MARITAL MISCONDUCT IN THE ASSESSMENT OF MAINTENANCE IN MANITOBA

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Although there are differences in Canadian and English divorce law, there are enough similarities so that the statement of Lord Denning [re "gross and obvious conduct" in *Wachtel* v. *Wachtel* would be applicable to the Canadian context in Ontario and Manitoba.

> Hon. Gerald W.J. Mercier, Attorney-General,
> debating s. 2(2) of Bill 39,
> *The Family Maintenance Act* in the
> Manitoba Legislature, May 29, 1978, at 2779.

[T]he English case law related to this wording shows that the interpretation given to the English cases varies tremendously from one judge to another. There is little or no consistency in the approaches which they have used . . . . We do not agree with the published suggestion that the English cases indicate that only extreme or bizarre behaviour fall within this definition as they are interpreted . . . . But the salient fact is that our judges are not bound by those decisions and I very much doubt that they are going to follow those English cases.

> Myrna Bowman, lawyer, speaking
> to the same s. 2(2) before the
> Legislature Committee on Statutory
> Rules and Regulations, July 17, 1978.

On July 20, 1978, Bill 39, *The Family Maintenance Act*[1] received royal assent, and became law in Manitoba in October of the same year. The essence of the new *Act* is to allow a spouse to apply for a court order containing provisions for the separation of the parties, custody of the children, and/or maintenance. In sharp conrast to the *Wives' and Children's Maintenance Act*[2] which was repealed by the new *Act, The Family Maintenance Act* no longer requires proof of grounds for a separation order, and does not bar maintenance due to the adultery or desertion of the spouse requesting the maintenance.

However, the question of conduct is not entirely ignored by the Legislature in the new statute. Section 2(2) of the *Act* reads as follows:

> 2(2) The obligation under subsection (1) exists without regard to the conduct of either spouse and in determining whether to make an order under this Act for support and maintenance of a spouse a court shall not consider the conduct of the spouses in respect of the marriage relationship but may, in determining the amount of the support and maintenance, have regard to *a course of conduct that is so unconscionable as to constitute an obvious and gross repudiation of the marriage relationship.* (emphasis added)

The question has inevitably arisen as to a possible definition or guide the courts will use to determine the conduct described in the emphasized words above. According to the Manitoba Government, the problem will likely be resolved by reference to post-1973 English jurisprudence, which invented the phrase "gross and obvious conduct" and, allegedly, gave it

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1. S.M. 1978, c. 25 (F20). *See generally* J. Cooper, "The New Concept of Spousal Relations in The Family Maintenance Act" (1979), 4 Man. L.J. 435.

2. R.S.M. 1970, c. W170.

judicial form. But, as the second opening quotation indicates, English law may be of limited assistance, leaving the interpretation open to several possibilities. Some lay critics fear that the provision will require the courts to delve obtrusively into the intimate relationship of the parties, ultimately considering conduct amounting to fault (*i.e.*, which spouse caused the breakdown of the marriage).

The object of this paper is to examine which forms of conduct might fall within the criteria of Section 2(2). Given the absence of Canadian case law on this issue, the examination will require qualified acceptance of the Government's premise, that English law will provide a resolution. To this end, the English cases will be discussed, with particular regard to acknowledged matrimonial offences, followed by a discussion of their application to Section 2(2).

English Law: "Gross and Obvious Conduct"

The Rule in Wachtel *v.* Wachtel

For many years in England, wives requesting maintenance at the termination of a marriage were denied relief if they were found to be guilty of a particular matrimonial offence, such as adultery or desertion.[3] This notion was developed in the Ecclesiastical Courts and was supported by later jurisprudence interpreting the conduct provisions of the *Matrimonial Causes Act 1857*.[4] Although some authority ran opposite to this interpretation,[5] the notion persisted in the courts until the enactment of the *Divorce Reform Act 1969*[6] and the *Matrimonial Proceedings and Property Act 1970*,[7] consolidated into the *Matrimonial Causes Act 1973*.[8]

