

Should we welcome an end to the 'blame game'? Reflecting on experiences of civil partnership dissolution

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Abstract

Current trends within family law in England and Wales favour the introduction of ‘no fault’ divorce. However, using empirical data, this article argues that there is still a place for ‘fault’ and that the law is an appropriate place to express emotion and ‘blame’. In the context of civil partnership, where it is impossible to specifically cite an ex-partner’s ‘adultery’ in the dissolution petition, the data indicate that petitioners have felt frustrated. This suggests that, were ‘fault’ to be removed entirely from the law, people may struggle to achieve emotional recovery after relationship breakdown, being offered fewer opportunities to tell their ‘story’.

Key words: relationship breakdown; civil partnership; fault; adultery; emotion.

Introduction

A reform of the law to introduce ‘no fault’ divorce has recently arisen, once again, on the Government’s agenda within England and Wales. This is in the aftermath of the highly unusual case of *Owens*, where Tini Owens was denied the right to divorce her husband, even in the context of a loveless and unhappy marriage. Within her petition, Mrs. Owens (seeking to cite her husband’s behaviour) alleged that he had prioritised his work; that he had treated her without affection; that he had been argumentative; and that he had disparaged her in front of others. Nevertheless, the Court of Appeal found that her petition, as it pertained to the requirements of the law, was “at best flimsy”, with Mrs. Owens being “more sensitive than most wives”, and having “significantly exaggerated [...] context and seriousness” ([2017] EWCA Civ. 182, paras 42, 46 and 49). The Supreme Court did not contest this conclusion and, given Mr. Owens’s opposition to the divorce, Mrs. Owens presently remains ‘locked’ in the marriage until 2020. The Court appeared to be reserving the matter for the legislature,

with Lady Hale, despite finding the case “troubling”, stating that “it is not for [the judiciary] to change the law laid down by Parliament – our role is only to interpret and apply the law that Parliament has given us” ([2018] UKSC 41, para. 46). The Ministry of Justice seemingly responded to this comment, publishing a consultation at the end of 2018 which asked for views on replacing the current law with a system based on notification. Under this system, divorce would be available if one (or both) parties registered that the marriage had broken down irretrievably, and then one (or both) confirmed the intention to divorce after a minimum period of six months. Responses to the consultation were reported to have shown widespread support for the initiative, and former Justice Secretary David Gauke confirmed that legislation was to be introduced “as soon as parliamentary time allows” (Bowcott, 2019). The Divorce, Dissolution and Separation Bill 2017-2019 was introduced to Parliament, but failed to complete its passage before the end of the session. Most recently, a 2019-20 Bill was announced in the Queen’s Speech on 14 October 2019 and was introduced in the House of Lords the next day. No date is yet available for its second reading.

Were the legislation to succeed in Parliament, England and Wales would be following countries such as Sweden, Finland and Australia, who have already implemented a ‘no fault’ divorce system. Strong support has been voiced by Resolution (see, for example, 2010), the national organisation of family lawyers, in favour of such a shake-up of the law. More widely, popular discourses have come to accept as a given that notions of ‘fault’, and the emotions that often accompany them, are not best suited to the legal process. This article offers a critical contribution by contending that there is still a place for ‘fault’ within the law of divorce, and that this area of the legal process is an appropriate place for the expression of emotion. It asserts this particularly in the absence of any apparent agenda as to how the important issue of the psychological trauma of divorcing adults could otherwise be addressed.

The possibility of citing ‘fault’ offers people an opportunity to have their hurt recognised in an official setting; to engage in conflict in a contained way; and, crucially, to work through the narrative of where their relationships went wrong. Without this, separating parties might find themselves with less of a chance to attain psychological resolution, and may experience difficulty in letting go. The paper seeks to demonstrate these points through the findings from qualitative interviews conducted with family lawyers, and with lesbian, gay, and bisexual individuals who had sought legal advice on civil partnership dissolution. It considers the importance of being able to apportion ‘blame’ within the legal process through looking at a case study, from the point of view of those seeking to dissolve a civil partnership in which ‘blame’ has centred around ‘cheating’. Under civil partnership (which is currently only available to people in a same sex relationship), it is not possible to petition for dissolution by specifically citing ‘adultery’, and the only ‘fault’-based option available is ‘unreasonable behaviour’. Even so, the indications within the study were that some people felt that they would, and should, be able to express their petition in terms of ‘adultery’, and that they felt frustrated at being unable to do so. This article argues, in light of the level of frustration generated where there is still the possibility of citing ‘unreasonable behaviour’, that this would only be likely to escalate in the absence of any ‘fault’-based ‘facts’ at all. Therefore, whilst the discussion relates specifically to ‘adultery’, it is possible to generalise from it about the utility of ‘fault’, and the implications were ‘fault’ to be removed altogether. The data suggest that people look to the law for emotional resolution when their formalised relationships break down. The laws of divorce (and dissolution) should respond to this by offering separating parties an appropriate outlet for their feelings, as other areas of the law have done.

The case in favour of ‘no fault’ divorce, and moves towards reform

The current position for different sex married couples in England and Wales is that there are five routes (or ‘facts’) through which it can be proved that their marriage has broken down ‘irretrievably’ (s.1(2) of the Matrimonial Causes Act 1973): that the respondent has committed ‘adultery’ and the petitioner finds it intolerable to live with them; that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with them (‘unreasonable behaviour’); that the respondent has deserted the petitioner for a continuous period of at least 2 years; that the parties have lived apart for a continuous period of 2 years, and that the respondent consents to a decree being granted; or that the parties have lived apart for a continuous period of 5 years. From these ‘facts’, it is not possible for a couple to obtain a divorce without alleging ‘fault’, unless they have been separated for 2 years. Consequently, whilst the law notionally operates a mixed system, comprising both ‘fault’ and ‘no fault’ elements, it incentivises people to exaggerate claims of ‘unreasonable behaviour’ or ‘adultery’ (Ministry of Justice, 2018). Indeed, it has been claimed that petitions will often be framed in terms of one of the ‘fault’-based ‘facts’, when the truth is that the parties simply both consent to the divorce (Trinder et al., 2017).

