

# Owens v Owens [2018] and the issue of a no-fault divorce



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*'Owens v Owens [2018] UKSC 41 is an anomalous case because, in the vast majority of cases, divorces are readily and easily available. The decision provides little support for the introduction of no-fault divorce'.*

## 1. Introduction

A system comprised only of no-fault facts is a concept that has had long-term support. Contrary to the assertion that *Owens V Owens* [1] provides little support for the introduction of no-fault divorce, the decision provides a stellar illustration of the weaknesses in the Matrimonial Causes Act 1973 (MCA). [2] *Owens* is an anomalous case as the majority of divorces are granted, yet this does not mean divorce law operates effectively or that *Owens* does not support the introduction of no-fault divorce. This essay will briefly describe the current legislation and the facts of *Owens*, before considering whether *Owens* is anomalous and examining the cases impact on the calls for no fault-divorce reform.

## 2. Divorce Legislation

Under s. 1(1) MCA a court is only able to grant a divorce if it is shown that the marriage has irretrievably broken down. In order to 'prove' irretrievable breakdown, the petition must be based on the facts listed in s. 1(2). England and Wales currently adopts a mixed system of fault and no-fault facts. The facts based on adultery s. 1(2)(a), behaviour s. 1(2)(b), and desertion s. 1(2)(c) require the establishment. It is only possible for parties to obtain a divorce in the first two years after separation based on adultery or behaviour. Criticism of the current legal framework largely focuses on the

concept of matrimonial fault and its negative impact on couples, families and the divorce proceedings.

### 3. Owens V Owens

Following the failure of The Family Law Act 1996 there have continued to be calls for reform by the senior judiciary and legal profession; these arguments were given a significant boost by *Owens*. [3] *Owens* highlights the inadequacies of the fault-based behaviour fact and demonstrates the need for change.

#### 1. The Facts

*Owens* concerned the interpretation of s 1(2)(b) MCA. The wife petitioned for divorce claiming that the marriage had irretrievably broken down due to the husband's unreasonable behaviour. Consistent with the general approach among the family law profession and the Law Society's Family Law Protocol, the wife's petition contained mild specifics of the husband's behaviour. [4] Mr Owens contested the application. Following a directions hearing, Mrs Owens amended her petition, considerably expanding on her anodyne examples, providing 27 allegations. At first instance the judge held that the wife's allegations were at 'best flimsy', 'significantly exaggerated' and 'minor altercations of a kind to be expected in a marriage'; the application was refused. [5] The Court of Appeal acknowledged that the law did not reflect reality but nonetheless applied the law correctly and dismissed the appeal. [6] The Supreme Court with great reluctance dismissed the appeal. Lord Wilson confirmed that the subsection was being correctly interpreted;

referring to the subsection as a three-stage factual, subjective and objective inquiry.[7]

### 1. Is Owens an anomalous case?

There are roughly 100, 000 divorces of opposite sex couples per year.

[8]Owens, like 60% of all divorces is based on fault, which is extremely high in international terms.[9]The reason for the high use of fault is not an abnormally high level of marital misconduct, but instead because the law encourages allegations of fault as they allow couples to obtain a 'quickie divorce'. The majority of cases ostensibly based on fault should in fact be viewed as divorces by consent as they are undefended. Divorces by consent are a common reality and adoption of the method ensures divorce is readily available. About 2% of respondents state that they intend to defend, but fewer than 1% of divorces each year are formally defended.[10]Successfully defended cases are rarer still. *Owens* is an anomalous case as it may be the only recent instance of a respondent to a defended divorce successfully opposing the grant of decree; only around 17 out of 114, 000 petitions proceeded to a contested final hearing for a defended divorce.[11] *Owens* is therefore anomalous in two respects, firstly it is a defended case and secondly it was successfully defended.

### 2. The impact of Owens on no-fault divorce

*Owens* supports the introduction of 'no-fault' divorce as it illuminates the problems faced by majority of those divorcing, whether the petitions are undefended or defended, who rely on the fault facts. Calls for the introduction of 'no fault' divorce must be understood as a call for a complete

' no-fault' system. The reasons underlying the removal of fault are numerous, compounded and widely supported.[12] Fault is a concept rooted in historical and patriarchal expectations of marriage; arguably there is no place in modern divorce law for fault.

