CONDUCT, FAULT AND FAMILY LAW by Norman A. Katter, Law Book Company, 1987. $24.

His Honour, Mr. Justice Selby in *Oliver* v. *Oliver* (1969) 13 F.L.R. 397 at 405 said, in the course of adjudicating a custody dispute between the parties:—

> "A parent is not given the custody of a child as a reward for virtue; neither is a parent deprived of custody as a punishment for vice. But the conduct of the parents is a matter of great importance because it is the basis upon which the court must try to assess their character and their temperament. Having made that assessment the court must try to envisage as a whole the picture made by the pattern of their present lives and their lives as they are likely to be in the future. Into that picture the life of the child must be inserted. It is the duty of the court, having formed that picture, to make the order for custody which will best promote the interests of the child."

Under section 85 of the Matrimonial Causes Act, 1959, the Act in force when *Oliver* was decided, the Court, in proceedings relating to the custody of children of a marriage, was to regard the interests of the children as the paramount consideration. This is, of course, analogous to section 60D of the Family Law Act, 1975, where the Court is required to regard the welfare of the child as the paramount consideration. These words of his Honour are of as much relevance today as they were in 1969. They illustrate that, no matter how high minded the hopes of the legislator, and how far reaching their efforts in eliminating considerations of "fault" in matrimonial proceedings, it must, almost a necessity, continue to be a relevant factor in such proceedings.

Further, the recent amendments to the Family Law Act, 1975 effected by the Family Law Amendment Act 1987 may well renew agitation for the reintroduction into the Act of considerations of fault. The amendments will have the effect of dramatically increasing the level of both spouse and child maintenance ordered. It remains to be seen as to whether or not this development will cause a backlash in the general community.

Conduct, Fault and Family Law, appearing some twelve years after the inception of the Family Law Act, 1975, is a timely reminder of the enduring importance and significance of this concept in such proceedings.

Katter's book is an exhaustive, and detailed examination of the role that "conduct" and "fault" has had under the Family Law Act. He sets out the aims of this book as:—

> "(1) To advance arguments for and against fault in ancillary proceedings under the Family Law Act; and
> (2) To examine the relevance of conduct under the Family Law Act."

Katter emphasises that his book is a legal study, with an emphasis on legislation, reported case law, relevant legal commentaries and studies

by law reform bodies. It is not intended as a sociological or psychological study. In this respect, it is a refreshing edition to the ever increasing literature on Family Law.

An examination of the bibliography demonstrates the depth of research that lies behind it. Even a cursory reading illustrates the extent of the research into the decided cases.

The book is divided into three parts. The introduction sets out, in a concise and comprehensible manner, both the meaning of the terms used, and the various context in which conduct of parties (and therefore fault) may be or has been relevant in proceedings under the Family Law Act. Eight separate categories are isolated. The analysis of each of these categories, and the allocation of different categories of conduct to each category shows the clarity of the analysis which has been applied to the wealth of cases considered. The process of classification of different applications of "conduct" leads to a clarity of approach which is both refreshing and useful. It is this clarity in application to issues which actually arise in legal practice which will make the book of value to the practitioner, and set it apart from much legal writing on Family Law which, whilst illuminating and interesting, is often of not much practical use in day to day litigation.

The second part canvasses arguments for and against the consideration of fault in ancillary proceedings. It is no criticism of Mr. Katter that no particular view is preferred. The purpose of this part of the book is to discuss the arguments for and against. Again, the arguments are firmly anchored in both decided cases and by reference to previous commentators. The section represents a useful, informative and perceptive summary of the positions.

In considering arguments against fault in ancillary proceedings, Katter discusses the difficulties in the assessment of fault. A decision of Fogerty J. in *Horman* v. *Horman* (1976) F.L.C. 90-024 at 75,114 is cited with approval. In that decision, his Honour asserted that our community enjoys the benefit of widely different social styles and attitudes. His Honour referred to the difficulty of determining what the community norm is and suggested that the Judge necessarily is limited by his own upbringing and social contacts. His Honour concluded by commenting that efforts by Judges in the Family Law jurisdiction to set standards of acceptable morality are of antiquarian interest only.

Secondly, the difficulty of the assessment of fault in the sense that the forensic process is not capable of adjudicating on the cause of marital breakdown is discussed. Reference is made to the decision of Ormrod J. in *Wachtel* v. *Wachtel* (1973) 2 W.L.R. 84 at 90. In that case, his Honour had commented that the forensic process was adapted well to determining the share of responsibility of each party for road accidents because the issues are relatively confined in scope, but not to determining responsibility in the complex area of marital breakdown.

The role of the Family Court in this area is discussed. The conflict between the therapeutic role and the judicial role of the Court is illustrated. Such a discussion is timely in the light of the current "renovation" of the Court with the return to robing and associated increase in formality.

The argument that the introduction of any considerations of fault, even on a limited basis, opens the "floodgates" is considered, especially with reference to the recently enacted section 25(1) of the English Matrimonial Causes Act 1973. This section, inserted into the legislation in 1984 requires the Court to have regard to the conduct of each of the parties, if that conduct is such that it would, in the opinion of the Court, be inequitable to disregard it. Decided cases are referred to, to illustrate the difficulty in application of such a principle.