There have been various attempts to move family law away from the employment of ‘fault’, to urge parties to look towards the future, rather focusing on the past (Resolution, 2010). To this end, efforts were made to bring about ‘no fault’ divorce through Part II of the Family Law Act 1996, although those were ultimately unsuccessful. During the debates leading up to the passing of the 1996 Act, concerns were expressed about the introduction of ‘quickie’ divorce, although this was not what it was intended to introduce (Day Sclater, 1999a). Whilst the Act was to abolish the five ‘facts’, with the ‘irretrievable breakdown’ of the marriage to be evidenced by one or both parties lodging with the court a ‘statement of marital breakdown’, the parties were then to wait for a prescribed period of time (at least nine

months) for 'reflection and consideration'. After having reflected on the breakdown of the relationship and considered arrangements for the future, they were to lodge an additional statement that the marriage had broken down irretrievably. As well as this, no party was to be entitled to make a statement of marital breakdown without attending an 'information meeting', which was, amongst other things, to encourage the use of mediation. In spite of this, during pilot studies of the scheme, most of those proceeding with divorce continued to consult with solicitors, and relatively few took up the option of mediation (Walker, McCarthy, Stark & Laing, 2004). The Government later decided to abandon the implementation of the reform, and the legislation was repealed (Reece, 2003).

The issue of 'no fault' divorce cropped up again when the No Fault Divorce Bill 2015-2016 was introduced to Parliament by Richard Bacon MP as a private members' bill. This aimed to amend both the 1973 Act and the Civil Partnership Act 2004 to introduce an additional 'fact' to the current law (that the couple agreed that their marriage had broken down irretrievably). Yet, the relevant Parliamentary session ended without the Bill advancing beyond its first reading in the House of Commons. In July 2018, Baroness Butler-Sloss introduced another private members' bill (the Divorce (etc.) Law Review Bill 2017-19) requiring the Lord Chancellor to review the law relating to divorce and dissolution, with this entailing consideration of a new scheme based on application and confirmation. Although that Bill also did not progress, the Divorce, Dissolution and Separation Bill 2017-2019 soon followed, this time seeking to replace the 'conduct' and 'separation' facts with a requirement to provide a statement of 'irretrievable breakdown'. The new 2019-20 Bill seeks to do likewise.

A number of arguments have been commonly used in favour of the removal of 'fault' from the law of divorce. Firstly, it has been recognised that making divorce relatively difficult to

obtain, through the use of ‘fault’, does not actually stop marriages from breaking down (Walker, 1991). No law, however formulated, is able to make people love, respect and/or tolerate one another (Lord Chancellor’s Department, 1993). That being the case, it is arguable that the law should provide procedures for managing the ending of relationships that are the least onerous for everybody involved. Secondly, Christian beliefs regarding the unbreakable nature of marriage have been viewed as incompatible with a progressively more secular society (Jeffs, 1996). As a result, it may seem less acceptable to force couples to remain in ‘empty shell’ marriages, where the partners are married in name only. Thirdly, there has been a dominant view that emotion should be relegated away from the sphere of public discourse, given its “chaotic”, “unpredictable”, and volatile nature (Grossi, 2015). This has particularly found favour within family law, given that the family is often perceived as being private, rather than public (Abrams, 2009). This article will now consider that line of thinking, arguing that, in fact, the legal process is an appropriate place to air parties’ emotions.

Emotion and the law

The idea that emotions are irrational, and should be excluded from the law, has in many respects become “deeply ingrained” in the legal sector (Maroney, 2006). Emotion has been seen as a “blind force”, as opposed to the law, a “rational regulator” (Clore, 2009). As Bandes (2008-2009, p. 493) explains, “to label [something as] ‘emotional’ is to say that it is inappropriate – the very opposite of the reasoned discourse on which the legal system is premised”. More specifically, in the context of family law, “the expression of [...] psychological needs [has been] seen as inimical to ‘civilised’ outcomes” (Day Sclater, 1997, p. 436). Emotions are viewed as phenomena that distract us from our purposes, and “lead us astray” (Grossi, 2015, p. 55). This line of argument manifests itself, in relation to divorce, in contentions that the use of ‘fault’ inflames issues around children and property, making those

more difficult to resolve. The ‘blame culture’ associated with ‘fault’ is perceived as bringing about “discord and unpleasantness”, and as causing further deterioration in the parties’ relationship as one dredges up the other’s past behaviour (Resolution, 2010). Children are frequently said to be the ‘victims’ of this, with a Ministry of Justice (2018, p. 5) consultation paper stressing how “parents [...] who need to continue to work together in their children’s best interests may struggle to overcome [the] feelings of hostility” caused. We might question to what extent it is reasonable to “trivialise” the feelings of adults in favour of the welfare of children (Day Sclater, 1999a). Furthermore, Wardle (1991) reports that, where ‘fault’-based ground have been removed in US states, hostility has simply shifted to other parts of the process. The suggestion is that no legislative framework is able to eliminate ‘blame’. Accusations and strong feelings of injustice persist, and people will look for alternative outlets to express the hurt that they feel (Richards, 1994; Wardle, 1991). In a survey of American matrimonial lawyers, Bohannon (referred to in Wardle, 1991, p. 99) found that 91% of respondents reported that custody disputes had either increased (53%) or remained the same (38%) as before the adoption of ‘no fault’ divorce grounds, and 88% reported an increase in bitterness (44%), or at least as much bitterness (44%), in these disputes. Accordingly, it may be that ‘no fault’ divorce would not bring about the reduction of acrimony and emotional damage inflicted on children that many have hoped for.

