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Psychosomatics and Judicial Separations

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PSYCHOSOMATICS AND JUDICIAL SEPARATIONS

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Psychosomatic experiments now being conducted at the Cornell University Medical College and the New York Hospital may have as profound an effect on the "cruel and inhuman" phase of judicial separations in New York as blood-grouping tests have had on paternity proceedings and the issue of adultery in divorce actions. Upon proof that the blood-grouping tests were competently and accurately made, their definite exclusion of paternity must today be accepted by the trial court as conclusive proof of nonpaternity, irrespective of the overwhelming non-scientific testimony to the contrary.[1] They may be ordered to determine the questioned legitimacy of a child born during wedlock[2] and, if they show definite exclusion, will overcome one of the oldest, strongest and most persuasive presumptions know to the law.[3] The Cornell experiments are producing equally irrefutable scientific proof of facts pertinent to actions for judicial separations[4] and now determined by haphazard conjecture and emotional reaction of the courts, as were paternity and legitimacy before recognition of the value of the blood-grouping tests.[5]

The New York statute provides that a judicial separation shall be granted to the spouse who has been exposed to "cruel and inhuman treatment" which renders continued cohabitation "unsafe and improper."[6] The basic question in such actions is whether the physical or mental health of the plaintiff is being seriously affected by the acts of cruelty alleged. Neither spouse need

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1. Commissioner of Welfare v. Costonie, 277 App. Div. 90, 97 N.Y.S.2d 804 (1st Dep't 1950); Cuneo v. Cuneo, 198 Misc. 240, 96 N.Y.S.2d 899 (Sup. Ct. 1950); Jordan v. Mace, 69 A.2d 670 (Me. 1949); Commonwealth v. Zamarelli, 17 Pa. D. & C. 229 (1931). Stronger lay evidence of paternity than that presented to the trial court in Commissioner of Welfare v. Costonie is difficult to conceive. The defendant signed a written acknowledgment of paternity, admitted sex relations with the child's mother during a period of 16 years, paid in full for her confinement, brought mother and child home from the maternity hospital and supplied both with rent and food even during the trial. Schatkin, *Judicial Acceptance of Blood Tests,* 124 N.Y.L.J. 12, col. 1 (July 5, 1950).

2. Kwartler v. Kwartler, 291 N.Y. 689, 52 N.E.2d 588 (1943); Matter of Lentz, 247 App. Div. 31, 34, 283 N.Y. Supp. 749, 751 (2d Dep't 1935); D'Agostino v. D'Agostino, 173 Misc. 312, 17 N.Y.S.2d 105 (Sup. Ct. 1940); Matter of Swahn, 158 Misc. 17, 285 N.Y. Supp. 234 (Surr. Ct. 1936); Anthony v. Anthony, 9 N.J. Super. 411 (1950).

3. Beach v. Beach, 114 F.2d 479 (D.C. Cir. 1940); Saks v. Saks, 189 Misc. 667, 71 N.Y.S.2d 797 (Dom. Rel. Ct. 1947); Schulze v. Schulze, 35 N.Y.S.2d 218 (Sup. Ct. 1942).

4. Proposed uniform marriage and divorce legislation includes "cruel and inhuman treatment" as a ground for absolute divorce. It is presently a ground for judicial separation or for divorce in 42 states. LEGAL STATUS OF WOMEN IN THE U.S.A. 63 (1942).

5. Sympathy for the complainant and prejudice against the respondent frequently result in a jury finding of paternity in the face of blood-grouping tests definitely establishing impossibility of paternity, where such tests are not given conclusive effect by the courts. Berry v. Chaplin, 74 Cal. App. 2d 652, 169 P.2d 453 (1946).

6. N.Y. CIV. PRAC. ACT § 1161.

sacrifice his or her body or mind to the marriage or expose himself or herself to continued infliction of serious physical or mental pain. In the absence of reliable scientific apparatus for determining the effect upon body or mind of the acts complained of, our courts have adopted certain rules of thumb. Actual physical blows against the plaintiff's body or threats by the defendant of such bodily harm accompanied by menacing gestures satisfy the statute. Thus a judicial separation has been granted against a husband who came home grossly intoxicated, threatened his wife with a loaded revolver, seized her person and threatened to put her head into a stove, pinching and bruising her in the struggle;[7] against a wife who ratified the actions of her daughter in striking the plaintiff on four different occasions, once with an earthen crock, causing physical injuries for which he needed some medical attention;[8] against a wife who assaulted her husband with knives on at least two occasions and bit him, drawing blood;[9] against a husband who kicked, beat and struck his wife during her pregnancy and on other occasions.[10] But a war of words between the spouses, no matter how acrimonious or prolonged, does not entitle either to a judicial separation. Verbal bickerings and quarrels are deemed to be proof only of "incompatibility of temper"; they are not grounds for a decree of separation in New York[11] since "their natural purpose and effect is neither to injure health nor to endanger reason."[12] They fall within the rule de minimis non curat lex and are dismissed by the courts as a mere incident of married life. They are held incapable as a matter of law of seriously affecting health or permanently impairing it.[13] But if the verbal barrage is accompanied by an affirmative act, wantonly or intentionally done, which causes physical or mental suffering—bodily harm demonstrable to the court—a judicial separation will be granted for "cruel and inhuman" treatment. Thus a separation was granted to a wife who claimed that her health was impaired by her husband's excessive and unreasonable sexual indulgences;[14] to a physician-husband who was publicly accused by his nagging wife of unchastity