Although the new legislation gave rise to the phrase "gross and obvious conduct," the actual wording does not appear in the statutes.[9] Rather, it is the judicial invention of Ormrod, J. and Lord Denning, M.R. in the trial and appeal decisions respectively, in *Wachtel* v. *Wachtel*.[10] The case involved a wife's application for maintenance after a *decree nisi* of divorce. Although adultery was alleged by each party, Ormrod, J. rejected the evidence of adultery and granted the decree on the irretrievable breakdown of the marriage, finding each party's behaviour to have contributed to the breakdown. The husband then contested the wife's application, claiming that her contributing conduct should cause a reduction in the amount of maintenance he would otherwise be required to pay.

Omrod, J. rejected the husband's argument, stating that the new legislation had finally put to rest the Ecclesiastical Courts' attitude towards

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3. *See* S. Cretney, *Principles of Family Law* (2nd ed. 1976) 202-03.
4. 1857, 20 & 21 Vict., c. 85 (U.K.).
5. *E.g.*, *Trestrain* v. *Trestrain*, [1950] P. 198; [1950] 1 All E.R. 618 (C.A.); *Porter* v. *Porter*, [1969] 1 W.L.R. 1155; [1969] 3 All E.R. 640 (C.A.).
6. 1969, c. 55 (U.K.).
7. 1970, c. 45 (U.K.).
8. 1973, c. 18 (U.K.).
9. *See* text, n. 13-16.
10. [1973] Fam. 72, [1973] 2 W.I.R. 84, [1973] 1 All E.R. 113 (Fam. Div.); var'd. in [1973] Fam. 81, [1973] 2 W.L.R. 366, [1973] 1 All E.R. 829 (C.A.).

conduct. He noted that the 1969 and 1970 *Acts*[11] brought about a shift in emphasis in the assessment of maintenance, by having regard to the old fault concept essentially only as evidence of irretrievable breakdown.[12]

Furthermore, on a construction of Section 5(1) of the new *Act*, Ormrod, J. found Parliament had isolated the concept of conduct. The previous legislation,[13] had included conduct among the other enumerated criteria to be considered in the assessment of maintenance. Section 5(1) read differently:

> 5(1) It shall be the duty of the court in deciding whether to exercise its powers under section 23(1)(a), (b) or (c) or 24 above in relation to a party to the marriage and, if so, in what manner, to have regard to all the circumstances of the case including the following matters, that is to say . . . [enumerated criteria (a) through (g) listing such matters as income earning capacity, financial need, ages of the parties, duration of the marriage, etc.] . . . and so to exercise those powers as to place the parties, so far as it is practicable and, *having regard to their conduct,* just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other.[14] (emphasis added)

The isolation of the word "conduct" from the rest of the criteria convinced the learned trial judge that it required different treatment: "As section 5 stands, conduct is to be taken into account as a factor which may modify the result which is arrived at after consideration of all the other factors specified in the section."[15]

These factors, together with the finding that it would not have been difficult for Parliament to insert a provision regarding contributory conduct, led Ormrod, J. to conclude that conduct would not affect the result unless it were both "gross and obvious."

In the Court of Appeal, the husband's appeal was allowed in part, on other grounds. Lord Denning, M.R. affirmed the trial decision with respect to conduct. He noted that in most marital breakdowns, both parties will carry some measure of blame and that Parliament was only concerned with conduct of an extraordinary nature.