The argument that fault engenders more on-going bitterness is discussed. The decision of Tonge J. in *Mills* v. *Mills* (1978) F.L.C. 90-404 at 77,080 referred to. In that case, his Honour, a devotee of the decision of Selby J. in *Oliver* v. *Oliver*, referred to the continuing relationship between separated parents, one of whom has the custody, care, control or management of the children. He referred to the suffering and confusion of children in marital breakdown and the fact that this suffering is compounded whether parents are critical of each other.

The consideration of arguments for fault in ancillary proceedings is equally detailed, complete and reasoned. Firstly, the necessity for fault to be considered in order that the Court be perceived as doing justice between the parties is dealt with. This is illustrated by reference to the decision in *Schenck* v. *Schenck* (1981) F.L.C. 91-023. In that case, the full Court commented that the justice of the situation as between parents must be subordinated to the principle of the child's welfare. It is pointed out that the decision in *Smythe* v. *Smythe* (1983) F.L.C. 91-337 reinforces this approach.

The problems of this approach are illustrated, for example, by reference to comments by the former Chief Justice of South Australia, the Honourable John J. Bray who said "To exclude it (fault) is in my view both unjust and dangerous. I cannot see why the contract of marriage should be the only contract, a breach which is not only penalised but positively rewarded." This comes from an address by his Honour to the Australian Labour Lawyers in Adelaide in 1985. Coming from a commentator with the stature, ability, humility and public perception of his Honour, such a comment cannot be lightly disregarded. Views from law reform commissions in England and elsewhere are also referred to.

The argument that the absence of fault in dissolution and ancillary proceedings provides no disincentive against conduct which disintegrades or contributes significantly to the breakdown of marriage of the family is likewise discussed in detail. Finally, concluding this section, the role (or non-role) of section 43 of the Family Law Act is referred to. There is a useful summary. Katter concludes that "after a decade of the operation of the Family Law Act in Australia, it would be appropriate for the legislator

to assess in a real and detailed manner, public reaction and attitude with respect to the operation and effect of the Act. Any such survey should be directed to the public at large and not just interested groups as it is the public who have and will continue to experience the effects of the Act".

The third and largest section of the book deals with conduct and its relationship to the Family Law Act 1975. This section obviously represents the fruit of enormous labour in analysis of deciding cases. The topic is broken into consideration of the relationship of conduct to divorce, custody and access, property and maintenance proceedings, and finally, injunctive proceedings and costs.

As in the rest of the book, there is a rigour of analysis and classification which brings a clarity of thought to the subject which this reviewer, at least, has not seen in other writings in the area. The only criticism which this reviewer would make would be to prefer that each subsection had a conclusion which summarises the arguments and discussions in the proceeding text. It is sometimes difficult to see where the discussion is going. However, this is largely because the book is, as has been said, related to decided cases and the actual application of conduct and fault in real situations.

What is sought to be achieved in this section is a detailed consideration of what has actually happened in decided cases under the Family Law Act 1975. In doing this, the book makes a significant and useful contribution. Perhaps more effort could have been devoted to the extraction of common principles from the cases but this may, of course, have been to impose on the cases a uniformity and consistency which does not in fact exist.

Of particular use is the material in chapters 4 and 5. These deal respectively with property and maintenance (chapter 4) and injunctions and costs (chapter 5). Intriguing cases such as *Steinmetz* v. *Steinmetz* (1980) F.L.C. 90-801 are dealt with. In that case, Hogan J. had to consider an application for lump sum maintenance by a wife against a husband who refused to grant a Jewish religious divorce to the wife. This prevented any opportunity by the wife for her remarriage since she was also of Jewish faith. His Honour stated "I am of a view that the husband's attitude in this regard is a matter properly to be considered as relating to the financial resources of the wife and at his wish, the husband's control over them and also is being applicable under the provisions of section 75(2)(o)". His Honour ordered a lump sum payment higher than would have been ordered if such conduct was absent. His Honour's views were affirmed by the Full Court on appeal.

Cases such as this illustrate, however, that broadly speaking, conduct is only relevant when it has economic consequences.

Some treatment is given to the concept of "rare and exceptional" conduct as used by the Full Court in *Soblusky* v. *Soblusky* (1976) F.L.C.

90-124 and *Ferguson* v. *Ferguson* (1978) F.L.C. 90-500. Again, reference is made to the new section 25 of the English Matrimonial Causes Act, 1973 with reference being made to decided cases under that section. The limited nature of such conduct is thereby illustrated.

One area in which conduct is clearly relevant, and indeed required to be considered by the Court under the Act is that of costs. The discussion of section 117, especially 117(2A) is crisp and will be of great use to practitioners. Again, as for the rest of the book, extensive reference is made to decided cases, including the aptly named *Greedy* v. *Greedy* (1982) F.L.C. 91-250. One wonders if *Greedy* would be as memorable if it had been a custody case.

Again, unfortunately, there is no overall concluding section to this chapter or indeed to part three of the book. It would have been more satisfying if the themes of the book have been brought together with an overall conclusion. Instead, one is left with a short discussion of section 118(1)(b), not a section which has assumed a central place on the Family Law scene.

In conclusion, therefore, this book represents a useful, refreshing, at times profound and always rigorous treatment of the role of fault and conduct under the Family Law Act. Its firm anchorage in decided cases, and its constant relation to procedures and proceedings under the Act make it of utility and relevance. It is hoped that other practitioners will find it as useful, thought provoking and satisfying.

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