7. Oltmann v. Oltmann, 236 App. Div. 817, 259 N.Y. Supp. 984 (2d Dep't 1932).

8. Bergman v. Bergman, 138 Misc. 335, 245 N.Y. Supp. 439 (Sup. Ct. 1930).

9. Weiner v. Weiner, 289 N.Y. 812, 47 N.E.2d 53 (1943), *affirming*, 264 App. Div. 538, 35 N.Y.S.2d 864 (1st Dep't 1942).

10. Waltermire v. Waltermire, 268 App. Div. 810, 48 N.Y.S.2d 499 (3d Dep't 1944).

11. Berg v. Berg, 289 N.Y. 513, 46 N.E.2d 910 (1943); Smith v. Smith, 273 N.Y. 380, 383, 7 N.E.2d 272, 274 (1937); Gabriel v. Gabriel, 274 App. Div. 141, 142, 79 N.Y.S.2d 823, 824 (1st Dep't 1948); Morris v. Morris, 260 App. Div. 6, 20 N.Y.S.2d 782 (1st Dep't 1940); Greene v. Greene, 244 App. Div. 219, 278 N.Y. Supp. 954 (1st Dep't 1935); Strnad v. Strnad, 238 App. Div. 572, 266 N.Y. Supp. 159 (1st Dep't 1933).

12. Pearson v. Pearson, 230 N.Y. 141, 148, 129 N.E. 349, 351 (1920). A wife who leaves her husband because of the bickerings will have a judicial separation decreed against her on her husband's complaint for unjustifiable abandonment. Berg v. Berg, *supra* note 11. And vice versa. Avdoyan v. Avdoyan, 265 App. Div. 763, 40 N.Y.S.2d 665 (1st Dep't 1943).

13. Avdoyan v. Avdoyan, *supra* note 12.

14. Harnish v. Harnish, 270 App. Div. 799, 60 N.Y.S.2d 153 (4th Dep't 1946).

with his women patients;[15] to a wife who was once forcibly thrown on the floor injuring her arms and back, after 30 years of married life marked by 20 years of bickerings;[16] to a wife whose mother-in-law had full charge of the marital household and treated her with contempt and ridicule.[17] Acts which are not reputed to cause physical or mental suffering fall within the de minimis classification, although the plaintiff may present medical testimony of resulting nervous tension. Thus a separation was denied to a wife whose husband did not speak to her for lengthy periods and smoked in her presence although she was suffering from asthma to his knowledge;[18] to a wife whose husband accused her in cables and letters of selfishness, disloyalty and disregard for her marital duties;[19] to a husband whose wife attempted suicide in his presence and by her displays of temper caused him to make a similar attempt.[20] Even acts which concededly fall within the "cruel and inhuman" category will not support a decree of judicial separation if the injured spouse was able to endure his physical and mental suffering sufficiently to remain under the marital roof.[21]

Physical or mental harm, either actual or imminent, from continued cohabitation must be shown by the spouse seeking the decree of separation. In the absence of proof of an actual or threatened physical blow, the plaintiff must be able to point to some affirmative act of such a character as to persuade the court that his health is thereby being seriously affected and probably will be permanently impaired.[22] Although the point in controversy is the actual or imminent physical and mental condition of the plaintiff, physical examinations are never requested in such litigations. And yet the inherent power of the court to order "such a medical examination as may be necessary to ascertain the facts requisite to a correct decision of the cause" in matrimonial actions, is well-established.[23] "The interest which the public, as well as the parties, have

15. Pearson v. Pearson, 230 N.Y. 141, 129 N.E. 349 (1920).

16. Jury v. Jury, 242 App. Div. 476, 275 N.Y. Supp. 586 (4th Dep't 1934).

17. Ammermuller v. Ammermuller, 249 App. Div. 609, 292 N.Y. Supp. 177 (1st Dep't 1936), *affirming*, 157 Misc. 75, 282 N.Y. Supp. 891 (Sup. Ct. 1935).