> There will be many cases in which a wife (though once considered guilty or blameworthy) will have cared for the home and looked after the family for very many years. Is she to be deprived of the benefit otherwise to be accorded to her by section 5(1)(f) because she may share responsibility for the breakdown with her husband? There will no doubt be a residue of cases where the conduct of one of the parties is in the judge's words . . . 'both obvious and gross,' so much so that to order one party to support another whose conduct falls into this category is repugnant to anyone's sense of justice. In such a case the court remains free to decline to afford financial support or to reduce the support which it would otherwise have ordered.[16]

11. *Divorce Reform Act 1969,* 1969, c. 55 (U.K.); *Matrimonial Proceedings and Property Act 1970,* c. 45 (U.K.)
12. *Wachtel* v. *Wachtel,* [1973] Fam., at 77; [1973] 2 W.L.R., at 87; [1973] 1 All E.R., at 117.
13. *Matrimonial Causes Act,* 1965, c. 72 (U.K.) s. 16(1).
14. *Matrimonial Proceedings and Property Act 1970,* 1970, c. 45 (U.K.).
15. *Supra* n. 10, at 80; [1973] 2 W.L.R., at 90; [1973] 1 All E.R., at 119.
16. *Id.,* at 90; [1973] 2 W.L.R., at 372; [1973] 1 All E.R., at 835-36.

Examples of Conduct Considered by the Courts

Adultery

Thus the phrase obtained judicial substance, but it remained to be seen what type of specific conduct would be considered to be gross and obvious. Perhaps the most prominent question was whether adultery would be included. Before 1969-70, adultery was almost always considered, even by the more liberal judges; although it depended on the circumstances of the adultery as to whether there would be an effect on the amount of the award. In *Iverson* v. *Iverson,*[17] Latey, J. found that if the adultery had broken up the marriage and was continuing beyond the break-up, it could act to disqualify the guilty spouse from a maintenance award. In *Trippas* v. *Trippas,*[18] decided one week after *Wachtel,* counsel for the husband urged the Court of Appeal to follow *Iverson.* Both parties, upon separation, had commenced adulterous relationships which had carried on for some years thereafter. Lord Denning, M.R. made short work of the husband's contention, stating that the *Iverson* decision could not survive *Wachtel,* and that, in the present case, no one party was guilty of gross and obvious misconduct.[19]

The same result was reached in two subsequent cases dealing with adultery. In *Harnett* v. *Harnett,*[20] the husband was domineering and occasionally violent towards his wife. Before long she began an adulterous relationship, which persisted for a year before the husband actually discovered the wife "in the act," and ejected her from the matrimonial home. After the decree, the husband resisted the wife's application for maintenance on the grounds of her conduct. Bagnall, J. refused to consider the conduct, interpreting *Wachtel* accordingly:

> In this phrase I think that 'gross' describes the conduct; 'obvious' describes the clarity or certainty with which it is seen to be gross. But the conduct of both parties must be considered. If the conduct of one is substantially as bad as that of the other, then it matters not how gross that conduct is; they will weigh equally in the balance. In my view to satisfy the test the conduct must be obvious and gross in the sense that the party concerned must be plainly seen to have wilfully persisted in conduct, or a course of conduct, calculated to destroy the marriage in circumstances in which the other party is substantially blameless.[21]

The trial judge found the wife's conduct, with or without comparison to the husband's, to be neither gross nor obvious.

In the second case, *W.* v. *W.*[22] the facts were somewhat similar, except the husband's violent attacks were considerably more excessive. Sir George Baker, P. refused to consider the conduct of the wife, advancing the following test:

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17. [1967] P. 134; [1966] 1 All E.R. 258.

18. [1973] Fam. 134; [1973] 2 W.L.R. 585; [1973] 2 All E.R. 1 (C.A.).

19. *Id.,* at 139; [1973] 2 W.L.R., at 589; [1973] 2 All E.R., at 3-4.

20. [1973] Fam. 156, [1973] 3 W.L.R. 1, [1973] 2 All E.R. 593 (Fam. Div.); aff'd. [1974] 1 W.L.R. 219, [1974] 1 All E.R. 764 (C.A.).

21. *Id.,* at 165; [1973] 3 W.L.R., at 9; [1973] 2 All E.R., at 601.

22. [1976] Fam. 107; [1975] 3 W.L.R. 752; [1975] 3 All E.R. 970 (Fam. Div.).

