



Mair, J. (2019) Divorce law in Scotland: not entirely without fault: LV v IV [2018] CSOH 80; X v Y [2018] SC DUM 54; Douglas v Douglas [2019] SC PER 4. *Edinburgh Law Review*, 23(2), pp. 236-242.
(doi:[10.3366/elr.2019.0551](https://doi.org/10.3366/elr.2019.0551))

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Deposited on: 19 June 2019

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Divorce law in Scotland: not entirely without fault:

LV v IV [2018] CSOH 80; *X v Y* [2018] SC DUM 54;

Douglas v Douglas [2019] SC PER 4

A. INTRODUCTION

Divorce law is currently on the family law reform agenda in England and Wales. The combined impact of a major research report, *Finding Fault? Divorce Law and Practice in England and Wales*;¹ a very high profile and “troubling”² case, *Owens v Owens*, and the introduction of a Private Member’s Bill³ into the House of Lords has had the effect of raising divorce law reform from a longstanding, but background, concern to a pressing priority.⁴ In September 2018, the Ministry of Justice launched a consultation entitled *Reducing family conflict: Reform of the legal requirements for divorce*⁵ and, while the outcome of that consultation is as yet unknown, reform seems likely. The current high profile of divorce law in England and Wales is in contrast to the reform landscape in Scotland. The Scottish Government is certainly active in the area of family law but “divorce law is not thought to be on its agenda.”⁶ The Scottish Law Commission has included Aspects of Family Law in its *Tenth Programme of Law Reform*⁷ but, while the precise focus of the planned reform project has not yet been confirmed, divorce has not been highlighted as a priority. Why should the position be so different in the two jurisdictions when their statutory grounds for divorce share much in common?

¹ L. Trinder, D. Braybrook, C. Bryson, L. Coleman, C. Houlston and M. Sefton, *Finding Fault? Divorce Law and Practice in England and Wales*, 2017, Nuffield Foundation, <http://findingfault.org.uk/wp-content/uploads/2017/10/Finding-Fault-full-report.pdf> (hereafter *Finding Fault?*).

² *Owens v Owens* [2018] UKSC 41, para 46, per Lady Hale.

³ Divorce etc Law Review Bill (HL) 2017-19.

⁴ For a useful overview of these developments see “No fault divorce”, House of Commons Briefing Paper Number 01409, October 2018; accessible at <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN01409#fullreport>.

⁵ The consultation document is accessible at https://consult.justice.gov.uk/digital-communications/reform-of-the-legal-requirements-for-divorce/supporting_documents/reducingfamilyconflictconsultation.pdf.

⁶ Sarah Harvie-Clark, “It’s the end of the line but no one’s to blame” (SPICE, 2018); accessible at <https://spice-spotlight.scot/2018/09/12/its-the-end-of-the-line-but-no-ones-to-blame-no-fault-divorce-in-the-uk/>.

⁷ Scottish Law Commission, *Tenth Programme of Law Reform*, 2018, Scot Law Com 250, at 19; accessible at https://www.scotlawcom.gov.uk/files/5615/1922/5058/Tenth_Programme_of_Law_Reform_Scot_Law_Com_No_250.PDF.

B. A TALE OF TWO SYSTEMS: SIMILAR IN FORM BUT DIFFERENT IN PRACTICE

According to the Matrimonial Causes Act 1973,⁸ and the Divorce (Scotland) Act 1976, both systems provide for divorce in the event of irretrievable breakdown of the marriage.⁹ In both, irretrievable breakdown must be established in accordance with a fixed set of factual situations – adultery, unreasonable or intolerable behaviour,¹⁰ desertion, or non-cohabitation, the latter either with or without consent.¹¹ As a result of reform of the Scottish legislation in 2006, desertion no longer applies in Scotland¹² and the original separation periods of two years where the defender consents and five years regardless of consent, which still apply in England and Wales, have been reduced to one year and two years respectively.¹³ The framework is therefore broadly similar in both systems albeit the waiting periods, the procedure and the broader family law systems are different.