In any event, though. this paper argues that divorce law should be considered an appropriate forum for the continued expression of emotion, and for individuals to cope with loss. The law must recognise that “actual people are involved in the activities upon which [it] operates”, and ought accordingly be concerned with human experiences (Sanger, 2001, p. 109). In this respect, there are many other areas where emotions are clearly at play. Tort law, for instance, seeks to measure emotional distress, whilst transitional justice procedures

seek to elicit, and facilitate the expression of, the emotions of both victims and defendants, including sadness, anger, and hatred on the part of the victims (Karstedt, 2016). Within criminal law, as well, sentencing judges, jurors, and parole boards stress the importance of remorse having been displayed by a defendant (Bandes and Blumenthal, 2012). Similarly, examples abound of trials concerning crimes of passion and episodes of provocation, and the existence, absence, or extent of emotions may well determine the applicability of various offences (Doak and Taylor, 2013). The relevance of this is clear, given that in criminal law, as with family law, emotion is present within a range of interactions, being “typical, rather than exceptional” (Abrams, 2009, p. 306). Over recent years, there has been a discernible shift towards improving the plight of victims in the criminal justice system, rectifying their lack of ‘voice’ in legal proceedings (Erez, 2000). A “re-emotionalisation” has occurred, with the focus being on the victims and their emotional needs (Karstedt, 2011). Notably, this goes against the grain of proposals within family law, which seek instead to take the emotion out of the process.

The introduction of restorative justice conferences has enabled victims of crime to meet their offender face-to-face. Simultaneously, there has been a trend around the world towards the use of victim impact statements, allowing victims to express their feelings about the crime in question. Jurisdictions with common law traditions, such as Canada, New Zealand and the UK, were early adopters of these kinds of statements (having done so in the 1980s and 1990s), and victims in the UK are now able to make a Victim Personal Statement, which enables them to communicate verbally and/or in writing the effects that a crime has had (Booth, Bosma & Lens., 2018). This statement will be in the victim’s own words and may be read aloud in court at the court’s discretion. Offering victims the opportunity to make such a statement has been conceived of as providing “recognition” that “they have been wronged”

(Lens et al., 2015, p. 21). An important part of this is permitting them the chance to express their pain in a public setting, and to obtain “official, albeit symbolic, acknowledgement” of what happened to them (Doak and Taylor, 2013, p. 8). It is stressed that this article is not suggesting that there is a parallel to be drawn between victim impact statements and apportioning ‘blame’ in divorce proceedings, in terms of the actual harms that are inflicted (apart, for example, from in cases involving aspects such as domestic abuse and marital rape). However, it may be that separating parties, like victims of crime, see some significance attached to having those various harms noted as part of the ‘formal’ legal process, and to being recognised as the “injured party” within this ‘official’ forum (Erez, 1994). In fact, criminal proceedings that provide victims with the chance to offer a personal narrative of their emotional journey have also been found to enhance those victims’ satisfaction with the justice system (Erez, 1999). According to theories of ‘procedural justice’, an individual’s sense of justice can be determined by the legal procedure itself, and confidence in the process is bolstered where victims feel that they are being heard and understood (Doak and Taylor, 2013). This confidence arguably reduces negative emotions, makes victims feel more supported, and helps with their psychological healing (Lens et al., 2015).

Although victim impact statements within the UK rarely influence sentencing decisions to a significant degree, it is acknowledged that they are of some practical effect, helping to provide a picture of culpability and harm for those purposes (Doak and Taylor, 2013). That is in contrast to the use of ‘blame’ in divorce proceedings, which does not tend to influence the ancillary proceedings, unless, for instance, there has been significant financial misconduct. This may seem relevant, in the sense that Tyler (1987) has contended that participants only feel the value of being given a ‘voice’ where a decision-maker actually considers their views. Nevertheless, research has suggested that, in terms of criminal law, the majority of victims

wish to provide input, even if their input is ultimately ignored or does not affect the outcome of the case. Leverick, Chalmers & Duff (2007, p. 40), for example, found, in their study in Scotland, that just over a third of victims cited their reason for making a statement as ‘to express my feelings/get my point across’, whilst only 5% sought to influence sentencing. In this way, it seems that the expressive and “communicative” value of these statements is more important than any “instrumental” role they might perform (Roberts and Erez, 2010). A similar conclusion was reached in relation to the Truth and Reconciliation Commission of South Africa, where, despite the absence of any ability to influence the punishment of the alleged perpetrators, 21,290 statements were received from victims (Roberts, 2009, p. 365). Half of the participants within Leverick et al.’s (2007, p. 46) study acknowledged that they did not know whether the court had ultimately considered their statement or not, and yet 87% said that they would either “definitely” or “probably” submit a statement again in the event of further victimisation. This was slightly higher than an earlier finding, in a study conducted within England and Wales, that three quarters of victims would submit another such statement in the future (Hoyle, Cape, Morgan & Sanders, 1998). In addition, many of the respondents found the process of making the statement helpful, and almost two thirds provided an affirmative answer when asked whether making the statement had made them feel better (Leverick et al., 2007, p. 45). This is presumably not least because it can act as a measure of achieving psychological catharsis, and a source of relief (Erez, Roeger & Morgan, 1994).