> [I]n some cases it is necessary for the court to inquire into the facts in order to discover whether the conduct is of the kind described . . . as 'gross and obvious' or of the kind that would cause the ordinary mortal to throw up his hands and say, 'Surely, that woman is not going to be given any money,' or 'is not going to get a full award.'[23]

Although these cases did not consider the conduct of adultery, they are far from saying that adultery can never amount to gross and obvious conduct. In fact, three cases assessing maintenance have considered the adultery of one of the parties to be gross and obvious. It is arguable whether these decisions are reintroducing some measure of the pre-1970 conduct considerations, or are confined to their special circumstances. In *Cuzner (Underdown)* v. *Underdown,*[24] the wife, unbeknown to the husband, was carrying on an adulterous relationship of some duration. The husband, meanwhile, acted on the advice of his solicitor and had his new home conveyed to both him and his wife as joint tenants, while he alone put up the funds. The wife agreed to the transaction, but, after the conveyance, she left the matrimonial home to live with the co-respondent. Soon after, she applied for an order declaring her one-half interest in the home. Davies, L.J. was astonished by the application, finding it both impudent and unjust. He was of the opinion that the wife's acceptance of the joint tenancy, while she was conducting an affair with the co-respondent, was indeed gross and obvious. The severity of this decision is well open to criticism,[25] particularly in view of the fact that the wife was found to have made a significant contribution to the raising of the children and the care of the household.

In *Dixon* v. *Dixon,*[26] the Court of Appeal found the conduct of the husband — an adulterous relationship with his daughter-in-law in the matrimonial home — to be both gross and obvious. Lord Salmon, L.J. suggested that "such conduct could properly be stigmatized as shocking to any ordinary man and woman."[27] Consequently, when the wife applied for maintenance, the husband's conduct resulted in greater maintenance than would have otherwise been ordered.

In *Issom* v. *Issom,*[28] an unreported Australian case, Fogarty, J. chose to follow *Wachtel* when assessing maintenance for a wife who had left the country to continue a liaison with a foreign military officer. She returned to Australia pregnant by the officer and wishing to eventually resume her new association, despite proposals of reconciliation from her husband. Fogarty, J. denied maintenance altogether, despite the almost complete absence of independent support, finding her conduct to have conformed to the *Wachtel* test, or any other test of conduct which would reduce maintenance.

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23. *Id.*, at 110; [1975] 3 W.L.R., at 754; [1975] 3 All E.R., at 972.
24. [1974] 1 W.L.R. 641; [1974] 2 all E.R. 351 (C.A.) (hereinafter referred to as *Cuzner*).
25. *See* M. Parry, "'Having Regard to Their Conduct' — Financial Provision on Divorce" (1975), 125 New L.J. 960.
26. Unreported decision digested in (1974), 5 Family L. 58 (C.A.) (hereinafter referred to as *Dixon*).
27. *Id.*, at 59.
28. Unreported Australian decision, April 12, 1976, referred to in *In The Marriage of Soblusky*, n. 32, at 720 (hereinafter referred to as *Issom*).

Perhaps it can argued that two of these cases can be distinguished on their particular facts. For example, *Cuzner,* notwithstanding the criticism, can be distinguished by noting that the wife's misconduct was in accepting the joint tenancy knowing full well that the marriage would soon end. As for *Issom,* it can be said that the misconduct was not in the wife's adultery, but rather in the fact that, while pregnant by one man, she sought support from another who was not the father and whose affection she had rebuffed.

Dixon, however, is not as easily distinguished, if at all. If it is right, its consistency with Lord Denning's reference to *Iverson* (in *Trippas*) can perhaps be rationalized by restricting the reference to adulterous conduct of less extraordinary character than had occurred in *Dixon. Dixon* would also be consistent with the comparative test in *Harnett,* since the wife was found to have been absolutely blameless when compared to the husband's conduct.

