66] Although it has been suggested that a different decision could be reached if the court take a deductive approach: David Burrows, 'Owens: an alternative judgment', New Law Journal, issue 7740.
[67] *Owens* (n 4) [99].
[68] Lord Keen of Elie, Ministry of Justice Spokesperson in the House of Lords gave this answer on 13 February 2017 in answer to a written question from Lord Pendrym: "To ask Her Majesty's Government whether they have any plans to review the fault-based divorce system" PQ HL5013 <http://www.parliament.uk/documents/publications-records/House-of-Lords-Publications/Hansard%20Bound%20Volumes/HLBV781Writtens.pdf> 136 accessed 26 September 2017.

and as it is currently being digitised, it is actually the perfect time to consider reform[69]; which begs the question, what *is* the government waiting for?[70]

It is hoped that with Finding Fault's final report imminent[71] and a Supreme Court judgment in the pipeline, the government will not be able to ignore this question any longer:

Don't you think that in 2017, the decision whether or not a marriage should be dissolved ought to be one for the parties which the State is not in a position to question?[72]

'I do.'

Word count: 2904

[69] *Finding Fault* (n 20).
[70] Also asked by *Sheppard* (n 3).
[71] Due Autumn 2017.
[72] Stephen Cretney, 'Family Law in the Twentieth Century: A History', 2003, Oxford, 391; quoted in *Owens* (n 4) [90] (the President).