In fact, offering the chance to provide a victim impact statement has, in and of itself, been argued to help victims’ recovery (Erez, 1999). This is compatible with the aims of ‘therapeutic jurisprudence’, under which it is asserted that insights should be taken from mental health disciplines to help to shape the development of the law (Winick, 1996).

‘Therapeutic jurisprudence’ aims to ascertain whether the law’s antitherapeutic effects can be reduced, and its therapeutic effects enhanced, such that, for instance, the legal process can be used to promote healing for the victims of crime (Imiera, 2018). The thinking is that legal institutions should be used in an enabling manner, acting as agents that are geared towards achieving psychological wellbeing (Doak, 2011). In this scenario, law operates to “guide and channel human behaviour” (Bandes and Blumenthal, 2012, p. 172). Advocates of ‘therapeutic jurisprudence’ have contended that legal actors and processes hold the potential to operate as “change agents” by offering victims “space to tell their story” (Wexler, 2005, p. 748). In their search for meaning around what has happened, the ability to tell such a ‘story’ in the context of the legal process can offer an important opportunity to make sense of the past and provide a foundation to start again. Being provided with this chance to externalise life-altering events, such as having experienced violent crime, has been argued to be an effective mechanism for coping and reducing feelings of depression (Doak, 2011). Likewise, it has been asserted that, both for victims of serious human rights violations and for plaintiffs in tort litigation, being able to tell one’s ‘story’ can be positive and empowering, helping to restore a sense of self-worth, and conveying value to society (Sveass and Lavik, 2000; Shuman, 1994). On the other hand, feeling silenced by the law carries the potential for victims to experience ‘secondary victimisation’ from a seemingly unsympathetic process, and a sense of alienation and frustration (Roberts and Erez, 2010). There can even be harmful longer-term effects, with those who are unable to discuss trauma finding themselves more likely to suffer from health problems (Pennebaker and Beall, 1986).

In terms of relationship breakdown, the current structure and rhetoric of the divorce procedures themselves provide a framework around which to develop this kind of ‘story’ or explanation as to what went wrong with the marriage. The citing of ‘fault’ can be seen to

perform an important role in that, through the five 'routes' to 'irretrievable breakdown', people are encouraged to 'name' the problem with their marriage, and to discuss its causes. This arguably satisfies a need, amongst separating parties, to explore the demise of the marriage before they are able to let go, and to build a constructive future (Walker, 1991). Further, Day Sclater (1997) contends that having the chance to appropriately 'label' our experiences in such a way is necessary to be able to transcend those experiences. In the absence of hearings in undefended divorce cases, having these 'stories' feature within their petition additionally provides divorcing parties with an 'official' airing of the 'wrongs' that they have experienced, and may be seen as a type of public acknowledgment of their comparative moral rectitude (Wardle, 1991). This is something that is lacking from mediation, where there is no 'formal' opportunity for determining responsibility (Shuman, 1994). On having successfully petitioned for divorce having cited their ex-partner's 'fault', people may well feel vindication in much the same way as, for instance, a tort litigant might experience where responsibility is acknowledged for an injury occasioned (Shuman, 1994).

It is recognised that some petitioners will draft their own divorce petition, whilst others will have theirs drafted by a legal representative. Where it is the divorcing party writing the petition, Pennebaker (1997) has observed that disclosing past traumas in a written form both enables people to confront those traumas, and can later bring about emotional and physical health benefits. Where a solicitor drafts the petition, it is acknowledged that the Law Society's Family Law Protocol encourages that petitions alleging 'unreasonable behaviour' include only brief particulars. That said, the waters appeared to have been muddied on this as a result of the decision in *Owens*, and it is possible that solicitors will now be tempted to 'beef up' petitions to ensure their success. Moreover, even the act of verbalising traumatic experiences has been argued to be an effective intervention for many people facing life-

changing events, and therefore simply explaining to a solicitor what has happened may well be of therapeutic benefit (Doak and Taylor, 2013). The process of expressing emotions in words allows a person to “change the way [that that person] organises and feels about the trauma [such that they can] more easily construct a coherent narrative” (Smyth and Pennebaker, 1999, p. 79). Being able to account for events, in this sense, provides a route through which the ‘storyteller’ can develop an understanding of those events, and rationalise the relationship breakdown (Kellas and Manusov, 2003). The act of (re-)construction helps people to regulate, and manage, the emotions that they experience (Bandes and Blumenthal, 2012). Once a narrative has been formed, it becomes easier to summarise, store, and even transcend, what has happened (Smyth and Pennebaker, 1999). As a result, through ‘storytelling’, as part of establishing ‘fault’, a means may seem to be provided for petitioners to obtain “closure or a cognitive ending” to the relationship (Kellas and Manusov, 2003, p. 290). As well as this, it has been suggested that people are able to claim a new sense of ‘self’ through having the opportunity to reappraise the past, and break away from the shared ‘reality’ that marriage entails (Johnston and Campbell, 1988). Conversely, if they are not offered such a chance to look back at, and render intelligible, the past of their marriage, divorcing parties may find themselves unable to move on (Day Sclater and Richards, 1995).

It is emphasised here that this article is not arguing that the legal process is able to constitute comprehensive ‘therapy’ in itself, or that the divorce process should act as a substitute for psychological interventions. Rather, it contends that it can, and should, have therapeutic effects, as the law does in other areas. The possibility of expanding mediation practices in such a way as to address psychological issues (instead of, as at present, simply focusing on the future, and discouraging reflection on the past) should be looked into further. It is also imperative that affordable divorce counselling be made widely available. However, it is

asserted that the ability to cite 'fault' can act as one instance of the repeated sharing usually required to achieve emotional recovery (Day Sclater, 1997; Curci and Rime, 2012).