Acts of violence and cruelty

There are currently only three reported cases dealing with whether physical violence or cruelty by one spouse against another will constitute "gross and obvious conduct." In two cases, where the conduct resulted in criminal prosecution, maintenance was affected. In the third case, the abuse was somewhat more restrained and was not considered. It would be trite to say that the degree of abuse would be a persuasive factor, but it is unclear whether the criminality of the act provides the appropriate test. A further, and more important, question involves whether any distinction can be made between gross and obvious conduct on one hand, and the offence of matrimonial cruelty on the other.

In *Armstrong* v. *Armstrong,*[29] the wife, after her husband had locked her out of the house at night, greeted him in the morning with a blast from a shotgun. The husband was only slightly wounded but the wife was charged, pleaded guilty, and was placed on probation. In the wife's application for maintenance, the trial Judge found the conduct to have fallen within the *Wachtel* test, a view which was accepted by the Court of Appeal. However, it should be noted that both courts felt free to apply the test in its broadest sense. They did not make a finding of gross and obvious conduct, preferring to rest their finding on the latter words of Lord Denning in *Wachtel,* which referred to conduct which would make an order of support "repugnant to anyone's sense of justice."[30] With respect, it is submitted that this is in error since the *Wachtel* test involves, at least, a two step process: (1) determining whether the conduct is both gross and obvious; and (2) if so, whether it is repugnant to one's sense of justice that this conduct should not be considered. Nonetheless, the result may not have been affected by this process, either, for it is also submitted that their Lordships imputed a moral connotation to the word "gross" which, as we shall see, is incorrect.[31]

29. Unreported decision digested in (1974), 118 Sol. J. 579 (C.A.).

30. [1973] Fam. 72, at 90; [1973] 2 W.L.R. 366, at 372; [1973] 1 All E.R. 827, at 835-36 (C.A.).

31. *See West* v. *West,* n. 37.

In *Jones* v. *Jones,*[32] the parties were divorced on the grounds of irretrievable breakdown and maintenance had been accordingly ordered. Some time later, the husband attacked the wife with a knife causing several wounds, one of which severed a tendon in her right hand. The husband was then imprisoned for three years and the wife sought a transfer of the matrimonial home (a declaration that is also governed by Section 5 criteria). The Court of Appeal found the conduct to have considerable impact on the decision. The fact that the conduct had occurred after the marriage had dissolved was irrelevant. It must, however, be noted that while the court did find the conduct to fit within the *Wachtel* test, Orr, L.J. was particularly concerned with the fact that the tendon injury left the wife unable to continue her previous occupation and gave rise to greater need.

Although the Court did not care to be bound by the *Wachtel* test in the Australian case of *In the Marriage of Soblusky,*[33] it nevertheless applied the test in *obiter dictum.* In that case, the wife was intensely domineering throughout the marriage, nagging the husband, and preventing the husband from doing much of anything without her permission. In particular, she occasionally threw objects at the husband and threatened him with a knife. Once, she viciously slashed his clothing with a knife. In its academic application of *Wachtel* the Court found the conduct to be neither gross nor obvious. Rather, it said the facts pointed to a strong case of constructive desertion, which was to be distinguished from the *Wachtel* test.

These three cases do not really give the courts a clear line that distinguishes physical and mental abuse that is gross and obvious, from that which is not. Nonetheless, it seems clear that the analogy to traditional matrimonial cruelty is somewhat limited, if *Soblusky* accurately reflects the law. By Canadian standards, the conduct of Mrs. Soblusky would, if it subjectively affected her husband, amount to the matrimonial offence of cruelty under Section 3(d) of our *Divorce Act.*[34] If *Soblusky* is right, "gross and obvious" implies a greater degree of severity of abuse than that which might barely qualify as matrimonial cruelty.