The current campaign for divorce reform in England and Wales has focused specifically on the issue of “fault” and, in that context, there are interesting comparisons between the jurisdictions. Structurally, both systems are based on the same model which, behind an apparently neutral mantra of “irretrievable breakdown”, relies on a combination of fault (ie adultery, desertion¹⁴ or behaviour) and no-fault (ie separation or non-cohabitation) methods of proof. When it comes to the role of fault in practice, however, the picture from each jurisdiction is very different. While 60% of divorces in England and Wales in 2015-16 were granted on one of the fault grounds, principally adultery or behaviour, in Scotland only 6% were so granted.¹⁵

⁸ Consolidating the earlier Divorce Reform Act 1969.

⁹ Matrimonial Causes Act 1973, section 1(1); Divorce (Scotland) Act 1976, section 1(1)(a).

¹⁰ Both are shorthand terms used to describe section 1(2)(b) of the 1973 and 1976 Acts. Baroness Hale was highly critical of the phrase “unreasonable behaviour” in *Owens* [2018] UKSC 41, para 48. Nonetheless I shall use “unreasonable behaviour” here as it is the phrase used by the judge in each of the cases being discussed and, in *X v Y* in particular, the focus is on the “unreasonable” nature of the wife’s behaviour.

¹¹ Matrimonial Causes Act 1973, section 1(2)(a)-(e); Divorce (Scotland) Act 1976, section 1(2)(a)-(e).

¹² Family Law (Scotland) Act 2006, section 12.

¹³ Family Law (Scotland) Act 2006, section 11.

¹⁴ Only in England and Wales.

¹⁵ *Civil Justice Statistics in Scotland 2015-2016*, ch 6, accessible at <https://www.gov.scot/publications/civil-justice-statistics-scotland-2015-16/pages/7/>. These are the most recent detailed statistics available as the *Civil Justice Statistics in Scotland for 2016-2017* do not include breakdown on the factual grounds; <https://www.gov.scot/publications/civil-justice-statistics-scotland-2016-17/pages/6/>. Of the 6% of fault based divorces in Scotland, 5% were based on behaviour.

While in terms of the legal rules themselves, Scotland is no more “no-fault” than England and Wales, in practice the granting of divorce is almost fault-free and it is perhaps this difference in how the law works that explains the urgent calls for divorce reform south of the border while in Scotland it is not perceived as a problem.¹⁶

C. A TRIO OF CONDUCT CASES

Against that background, three recent Scottish judgments have been published, in each of which divorce was granted on the basis of fault, in the form of unreasonable behaviour: *LV v IV*,¹⁷ *X v Y*¹⁸ and *Douglas v Douglas*.¹⁹ As individual examples they shine some light on the continuing use of fault, specifically unreasonable behaviour, and, when considered against the research findings and policy goals current in England and Wales, they provide an opportunity to question assumptions about the settled and uncontroversial nature of divorce law in Scotland.

The judgment of Lord Brailsford in *LV v IV* is perhaps of more obvious interest for what it says about financial provision on divorce and in particular about the valuation and division of foreign pensions and employee share schemes.²⁰ The action for divorce itself attracts little attention, with the wife pursuer’s claim of unreasonable behaviour by her husband being uncontested and established by affidavit. It is not the detail of the defender’s behaviour, however, but the very fact of its use in order to establish irretrievable breakdown that is noteworthy. The couple separated in November 2014, with the proof almost three years later and yet, despite sufficient passage of time to satisfy either of the no-fault grounds, the wife still relied on her husband’s conduct in order to secure the divorce.

In contrast to *LV v IV*, where little is recorded of the defender’s behaviour, in *X v Y* the disputed facts are presented and examined in somewhat disturbing detail. The evidence disclosed a relationship in which the wife had been unhappy for some time. She was apparently making plans to leave, of which she had spoken to various third parties, and taken some preliminary steps to implement, but in the end it was her husband who sought divorce based on her unreasonable behaviour. The behaviour in question was the making by her of an allegation of rape against him. The husband

¹⁶ For further comparative analysis, see Trinder et al, *Finding Fault?*, ch 11.

¹⁷ [2018] CSOH 80.

¹⁸ [2018] SC DUM 54.

¹⁹ [2019] SC PER 4.