18. Reider v. Reider, 228 App. Div. 334, 239 N. Y. Supp. 508 (1st Dep't 1930).

19. Treherne-Thomas v. Treherne-Thomas, 178 Misc. 634, 35 N.Y.S.2d 619 (Sup. Ct. 1942).

20. Avdoyan v. Avdoyan, 265 App. Div. 763, 40 N.Y.S.2d 665 (1st Dep't 1943).

21. Berman v. Berman, 277 App. Div. 560, 101 N.Y.S.2d 206 (1st Dep't 1950).

22. Avdoyan v. Avdoyan, 265 App. Div. 763, 766, 40 N.Y.S.2d 665, 668 (1st Dep't 1943).

23. Trovato v. Trovato, 262 App. Div. 276, 277, 28 N.Y.S.2d 55, 56 (1st Dep't 1941). See also White v. White, 255 App. Div. 718, 6 N.Y.S.2d 512 (2d Dep't 1938); Lamour v. Lamour, 251 App. Div. 725, 295 N.Y. Supp. 513 (2d Dep't 1937); Galligano v. Galligano, 245 App. Div. 743, 280 N.Y. Supp. 419 (2d Dep't 1935); DeNisco v. DeNisco, 125 N.Y.L.J. 483, col. 3 (Sup. Ct. Feb. 7, 1951) (physical examination of husband ordered on application to hold him in contempt for nonpayment of alimony); Yelin v. Yelin, 142 Misc. 533, 535, 255 N.Y. Supp. 708, 710 (Sup. Ct. 1929); Cowen v. Cowen, 125 Misc. 755, 211 N.Y. Supp. 840 (Sup. Ct. 1925); LeBarron v. LeBarron, 35 Vt. 365 (1862). In the federal courts, physical examinations may be ordered in all actions in which the physical or mental condition of a party is in controversy. FED. R. CIV. P. 35 (a).

in the question of upholding or dissolving the marriage state" compels the court to order a physical examination of its own motion when the matrimonial litigation before it depends on facts not otherwise ascertainable,[24] *i.e.*, the physical condition of the parties, as to which "nature has provided no other means" of proof.[25] Such facts the Cornell experiments disclose. In personal injury actions it has long been recognized that serious bodily ailments are those which affect the internal organs of the body, that severe pain is that which results from an internal injury. The body blow which is accepted as conclusive proof of physical injury in separation actions would receive short shrift in personal injury litigations unless accompanied by proof of resulting internal damage. The acts of humiliation and ridicule which are sometimes accepted as sufficient ground for a decree of separation endanger health only to the extent that they affect the internal nervous system and vital organs. A defendant charged with monetary liability for inflicting similar injuries is automatically granted a physical examination of the plaintiff and is not required to accept the latter's recital of his symptoms—known to be exaggerated, especially when litigation is in hand, and of doubtful, if any, value in the proof of internal injuries.[26]

It would thus seem self-evident that we need to look within the body, to examine the internal organs of the allegedly cruelly-treated plaintiff, before we can know whether there has been a physical or mental injury serious enough to warrant disruption of the marital status by judicial decree.[27] Without an internal examination, the court can know no more concerning the state of the plaintiff's health than it does about a party's impotency, tuberculosis or venereal disease, on which it has repeatedly refused to make any finding in the absence of a physician's examination because it deems itself "impotent" to act on matters which a layman can know only by hearsay.[28] Such internal examinations will disclose that we are as mistaken in accepting non-scientific testimony to prove cruel and inhuman treatment as we were in accepting such testimony to prove paternity and legitimacy. The scientific facts disclosed by the

24. McQuigan v. Delaware, L. & W. R.R., 129 N. Y. 50, 54, 29 N. E. 235, 236 (1891), quoting from Union Pac. Ry. v. Botsford, 241 U. S. 250, 252 (1891); Gore v. Gore, 103 App. Div. 168, 169, 93 N.Y. Supp. 396, 397 (3d Dep't 1905); Anonymous v. Anonymous, 69 Misc. 489, 491, 126 N.Y. Supp. 149, 150 (Sup. Ct. 1910). The ordered examination may include insertion of instruments into the body and whatever tests are necessary to determine the state of the litigant's health. Hayt v. Brewster, Gordon & Co., 199 App. Div. 68, 72, 191 N.Y. Supp. 176, 179 (4th Dep't 1921).