Desertion

Referring once again to *Soblusky,* it would seem that desertion is not necessarily within the *Wachtel* test since the wife's constructive desertion did not affect her entitlement to the amount. Nonetheless, a recent case suggests that desertion may have at least a marginal effect. In *Backhouse* v. *Backhouse,*[35] the wife deserted her husband and child to live with another man. Later, as a result of a guilty conscience, the wife agreed with the husband's request to transfer her share of the interest in the home to the husband. She had financially contributed to its purchase. Later, after the divorce and remarriage of both parties, the wife sought a transfer of the home. In regard to conduct, Balcombe, J. dwelt on the wife's desertion, virtually ignoring the adultery. He lamented the fact that the words "gross and obvious" came to have the effect of statutory words, and it is unclear

32. [1976] Fam. 8; [1975] 2 W.L.R. 606; [1975] 2 All E.R. 12 (C.A.).

33. (1976), 12 A.L.R. 699 (Fam. Ct.) (hereinafter referred to as *Soblusky*).

34. R.S.C. 1970, c. D-8.

35. [1978] 1 all E.R. 1158 (Fam. Div.).

whether he applied the words to the wife's conduct. Instead, Balcombe, J. preferred to rest his decision on whether its effect would be "repugnant to anyone's sense of justice." He concluded that this would be so if the wife succeeded in obtaining the transfer, or if the husband did not compensate the wife for her contributions.[36] Consequently, he met the parties halfway, ordering the husband to pay an amount which would reflect the equity of the wife in the home at the time of her desertion, but which would not severely affect the husband's credit.

On a reading of the case, it is arguable whether the learned Judge had properly included the desertion as gross and obvious conduct. The fact that he considered the conduct at all would indicate that he did. However, the award reflected a consideration of the conduct only to the extent that she was not allowed to benefit from the appreciation of the property, subsequent to her desertion. Couple this with the fact that her financial situation was not desperate, one would find that, if the conduct was within the *Wachtel* test, its impact was negligible.

Other forms of conduct

Aside from the more obvious forms of marital misconduct, the English courts have been required to assess various other forms in the context of the rule in *Wachtel*. In *M.* v. *M.*,[37] the wife was extremely possessive with the children of the marriage and, after cohabitation had ended, denied the husband access to the children. During the later years of the marriage, the wife refused to engage in sexual intercourse with the husband and humiliated him publicly, on occasion. The Court of Appeal agreed with the trial Judge, without explanation, that the conduct was not gross and obvious.

Two subsequent cases, both from the Court of Appeal, give us a somewhat better footing to consider this miscellaneous type of misconduct. In *Martin* v. *Martin*,[38] the Court found that the husband, during the separation, had frittered away most of the assets that had previously been held jointly. The Court of Appeal, through Cairns, L.J. felt that this conduct was not gross and obvious but had to be taken into account, nevertheless.

With respect, it is submitted that *Martin* attains the correct result with the wrong reasoning. In the later case of *West* v. *West*,[39] a differently constituted Court of Appeal was requested to assess the conduct of a wife who had, for no sufficient reason, refused to consummate the marriage. She had consented to the purchase of their house, but lived there with her husband on only few occasions, each lasting no more than several days. The Court agreed with the trial Judge that the conduct was gross and obvious. In his reasoning, Sir John Pennycuick presented the court's interpretation of the pertinent words:

> I find it difficult to think of any conduct more gross than totally to fail to set up any married life at all where it is no fault of anyone else, but for reasons which the judge held to be predominantly her own fault . . . . I suspect that the word

36. *Id.*, at 1167.

37. Unreported decision digested in (1976), 6 Family L. 243 (C.A.).

38. [1976] Fam. 335; [1976] 3 W.L.R. 580; [1976] 3 All E.R. 625 (C.A.) (hereinafter referred to as *Martin*).

39. [1977] 2 W.L.R. 933; [1977] 2 All E.R. 705 (C.A.) (hereinafter referred to as *West*).