²⁰ See, eg Case Comment by J Speir at (2019) 157 *Fam LB* 7-8.

claimed that the allegation was false and that, by making such a false allegation, she had acted unreasonably. On the basis of the evidence of the parties, the evidence of various witnesses concerning the behaviour and demeanour of the parties around the date of the alleged rape and the fact that, although the pursuer was interviewed by the police in respect of his wife's allegation, no arrest was made and no criminal proceedings were commenced, Sheriff Mohan concluded that the wife had indeed made a false allegation. Unsurprisingly perhaps, in light of that clear conclusion, he had no difficulty in finding the husband's claim of unreasonable behaviour established.

While *X v Y* was all about the facts and the credibility of the various conflicting accounts thereof, in *Douglas v Douglas* the focus was on the law and procedure of divorce. The couple separated in October 2014 and the husband applied for divorce in July 2015. The crave for divorce, in the initial writ, was on grounds of irretrievable breakdown "as evidenced by the defender's unreasonable behaviour". The defender lodged notice of intention to defend and raised an action for aliment. There followed a period of claim and counter-claim – the lengthy pathway towards divorce perhaps reflecting what the sheriff had described as the couple's "volatile" relationship.²¹ There was a key moment in June 2017 when, in answers to a minute of amendment by the defender, and reflecting the fact that two years of non-cohabitation had by that time elapsed, the pursuer deleted his original averments of unreasonable behaviour and substituted averments to the effect that the irretrievable breakdown was evidenced by non-cohabitation.

At proof in December 2017, Sheriff Collins raised the issue of whether it was competent for the court to grant decree of divorce on the basis of these averments. In doing so, he referred to his similar earlier observations in *McNulty v McNulty*.²² The "basic issue" was, according to Sheriff Collins, one of "statutory interpretation".²³ Section 1(2)(d) and (e) of the 1976 Act require a certain period of non-cohabitation "immediately preceding the bringing of the action" and the question was whether "the action" was the lodging of the initial writ in July 2015, at which point sufficient period of non-cohabitation had not elapsed, or the amendment in June 2017, by which

²¹ [2019] SC PER 4, para 13.

²² 2016 Fam LR 145.

²³ [2019] SC PER 4, para 18.

point it had. Lord Murray in an earlier case, *Duncan v Duncan*,²⁴ thought it was the latter but Sheriff Collins in *McNulty* commented, *obiter*, that while he could “see the pragmatic good sense” of this approach, respectfully queried whether it was “strictly correct as a matter of law.”²⁵ In *McNulty*, the parties’ agents accepted that it would not be competent, thus avoiding the need for decision, and at the outset of the proof in *Douglas*, the sheriff again asked counsel to reflect on the same point. Once again it was accepted and the defender’s unreasonable conduct was reinstated as the basis for establishing irretrievable breakdown. This was despite the fact that, in the intervening period between *McNulty* and *Douglas*, another sheriff in *Ray v Ray* had taken the view that the date of the “action” for the purposes of establishing a sufficient period of non-cohabitation was the date of the minute of amendment.²⁶ With the reinstatement of the original averment of unreasonable behaviour, the divorce proceeded as fault-based and was granted accordingly.

D. THE PROBLEMS WITH FAULT

On the face of it, there is relatively little of concern about fault in the context of *LV v IV* because the wife’s action proceeded unchallenged. We can only speculate as to why she chose to rely on her husband’s behaviour rather than the simple fact of non-cohabitation. Perhaps there was a sense of vindication; perhaps the decision to proceed on the basis of the defender’s behaviour was a rare example of agreement between the parties in an otherwise highly contested environment; perhaps she had been advised to do so? What can be reflected upon is the very fact that Scots law offers a choice. The proposed reform of divorce law in England and Wales not only seeks to reduce the use of fault-based grounds for divorce but to reform the law in a way which would remove altogether “the ability to allege ‘fault’”.²⁷ In a national opinion survey, conducted as part of the *Finding Fault* project, 71% of respondents were in favour of the retention of fault²⁸ but deeper analysis disclosed a range of underlying and conflicting views and perhaps “a misunderstanding that fault is required to allocate blame (rather than providing evidence of breakdown)”.²⁹ At

²⁴ 1982 SLT 17.