Allegations of fault often increases conflict between couples as it inevitably promotes the appearance that one party is to blame for the marriage breakdown, causing significant stress and upset.[13] Behaviour petitions are particularly problematic as they involve producing a catalogue of conduct, to which the accused must admit before the divorce can proceed. Forcing parties to make accusations frustrates the law's admirable objective of rescuing saveable marriages and ending hopeless ones with the minimum amount of distress and humiliation.[14] In *Owens*, the parties' willingness to reach the Supreme Court demonstrates that the differences were clearly irreconcilable, yet the Judges' hands were tied by the law. The financially and emotionally draining appeals focussed on the unreasonable behaviour of Mr Owens would have only increased hostility. Additionally, *Owens* may even lead to more divorces being defended. More likely, due to the prohibitive costs perhaps respondents may refuse to accept stronger allegations and seek to delay the progress of a divorce by giving notion of intention to defend. These potential consequences will undoubtedly cause hostility. Resolution has been continuously campaigning for no-fault divorce, and in their recent survey 67% of members said that the current law makes it harder for separated parents to reach agreement and 90% that it makes it harder to reduce conflict and confrontation.[15]

Allegations may also not represent the true reasons for marital breakdown. Trinder perceptively asserts that divorce petitions are best understood as a narrative produced to secure divorce.[16]The allegation of fault is often simply a formality to abide by; there is a gap between the black letter law and the actual practice.[17]This falsity creates a gap between the law and reality.[18]If a couple fails to persuade the court, the divorce may be refused even where marriage has clearly broken down.[19]In *Owens*, the Supreme Court raised questions about whether the trial judge had heard enough evidence to determine the cumulative effect of the wife's allegations and Lady Hale sought to soften the general approach to what has become known as 'unreasonable behaviour' petitions.[20]Nonetheless, the Supreme Court could only interpret the law and Mrs Owens failure now means she is trapped in a marriage that is clearly over until 2020.[21]

Divorces may readily available under s. 1(2)(b) in undefended cases where parties 'divorce by consent' or in defended cases where they are willing to exaggerate claims at the expense of hostility, but the issue in *Owens* was that this was not 'divorce by consent' and the behaviour allegations did not persuade the trial judge.[22]Practitioners face an increasingly difficult balancing exercise between keeping the particulars as non-confrontational as possible for the benefit of the family while importing sufficient gravity to the allegations as to satisfy the requirements under s 1(2)(b). This confusion does nothing for legal certainty making the law is neither clear, understandable nor predictable. The introduction of no-fault divorce arguably would ensure a minimum amount of distress and humiliation, removes the need for artificial blame games, and would increase certainty.[23]

### 3. Conclusion

*Owens* emphasises the discrepancy between defended and undefended divorces, not only in terms of procedure but also in terms of legal principles highlighting the need for reform. *Owens* is anomalous as divorce is readily and easily available under s. 1(2)(b), but only in undefended cases where parties 'divorce by consent' or in defended cases where they are willing to exaggerate claims at the expense of increased hostility. This reality contradicts the modern, transparent, problem-solving family justice system, which has a prevailing aim at decreasing hostility and encouraging couples to work together productively.[24] Arguably, as we have divorce by consent in practice, the law should remove the artificial fault element from the process, especially if fault causes further conflict.[25]

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[2] Matrimonial Causes Act 1973 (MCA)

[3] The Family Law Act 1996

[4] Family Law Protocol, (4th edition 2015) Law Society Publishing.

[5] *Owens V Owens* [2016]



[6]Owens V Owens [2017] EWCA Civ 182

[7]Ibid n(1), 28

[8]Office of National Statistics 2015

[9]L. Trinder, ' *Finding Fault - Divorce Law and Practice in England and Wales*' (Summary Report), 2017

[10]L. Trinder, ' *No Contest: Defended Divorce in England & Wales Trinder*' (Summary Report), 2018

[11]Ibid n(1), 15

[12]Sir James Munby, President of the Family Division; L. Trinder; A. Bainham.

[13]Resolutions: Manifesto for Family Law 2015; Government Mediation Task Force

[14]A. Bainham, ' *Men and Women Behaving Badly: Is Fault Dead in English Family Law ?*' (2001) 21 Oxford Journal of Legal Studies 219.

[15][http://www.resolution.org.uk/editorial.asp?page\\_id=1320](http://www.resolution.org.uk/editorial.asp?page_id=1320)(11/12/2018, 8pm)

[16]Ibid n(8)

[17]R. Deech, ' *Divorce: A Disaster ?*' [2009] 39 Fam Law 1048

[18]Ibid n (13)

[19]Ibid n (1)

[20]Ibid n (1), 50

[21]Ibid n (1), 46

[22]Ibid n (9)

[23]Ibid n (8)

[24]Ibid n (8)

[25]No Fault Divorce Bill 2015-16