> 'gross' has given rise to some misunderstanding in this connection, and that the word 'gross' has been given an imputation of moral blame. In fact, I do not think the word 'gross' really carries any sort of moral judgment. It means I think no more than 'of the greatest importance.'[40]

In the concurring judgment of Stamp, L.J., reference was made to the trial decision in *Wachtel,* to illustrate the notion that the words do not carry definite moral connotations. He quoted Ormrod, L.J. as follows:

> Conduct subsequent to the separation by either spouse may affect the discretion of the court in many ways, e.g. the appearance of signs of financial recklessness in the husband or of some form of socially unacceptable behaviour by the wife which would suggest to a reasonable person that in justice some modification to the order ought to be made. In my experience, however, conduct in these cases usually proves to be a marginal issue which exerts little effect on the ultimate result unless it is both obvious and gross.[41]

Therefore, it is submitted that the court in *Martin* could have, and should have found the conduct of the husband to have been gross and obvious, a finding which would be consistent with the trial judgment in *Wachtel.* It is important to note that Ormrod, L.J. sat on the Court of Appeal panel in *West,* and concurred in the decision.

Application of English Case Law in Manitoba

Ontario and Prince Edward Island have also ventured into this field of family law reform, and enacted provisions similar to Section 2(2) of our *Family Maintenance Act.*[42] In commenting on the English authorities on this matter, an Ontario critic set forth an appropriate thought: "One wonders whether the legislators of the two provinces are fully cognisant of the evasive standards which they seek to adopt as their own."[43] Indeed, there is an interesting and somewhat confusing array of conduct which may or may not be gross and obvious. Adultery will not qualify unless the other party is essentially blameless or the conduct is particularly stigmatizing; desertion has been distinguished from gross and obvious conduct, but in another case it is a marginal factor; cruelty, such as physical violence, has been considered but only in extreme cases.

However, the most significant question relates to whether these cases should be adopted at all by the respective provinces. One could argue that the cases are only minimally persuasive: (1) the English provision and Section 2(2) are quite distinct and, furthermore (2) Section 2(2) significantly differs from the wording used by both Ormrod, L.J. and Lord Denning in *Wachtel.*

With respect to the first point, one must note that the English statutory provision regarding conduct differs only slightly from Section 11(1) of our *Divorce Act.* One could argue that *Wachtel* and the subsequent cases simply give possible interpretations of that particular provision, and can be extended no further. In rebuttal, it can be submitted that, since the Canadian

40. *Id.*, at 939; [1977] 2 All E.R., at 711.

41. *Id.*, at 942; [1977] 2 All E.R., at 714. The quoted portion appears in the trial decision in *Wachtel, Supra* n. 10, at 80; [1973] 2 W.L.R., at 90; [1973] 1 All E.R., at 119.

42. S.M. 1978, c. 25.

43. V. Kondo, "No Fault Maintenance for Spouses" (1978), 1 Can. J. of Fam. L. 57, at 77.

courts have given such a broad interpretation to Section 11(1),[44] that the Legislature, which wished to restrict the effect of conduct, was forced to look elsewhere for the wording. By using the phrase "gross and obvious," the Legislature arguably was considering the English cases since the wording is found in no other jurisprudence relating to matrimonial conduct.

The second argument is more forceful. The Legislature did not, in fact, employ the full effect of the words in *Wachtel.* It has placed the words "gross and obvious" in a somewhat different context so as to involve three other features. First of all, the statute denotes a "course of conduct," signifying activity of some duration. This may mean that 'one shot' activities such as one act of adultery or one act of violence (*e.g.*, as in *Jones*[45]) cannot be included in the court's consideration of quantum of maintenance.

Secondly, the conduct must be "so unconscionable" that it becomes gross and obvious. *Black's Law Dictionary* defines "unconscionable conduct" as "conduct that is monstrously harsh and shocking to the conscience."[46] On a construction of the statute, it is submitted that the words "obvious and gross" in the statute describe something more than that which is merely unconscionable conduct, implying a greater degree of unconscionability. Therefore, it is arguable whether the Legislature has given a new meaning to the phrase "obvious and gross," or whether the English cases, in which gross and obvious conduct was found, reflect that degree of unconscionability. It is submitted that cases such as *West* and *Cuzner* would not.