²⁵ 2016 Fam LR 145, para 32.

²⁶ *Ray v Ray* [2017] SC BAN 60, para 11, per Sheriff Mann.

²⁷ MoJ, *Reducing family conflict: Reform of the legal requirements for divorce*, 6.

²⁸ *Finding Fault?*, 137.

²⁹ *Finding Fault?*, 169.

present it seems unlikely that we will have a comparable opportunity in Scotland to consider in such detail public and party views of fault in divorce but the general conclusion from the English research and the emerging Westminster policy on the harm which may result from any place for fault in the divorce process should lead us to pause and reflect.

There is perhaps much more pressing cause for concern in *X v Y*. It is in many ways a disturbing narrative, with undertones of coercive control and parental alienation, and it is tempting to reinterpret the facts to tell a different story. In such a fact-reliant judgment, however, where so much depends on the sheriff's hearing of all of the evidence and his assessment of credibility, such an exercise would be inappropriate. What can be observed from second-hand reading of the written judgment is the extent to which the behaviour complained of became central to the whole decision. In addition to the order for divorce, the pursuer also sought contact with his two daughters who had, and it was agreed should continue to have, their principal residence with their mother, the defender. Sheriff Mohan's opening words stress the veracity or otherwise of the wife's allegation as the central issue: "All of the contested orders which the court was asked to make turned on whether this allegation was proved".³⁰ The close link between the "fault" in the mother's allegation of rape and the child contact decision was evident throughout and particularly explicit in the following comments:

None of the defender's witnesses said anything positive about the pursuer in relation to his parenting skills or relationship with the girls. It may be, of course, that these witnesses were appalled at the allegation which was central to this dispute, namely that of rape, and that this coloured any recollection they had of the pursuer.³¹

As Trinder *et al* comment in *Finding Fault* "Family lawyers have ... long raised concerns about the disjunction between a blame-based divorce law and attempts to limit the impact of parental conflict on children."³²

Douglas v Douglas is the most recent in a small but worrying series of published judgments to ponder, *obiter*, the correct interpretation of section 1 of the Divorce (Scotland) Act 1976. Two areas of doubt, and disagreement, arise. The first is

³⁰ [2018] SC DUM 54, para 1.

³¹ [2018] SC DUM 54, para 127.

³² *Finding Fault?*, 106.

what precisely is meant by “the action” in section 1(2)(d) and (e) and the second is the thorny question of whether there is in fact one ground for divorce in Scotland, that is irretrievable breakdown, or four separate grounds, that is adultery, behaviour or the two forms of non-cohabitation. As Sheriff Collins made ominously clear, these are not purely matters of academic debate:

Parties could have simply continued with the proof ... and in due course sought to persuade me that the concerns which I raised in *McNulty* were ill founded and that Sheriff Mann's understanding of the law in *Ray* was to be preferred. The difficulty with that of course was that if I could not be so persuaded then I would be liable to refuse to grant decree of divorce”.³³

The uncertainty which emerges from *Douglas* and the preceding line of decisions suggests that the Scots law of divorce may not be working quite as smoothly in practice as the statistics suggest. One of the key findings from *Finding Fault* in respect of the law in England and Wales was as follows: “Conflict will occur on separation whether the divorce law includes fault or not. However, the current divorce law appears to introduce an entirely unnecessary additional source of conflict.”³⁴ The fact that the doubt highlighted by Sheriff Collins was resolved in an already “acrimonious and protracted divorce”³⁵ by the parties reverting to the use of behaviour to establish irretrievable breakdown is surely a matter of concern.

E. CONCLUSIONS

Three judgments are not statistically significant; their publication in close succession does nothing to disturb the general and overwhelming Scottish trend away from fault, and no one of them is likely to catch the public or political imagination in any way comparable to *Owens*. Nonetheless, each raises concerns about the continuing role of fault in divorce law in Scotland and should caution us against any hasty conclusions to the effect that, while English law is in need of reform, our system is working largely without fault.

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³³ [2019] SC PER 4, para 16.

³⁴ *Finding Fault?*, 15.

³⁵ [2019] SC PER 4, para 16.