It might initially seem that divorce law is less suited to the expression of emotions than other areas, given the conflict that can be generated between parties needing to maintain some sort of ongoing relationship. Yet, it is arguable that the form of open and direct conflict entailed in citing 'fault' is, in fact, the most "honest", and "capable of effective management" (Wardle, 1991, p. 100). In this respect, Brown and Day Sclater (1999) have asserted that the 'formal' legal process has a role to play in "containing", and taming, some of the "raw and unprocessed" emotions and anxieties that arise in the event of relationship breakdown. The law as it stands can be seen to channel or encapsulate "unruly emotions by allowing circumscribed forms of polarisation to be worked through" in a productive way (Day Sclater, 1997, p. 432). It provides a structured setting for the expression of difference and the work of mourning, preventing the associated emotions from 'leaking' too much into separating parties' personal lives. It may even be that it is this kind of conflict that enables divorcing people to move forward autonomously (Day Sclater, 1997). Vaughan (1987) has contended, for instance, that the adoption of an oppositional stance, where the 'self' is constructed in contradiction to the 'other', is a key part of the process of 'uncoupling', enabling psychological separation from a former partner. From a slightly different perspective, Isaacs and Leon (1988) have also claimed that the anger that arises out of this opposition might serve a useful purpose in generating the energy necessary to reconstruct one's life. Where a barrier is posed to this expression of hostility, this runs counter to ordinary strategies for coping (Brown and Day Sclater, 1999). Indeed, Kelly, Gigy & Hausman (1988), while considering mediated and adversarial divorce, found that their mediation sample reported significantly higher levels of depression than their adversarial counterparts. It is for these

kinds of reasons that we may question the recent inclination to move away from conflict, and towards the removal of 'fault'. To explore the difficulties that might be presented by any such reform of the law, this paper considers what has been happening in the context of civil partnership dissolution.

Why focus on civil partnership?

The law surrounding civil partnership, in contrast to that for different sex spouses, was framed such that it is not possible to cite 'adultery' as a separate basis for dissolution. The assumption behind this seems not to have been the belief that civil partnerships were not sexual. Instead, an initial issue seems to have been the legal complexity of incorporating lesbian and gay sexual acts within the existing law. The courts have been clear historically that 'adultery' consists of "a voluntary act of sexual intercourse between the husband or wife and a third party of the opposite sex" (*Dennis v. Dennis*, [1955] 2 All ER 51, 160). Furthermore, there appears to have been a squeamishness about defining what a sexual act between two same sex partners might entail. This is evidenced by a comment by Baroness Scotland that "we do not look at the nature of the sexual relationship that enters into the civil partnership. It is totally different in nature" (HL Hansard 17 November 2004, col. 1479).

The reluctance to talk about lesbian and gay sex may well be a hangover from the repression of sexuality than can be identified within Western society since the seventeenth century (Spargo, 1999). However, two further reasons also appear to have influenced the omission of 'adultery' from the civil partnership legislation. Firstly, sexual relations between lesbians and gay men are not reproductive. Without the risk of pregnancy outside of the partnership, there may seem less of a need to encourage monogamy within lesbian and gay formalised relationships. A second reason seems to have been the cultural stereotype that gay male

partnerships entail promiscuity. This does have some data to support it: Blumstein and Schwartz (1983, p. 312), for example, found that 65% of American gay male couples had some kind of non-monogamous arrangement (see as well, for instance, Blasband and Peplau, 1985; Weeks, Heaphy and Donovan, 2001). That was in comparison to 29% of lesbian couples, and 23% of different sex married couples (Blumstein & Schwartz, 1983, p. 312). Should it be the case that it is acceptable to have a number of sexual partners, it may have been supposed that ‘adultery’ was unlikely to be cited as a reason for gay male relationships breaking down. Moreover, the feeling at the time was that gay men especially may not be willing to ‘sign up’ to monogamy. That being the case, there was concern that they would be unlikely otherwise to subject themselves to the “disciplinary, domesticating” effects of a formalised relationship (Stychin, 2006). Therefore, the legislation was framed in such a way as not to deter gay men from entering into the institution.

The 2004 Act does not dispose of ‘fault’-based grounds entirely, though, still including the possibility of citing ‘unreasonable behaviour’ (s.44(5)(a)). It is interesting that same sex partners’ infidelity should potentially be conceived of as falling within ‘unreasonable behaviour’, given Barker’s (2006) suggestion that non-monogamy may not be ‘unreasonable’ in a same sex relationship. A focus on ‘behaviour’, and an absence of ‘adultery’, has likewise been retained by the more recent Marriage (Same Sex Couples) Act 2013, which introduced same sex marriage. In fact, Part 3 of Schedule 4 to the 2013 Act amended section 1 of the 1973 Act to state that “only conduct between the respondent and a person of the opposite sex may constitute adultery for the purposes of this section”. Of course, it is less likely that this situation will have arisen in a same sex relationship than that there will have been relations with somebody of the same sex, so lesbians and gay men are again largely excluded from that provision. It is worthy of note at this point that, in the aftermath of *Keidan v. Steinfeld* [2018]

UKSC 32, the Civil Partnerships, Marriages and Deaths (Registration etc.) Act 2019 has been passed. This states that the Secretary of State must ensure that regulations are in force introducing different sex civil partnerships by 31 December 2019 (although, in the present political times, some uncertainty hangs over this). The campaigns for different sex civil partnerships have not highlighted the issue of ‘adultery’, and a question mark remains over whether it would be included as a reason for the ‘irretrievable breakdown’ of future different sex civil partnerships.