Thirdly, it must be noted that it is not the conduct which is to be seen as gross and obvious, but rather it is the "repudiation of the marriage relationship" which is to be so described. The word "repudiation" involves the refusal to accept or continue to accept the benefits to which one is entitled. Were it not for the construction of the rest of Section 2(2), repudiation could apply to any act which was intended to bring matrimonial consortium to an end, such as desertion, a divorce petition, or an attempt to obtain a nullity decree.[47] However, with the qualifying words in Section 2(2), the meaning of "repudiation" becomes muddied.

Consequently, on the basis of the second argument, it is submitted that the words of Section 2(2) contemplate a more severe and harsh form of conduct than has been found in the English cases since *Wachtel.* In the alternative, if this submission is not accepted, one can at least argue that the conduct in Section 2(2) will not be mere fault. The method of statutory interpretation used by Ormrod, L.J. is equally applicable to the new statute. Aside from the grammatical separation of the conduct provision from the other criteria, it can be said that the Legislature has excluded fault from the issue of judicial separation in the *Act,* and, therefore, it could not have contemplated a return to the old fault notion when assessing maintenance, without specific wording to that effect.

44. *See Power on Divorce* (3rd ed., 1976) 181-85.

45. *Supra* n. 31.

46. *Black's Law Dictionary* (4th ed. 1968) 1694.

47. *See* I. Baxter, "Family Law Reform — Ontario" (1977), 55 Can. B. Rev. 187, at 193.

Although the persuasive effect of the English cases can be doubted, they raise certain interesting questions. The first one involves whether the misconduct of the paying spouse will, if it meets the test, cause an increase in the quantum of the support or maintenance. The *Dixon* and *Jones* cases suggest that this is so. The Court in those cases did not even hesitate to dwell on this matter. Of course, it can be argued that, in *Jones,* the court was not considering the husband's conduct as much as they were considering the wife's increased financial need which resulted from the conduct. *Dixon,* if it is correct, is more difficult to distinguish. The wife's need was made no greater than it otherwise would have been because of her husband's conduct.

With respect of the *Family Maintenance Act,* Section 2(2) makes no distinction between conduct of the paying, and of the recipient spouse. Therefore, the *Dixon* case can be argued. However, this can be met with an argument which points to the overall intention of the *Act, i.e.,* to ensure that spouses are supported with adequate provision, having regard to need, means, standard of living, etc. Bearing this in mind, it could be said that an increased assessment against the paying spouse is merely punishment which will, in fact, raise the recipient spouse's maintenance beyond the limits of his/her financial need. Similary, decreasing maintenance below the limits of financial need punishes the recipient spouse. It must be recognized that a consideration of conduct in the assessment will always have a punitive effect, regardless of which spouse is affected.

Another question, raised by the English cases, relates to whether post-separation conduct will be considered. It can be argued that it would not, because one cannot obviously and grossly repudiate a marriage relationship which has been already been repudiated by separation. However, it is more likely that the courts will have regard to the judgment of Matas, J.A. in *N. v. N.*[44] In that case, it was held that, in a divorce action, Parliament could not have contemplated that a spouse who treated the other with physical or mental cruelty after separation would expect immunity insofar as grounds for divorce were concerned. It is submitted that this notion would also hold for Section 2(2).

Conclusion

With all due respect to the opinion of the Manitoba Government, that the rule in *Wachtel* and the subsequent case law will resolve the difficulties of interpreting Section 2(2), it is submitted that the persuasive force of the English cases will be minimal. The words surrounding the phrase "obvious and gross" have qualified its meaning to the extent that the test of Section 2(2) conduct is substantially different from the *Wachtel* test. However, it is also the submission of this paper that the Section 2(2) test is stricter than the *Wachtel* test. Although an example of the type of misconduct falling within Section 2(2) cannot yet be ascertained, it seems fair to say that the inclusion of words such as "course of conduct" and "unconscionable" indicates that maintenance would be varied only if the misconduct were quite extreme.

48. (1976), Unreported (Man. C.A.).