25. Briggs v. Morgan, 3 Phill. Eccl. 325, 330, 161 Eng. Rev. 1339, 1341 (1820), quoted in Anonymous v. Anonymous, 69 Misc. 489, 491, 126 N.Y. Supp. 149, 150 (Sup. Ct. 1910).

26. BRAHDY AND KAHN, TRAUMA AND DISEASE 21 (2d ed. 1941).

27. The only evidence acceptable to the old Court of Chancery in annulment actions for impotency was that disclosed by a physical examination of the defendant conducted by surgeons appointed by the court. Cahn v. Cahn, 21 Misc. 506, 48 N.Y. Supp. 173 (Sup. Ct. 1897); Newell v. Newell, 9 Paige 25 (N.Y. 1841); Devanbagh v. Devanbagh, 5 Paige 554 (N.Y. 1836).

28. Cahn v. Cahn, *supra* note 27, in which physical examinations of both spouses were ordered.

Cornell experiments require us to reexamine the conclusive effect given to physical blows and the cavalierness with which we treat the war of words; and possibly to alter our premise that it is the successful plaintiff who is the actual or potential sufferer and the one whose health needs judicial protection.

Emotional stresses and disturbances are perceived by one or more of the body's internal organs, glands, circulatory system and airways. These structures become either overactive or underactive. With proper apparatus their abnormal functioning can be detected and even photographed. Just as the external limbs of the body mobilize to ward off physical assaults, so do the internal viscera battle against emotional assaults. The only external evidence of the internal fight against emotional assaults may be occasional physical blows or torrents of ill-tempered words, as the body "lets off steam" and temporarily relieves the affected organs of the tensions to which they have been reacting by abnormal behavior.[29] These external manifestations will be directed against the persons closest at hand. Being unreasoned and quasi-reflex, they are not directed solely to the persons or situations which produced the emotional stress. In fact, the individual whose viscera are suffering from the emotional assaults upon him may be unaware that he is being thus assaulted.[30] Usually he is grossly mistaken as to the source of the stresses of which he is aware.

Consequently, the parties to a separation action for cruel and inhuman conduct are seldom in agreement on the causes of the marital dispute. Each honestly believes the other is to blame and protests that the acts complained of occurred involuntarily and only in retaliation to the other's misbehavior.

As far as the health of the spouses is concerned, the Cornell experiments require the conclusion that the defendant who delivered the physical blow for which a judicial separation is sought is often the one most seriously ill. Long before the blow has been struck, the defendant's stomach, intestines, heart, blood vessels or airways may have become diseased in a desperate attempt to counteract an emotional stress engendered by events having no relation to his marital status or marital partner. Dissatisfaction with his occupation, resentment against his immediate superior may have caused hyperfunctioning of one or more of his internal organs. It may be his stomach that incessantly churns and secretes destructive acids intended only for digestion of food, until its membrane lining becomes fragile, tears and develops peptic ulcers.[31] Or it may be his intestines that become overactive until their membrane lining develops lesions and bleeding ulcers.[32] Or it may be his heart and blood vessels

29. LIFE STRESS AND BODILY DISEASE 1066 (1950), published by the Association for Research in Nervous and Mental Diseases. This volume contains detailed reports prepared by 132 experts in the field, amply supporting the conclusions herein stated.

30. The problem of the physician in these cases is to discover the type of situations to which the individual under examination reacts by over or under functioning of his internal organs and to induce him to alter the importance and significance he currently gives to the problems falling within that type or category. *Id.* at 1079. When the irritant is neither the personality of his spouse nor the marital status, it seems clear that a judicial separation is wholly unnecessary as well as irrelevant.

31. *Id.* at 647-76, 1064.

32. *Id.* at 679-97, 1065.

that react to his feelings of dissatisfaction and resentment by continuously functioning as during periods of physical exercise, until his heart becomes structurally diseased, his blood pressure reaches abnormal heights, his kidneys fail to perform their function and his breathing becomes labored.[33] Or it may be his skeletal muscles that contract and remain contracted, producing severe headaches, backaches, sustained muscle cramps.[34] Or it may be his nasal cavities and air passages that become engorged to the point of obstruction, resulting in hay fever, asthma and sinus abnormalities.[35] Inability to cope with his workaday problems, feelings of helplessness against overwhelming odds may have caused hypofunctioning of one or more of his internal organs with equally disastrous internal effect. Nausea, vomiting, belching are some of the results when the stomach is the reacting organ.[36] Constipation and inability to eliminate waste matter from the body is the result when the intestines take over his feelings of futility, dejection and useless striving.[37] The external physical blow against his spouse will momentarily relieve these diseased internal organs from the tensions which have caused them to behave abnormally and become diseased.[38] But that blow is irrelevant to a determination of the striker's disposition, attitude toward his spouse and probability of future blows.