In any event, it is as a consequence of the present exclusion of ‘adultery’ that it was felt that studying civil partnership dissolution could shed some light on the possible implications of removing ‘fault’ altogether from the law. It was to this end that empirical data was gathered through the use of interviews focusing on people’s experiences of apportioning ‘blame’ in the dissolution process.

Methods

The in-depth interviews conducted for this project took place between September 2013 and June 2014, and were with 14 practitioners and 10 people who had experienced dissolution. A semi-structured interview schedule was employed, which enabled comparison between participant responses (May 2001). However, there was also the flexibility to probe beyond the respondents’ answers, and to give them the opportunity to develop their thoughts (Gilbert, 2008). My gaze was turned towards the lawyers, as well as towards the parties themselves, which enabled me to access a greater number of accounts of civil partnership dissolution. The practitioners were identified by carrying out an Internet search for the term ‘civil partnership solicitor’. On the websites of the firms that this generated, the profiles of the individual solicitors were examined to see whether it was specified that they had advised on civil

partnership cases (and, where the information available was vague, the heads of the departments were e-mailed). A total of 291 firms were contacted, 10 of which agreed to take part. It had been hoped that the solicitors would offer introductions to their clients, and that this would assist in attaining further interview participants, although this only occurred twice. As a result, an advertisement was also sent to 217 lesbian and gay organisations, mailing lists, and publications, in an attempt to recruit those that had sought legal advice on dissolution. Twitter was used as well, with tweets directed at 87 individuals and organisations that might have an interest in the topic, whilst the details of the research were posted on two online forums. Of the clients that were ultimately recruited, all reported that their civil partnership had broken down due to an element of 'fault'. In every case where the breakdown was reported to have occurred because of infidelity, the clients described their partners' affairs, rather than their own. It may be that people that have been 'cheated on' are more likely to volunteer for this kind of research, seeking another opportunity to 'tell their tale'. Even so, follow-on research from this initial pilot study would actively seek to interview people who have 'cheated'.

Once the interviews were completed and had been transcribed by the author, the transcripts were imported onto NVivo 10 to conduct thematic analysis. Codes were generated on NVivo both deductively, from the existing literature in the field, and inductively, emerging from the data themselves. The data offered a snapshot of the discourse around the issue of 'adultery' in relation to civil partnership dissolution, from the point of view of the petitioner. The article will now move on to discuss this.

Empirical findings

'Cheating' commonly cited as the cause of relationship breakdown

The reason most commonly identified as having caused civil partnership breakdown within the study was that there had been infidelity within the relationship. Descriptions of ‘cheating’ could be found in the solicitors’ accounts as to why their lesbian and gay clients’ partnerships had broken down, as well as those of the clients’ themselves. Practitioner Mr. Derrick, for example, recalled how one of the parties in a same sex case that he had worked on had met somebody through their employment and formed a new relationship with them.* He asserted that,

the reasons for [the relationship breakdown] were very usual [...] it’s perfectly standard stuff, I think, and, er, human nature, you know, people drift apart, people meet somebody new and cheat. (Mr. Derrick)

Echoing this, Mr. Norris observed that “the usual [...] human frailty” found in different sex cases, such as ‘cheating’, had been the cause of dissolution in his civil partnership matters too. It is noteworthy here that the solicitors stressed the ‘sameness’ of their clients’ relationships, both same and different sex, in terms of their reasons for relationship breakdown. This sits well with a wider emphasis on ‘sameness’ between same and different sex partners that accompanied the introduction of the civil partnership (Stychin, 2006).

Seven of the clients likewise described ‘affairs’ as having been the cause of their relationship breakdown. Their explanations included the following:

She spent this holiday with a lot of friends of ours, and [...] she met up

* All names are pseudonyms. Clients have been given first names and solicitors have been allocated surnames in order to easily differentiate between the two groups of interviewees.

with some woman, a lady from [another country], and, um, she claimed that they didn't have an affair, but, um, one day she'd left her computer on, and I found an e-mail, um, from her to her friend saying how she'd met somebody, and it was the best time of her life. [...] I said, "I think we need to talk, yeah?" [...] and everything came out. [...] They'd been sleeping together [...] and she wanted to be with her. (Debbie)

Last summer, out of the blue, she announced that she'd met somebody else a few weeks before, and that she was leaving. (Heather)

I realised [...] that he was wiping his Internet history as he went along, but one day he missed a couple of items and I found them, and I went in. And that's when I realised that he'd been playing... he'd been behaving this way with maybe a hundred or more people [...] There was a record for a Gaydar membership going back to 2004 [...] and it was still ongoing. (Bill)

I noticed that there was some little memory card [...] and curiosity got the best of me. And, I looked at the memory card and discovered that he was actually having sex with quite a lot of different men over a very long period of time, and he'd gone to the trouble of keeping all of the photographs. So, those photographs were in our home, and in our previous flat, and even in our bed, and I just threw him out. (Freddie)

He was very, very sexually active [...] We split up because, er, he sexually

just wanted to be on a, kind of... no leash at all. He wanted to go and do his own thing [...] and I just thought “this isn’t right, this is going to stop”.

(Isaac)

The clients’ accounts are interesting as, despite assumptions that having sexual partners outside of the formalised relationship may be considered tolerable, especially amongst gay men (given the high percentage of gay relationships that are non-monogamous, as above), the indication is that sometimes it is not. It is also striking that, even though it is not possible to specifically cite ‘adultery’ in the event of civil partnership dissolution, the partners still explained the breakdown of their relationships on that basis. Although the law has moved away from framing civil partnership dissolution in this way, those people who are actually experiencing dissolution may have been unable to follow suit. In fact, several of the participants raised as an issue, within the interview, their inability to ‘blame’ their partner, within the dissolution petition, on the terms that they would have wished. The paper will now turn to explore this issue, and consider why it was perceived to be so problematic.

A dissatisfaction with the lack of ‘adultery’ within the legal framework

A number of the clients interviewed had thought that they would, and should, be able to specifically cite their partner’s ‘adultery’ in their dissolution petition and found it extremely difficult that this was not possible. Previous work has suggested that it does not matter that there is no ‘adultery’ provision within the civil partnership framework, as there is the alternative option of ‘unreasonable behaviour’ (Barker & Monk, 2015). This attitude was repeated by one of the practitioners, who stated that “because ‘adultery’ is not an option in civil partnership, you can get through using ‘unreasonable behaviour’ [...], so you can get around it” (Ms Clarke). However, the opinion was not shared by solicitor Ms Lane, who

expressed her annoyance at the lack of ‘adultery’ and emphasised how it “doesn’t really make any sense”, either to her personally, or to her petitioning clients. A similar feeling of irritation was evident amongst the clients, with Jennifer exclaiming, for instance, that,

the main difference that I could see between divorce and dissolution is that you can’t have the grounds of ‘adultery’. [...] Why? I don’t get it.

(Jennifer)

Heather particularly appeared to perceive a disconnection between the law around same sex relationship breakdown, and the expectations of those people whose relationships are breaking down:

The only thing that was discussed [in the initial meeting with the solicitor] was the fact that I couldn’t apply for [the dissolution] on the grounds of ‘adultery’, which I had wanted to do [...] I found that quite frustrating, because I wanted to apply for that, [...] and obviously I couldn’t [...] To be honest, I can’t see the rationale behind it, because if you’re in a committed relationship with someone and they’re unfaithful, then it’s ‘adultery’ [...] I didn’t quite understand, but that’s the way it was.

(Heather)

Having been told that she would have to petition on the basis of ‘unreasonable behaviour’, rather than ‘adultery’, Heather voiced her surprise, reiterating the sentiment of Auchmuty’s (2016) same sex interviewees. In fact, even having been made aware that ‘adultery’ could not be cited in civil partnership dissolution petitions, she had believed, at the date of the

interview, that it could still be cited in the event of same sex divorce (which is also not the case). It should be highlighted that that interview took place in the spring of 2014, which was in the very early days of same sex marriage, and that this may now be something that people are more aware of. Nevertheless, both Heather, and the clients interviewed more broadly, appeared to support the transplanting of an ‘adultery’-like provision into the same sex legislation, perceiving only having the option to cite ‘unreasonable behaviour’ not to be ‘enough’. It might be that this attitude is to be anticipated in light of a more widespread approach towards ‘equality’ for same sex couples as amounting to ‘sameness’ of treatment to different sex relationships. In this sense, it may be that the findings show the difficulty of adopting a ‘formal equality’-based legislative framework for civil partnership that mirrors marriage, with only a few exceptions. Even so, Heather evidently felt aggravated that, in the absence of ‘adultery’, the law around civil partnership had not enabled her to appropriately ‘name’ what had happened to her. That this mattered so much supports the notion that the allegations made on relationship breakdown are far from incidental but are rather a key part of the separation process (Walker, 1991).

Bill likewise considered it unfair that he was not expressly able to refer to his partner’s ‘adultery’ within the dissolution process (as a consequence of his hurt feelings, and of a desire to shame his ‘cheating’ partner). He exclaimed at,

how unfair the law seems to be against the innocent party [...] I am astounded that blame or, you know, any sort of, um, situation doesn’t seem to be given proper account [...] It just seems all very remote. (Bill)

In the absence of ‘adultery’, the client voiced his exasperation at the law not having offered

him a suitable channel to account for what had gone wrong. Clearly, he had felt that the legal process should be the place to be able to attribute ‘blame’ on these terms. This was in the context of a relationship where his partner had been “playing around with people days before the civil partnership and, days after the honeymoon, he’s doing it again”. It is interesting that Bill used the terminology of ‘innocence’ to position himself in contrast to his ex-partner. In later depicting his ex-partner as the ‘guilty’ party, he further explained how his partner,

was going to try to be the petitioner, and I said, “that’s ridiculous” [...] and I was very surprised when [the solicitor] said “actually, no, it’s whoever’s application gets to the court first”. I was absolutely dumbfounded by that. Um, so, I then said [...] “I wouldn’t want to be in the position where I feel like I’m the guilty person, um, so [...] I’d rather be the petitioner, thank you very much.” (Bill)

The client ultimately perceived himself as having been “abused” by his ex-partner and sought a means to note the way in which he had been wronged within the dissolution process itself.