The outstanding characteristic of many individuals whose bodies react to their feelings of resentment and hatred in the form of hyperactivity of their internal organs is an outward calm, serenity and sweetmanneredness while their inners bear the brunt of the hostility they feel.[39] Their overall marital behavior is frequently exemplary.[40] Their occasional body blow against others is akin to the wild striking by a drowning man of his rescuer. When the victim has been safely brought ashore, he may aim a few more blows at those around him until his water-logged body returns to its normal state. The defendant in a separation action may act similarly until his diseased internal organs again function normally. A judicial separation is the curative agent only in those rare instances in which the spouse or the marital status was the emotional stress which caused the internal disease. Where dissatisfaction with employment or with self[41] is the causative stress, the decree of separation will not only fail to cure the diseased organs but may aggravate the disorder. On the other hand, the spouse against whom the blow was delivered may be internally healthy

33. *Id.* at 799-817, 870-80, 1068-71.

34. *Id.* at 609-14, 750-52, 1066-7.

35. *Id.* at 545-601, 1075, 1082.

36. *Id.* at 1065-6.

37. *Id.* at 724-31, 1067-8.

38. Intestinal lesions disappeared when the individual under physical examination gave vent to his feelings of resentment and hostility. *Id.* at 683-4.

39. *Id.* at 1065, 1087.

40. Smith v. Smith, 273 N.Y. 380, 384, 7 N.E.2d 272, 274 (1937); Jury v. Jury, 242 App. Div. 476, 477, 275 N.Y. Supp. 586, 587 (4th Dep't 1934).

41. "Lack of a reference point," absence of "focus" and ultimate goal for the activities of the individual is the basic cause of his psychosomatic ills, in the opinion of Harold G. Wolff, the leading scientific experimenter and authority in the field of psychosomatics in the United States, under whose direction the Cornell experiments were conducted. LIFE STRESS AND BODILY DISEASE 1088 (1950).

and, with medical guidance, able to cure[42] the diseased defendant; or may even be the generator of the stresses which caused the disease and thus indirectly of the physical blow complained of, and therefore the one actually at fault.

To a court charged primarily with upholding the marital status, evidence of the external behavior of the defendant's limbs should be unacceptable as basis for a decree of separation. It should demand and receive, through physical examinations, scientific evidence of the etiology of the external blow, of the internal behavior of the defendant's vital organs and of their diseased condition if they behave abnormally and were the unwitting cause of the blow; and scientific confirmation that the physical blow for which the plaintiff seeks the separation—if an isolated occurrence as it frequently is—has done more than superficial damage to his body. Without such scientific evidence, it will separate the spouses because the defendant's employer mistreats him or his war service destroyed his prior sense of values and left him without a goal.[43] Without such scientific evidence it does not know—as it must—that the plaintiff's health or mind is being endangered and that the defendant is assault prone.

Medically there is little generative difference between the physical blow of the spouse whose stomach is being ulcerated by continued exposure to emotional stress and his verbal bickerings. Medically such bickerings may cause serious internal injury to the spouse against whom they are directed and may prove fatal if prolonged. Only an internal examination can determine whether in fact the bickerings are more "cruel and inhuman" to the addressee than the visible physical blow. Stomach ulcers, intestinal bleeding, asthma, migraine headaches, heart damage may be the result of the war of words which the court presently treats as too trivial to merit serious consideration. The Cornell experiments have shown beyond possible doubt that "insulting and angry words," irrespective of the intent of the speaker, may permanently injure health and may result in death by causing internal organs of the addressee to destroy themselves in a vain attempt to fight against the hostile words.

The same public policy which makes the State a party to all marriages and vitally concerned in their non-disruption requires the court to avail itself of the scientific approach to the judicial separation for cruel and inhuman treatment. If the marital disturbances are allegedly endangering health, it should determine by expert testimony based on physical examinations whose health is being adversely affected and grant judgment accordingly. Whether the marital disturbance manifests itself in physical blows or in a war of words should not be the determinant of the grant or denial of a decree. The question would seem to be whether there is an ascertainable cause for the behavior of the spouses which can be eliminated without danger to their health or quasi-termination of their marriage.

42. Cure does not require a removal of the cause but the substitution of new credits—"self respect, satisfaction from activities, belief in himself, his potential and in those about him." *Id.* at 1090.

43. The trial court must determine "the basis of the differences" between the spouses and "the question of fault for the matrimonial rift. . . ." Jagger v. Jagger, 274 App. Div. 785, 786, 79 N.Y.S.2d 718, 719 (1st Dep't 1948).