Findings

Although the discussion above is looking at a case study focusing on ‘adultery’, the indications that arise from it are of assistance, more generally, when considering the utility of ‘blame’, and the possible implications were it to be removed altogether. The interviews indicate that, although specific reference to ‘adultery’ is excluded from the dissolution framework, people are still perceiving, and describing, the breakdown of their civil partnerships on that basis. Likewise, were the law to entirely get rid of ‘fault’, preoccupation with it would be unlikely simply to disappear. Moreover, the data suggest that the ability to

cite an ex-partners' 'fault' within the legal process itself is considered important, with some petitioners, like victims within the criminal justice process, seeking "official, albeit symbolic acknowledgement" of what has happened to them. As previously explained, the use of victim impact statements can provide victims of crime with recognition, in the public domain, that they are the injured party. In the same way, some people experiencing dissolution have sought acknowledgement, as part of the 'formal' legal process, of the cause of the breakdown of their relationship. As part of this, there was a need felt by some of the clients for their virtuous behaviour, in comparison to that of their ex-partners, to be recognised within this process (as is evident in Bill's construction of the 'self', as against the 'other'). This chimes with Day Sclater and Piper's (1999) argument that separating parties will often view the legal system as being about exonerating one party and attributing 'fault' to the other. Further, this seems to confirm the importance of adopting an oppositional stance to some people in the context of formalised relationship breakdown (as suggested by Vaughan, 1987). The adversarial approach of attributing 'fault' can, when appropriately framed, help to meet this need for conflict, but is being constructed as avoidable, and even dangerous, within recent discourse around reform in this area (Day Sclater, 1999b).

The findings within the study additionally back up the idea that some petitioners seek an opportunity to explore the downfall of their relationship as part of the legal separation process (Walker, 1991). It was apparent that the client interviewees were often unable to simply ignore what had happened to them, and that they needed to make sense of their experiences through 'storytelling'. Just as it has been established that victims desire to have their 'voice' heard and welcome an opportunity to express their pain within the criminal justice system, some of the clients in this study looked to the law for a chance to explore what had occurred within their relationship. In so doing, they expected that the divorce process

would provide them with more than just a legal ‘uncoupling’: an outlet for their emotions to aid their psychological reconstruction. However, they did not ultimately feel that they were offered an adequate channel for this, given the lack of ‘adultery’. That led them to express their annoyance, in much the same way as the literature suggests will take place where victims have felt silenced by the criminal justice system. The paper contends that, given the frustration that the interviewees felt under circumstances where there was still the option to cite ‘unreasonable behaviour’, this would most likely be amplified were there to be no ‘fault’-based ‘facts’ to cite at all. That would be problematic from the perspective of ‘therapeutic jurisprudence’, given its focus on the law attempting to ensure the psychological wellbeing of those that engage with it. Similar to how victims historically experienced ‘secondary victimisation’ from the criminal justice system where they perceived it to be unsympathetic to their ‘stories’, there was already a sense that some clients felt relatively alienated from the law (Roberts and Erez, 2010). Part of the problem seemed to be due to an inability to adequately ‘label’ the cause of the relationship breakdown, and therefore for the petitioner to tell their ‘story’ on their own terms (identified as important by Day Sclater, 1997). There was a feeling amongst the clients that justice would not be attained without being able to specifically cite ‘adultery’, and that this would have offered a catharsis otherwise lacking from the separation process. Were ‘unreasonable behaviour’ also to be removed as a ‘fact’, this position would only be worsened, with the parties being offered even less of an opportunity to work through their emotions and feelings, and making it even more difficult for them to achieve psychological resolution.

Conclusion

The data generated by this pilot study indicate, in accordance with the literature, that separating parties sometimes look to the law to attain ‘official’ recognition of their

grievances, and to engage in controlled conflict with their ex-partner. Perhaps most importantly, the data also suggest that they seek, through the legal separation process, to tell their 'stories' and, in this way, to be offered an outlet for their feelings of loss and emotional injury. The research, in that respect, might seem to sit well with the fact that 71% of people, in a national opinion survey, thought that 'fault' should remain part of divorce law (Trinder et al., 2017, p. 16). It is, of course, acknowledged that it is not a given that, because people want something, the state is obliged to provide it. Nevertheless, it is notable that these sorts of findings appear to contrast with recent pushes towards a more harmonious 'no fault' divorce, under which conflict, polarisation and 'blame' are discouraged. In the context of civil partnership, 'adultery' was commonly referred to amongst the participants as having been the cause of dissolution, despite its absence from the legal framework. To add to this, a number of the clients thought that they would, and should, be able to cite their partner's 'adultery' within the petition and expressed frustration at their inability to do so. Whilst these findings relate specifically to 'adultery', it is possible to generalise, in relation to 'fault' more widely, in that this signals an expectation that the legal process should be the place to apportion 'blame'. Were 'fault' to be removed altogether from this area of the law, even greater frustration would most likely be experienced by petitioning parties.

It is recognised that there are always two sides to every relationship breakdown. Whilst this case study focuses on those who have been 'cheated on', it raises a need for future study that looks at perspectives on divorce law from the point of view of the 'adulterers' themselves. A larger project could also helpfully examine the issues discussed within this article as they have played out in those countries that have already introduced 'no fault' divorce. On the basis of the initial data discussed within this paper, though, it is argued that 'fault' should be retained within the divorce law of England and Wales. It may be that the amendments

proposed by Richard Bacon's Bill, or a system that replicates the developments within this area of the law in Scotland, would offer a preferable way forward to the most recent proposals for reform. Rather than removing the 'fault'-based 'facts', the Family Law (Scotland) Act 2006 reduced the separation periods for divorce from two years to one where there was consent, and from five to two where the respondent opposed the divorce. To introduce such a system in England and Wales would mean that the 'no fault'-based 'facts' would become more feasible to rely on (in comparison to the present, relatively lengthy, separation periods). This would not only assist those in the extremely rare position of Mrs. Owens, but also provide less of an incentive to rely on 'fault'-based 'facts'. Equally, those who sought to do so would still be able to apportion 'blame' and reap the psychological benefits of that. This is important, as to deny those who are separating the ability to express their feelings may have harmful effects in the longer term, operating against the achievement of emotional healing, and preventing them from being able to move on with their lives.

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