

Marital Fault: Redefining Egregious Conduct in the 21st Century

By Lee Rosenberg, Editor in Chief

Courts have been long circumspect regarding the use of marital fault to affect equitable distribution and spousal support. This is particularly true after the passage of the no-fault divorce law in 2010, as references to cruel and inhuman treatment claims have virtually vanished, though all previously existing grounds for divorce remain intact and viable.



Cases addressing non-economic marital fault have been historically constricted by the use of the adverb “egregious” as the standard by which these claims are held— even though that word has not in actuality been defined with any great exactitude. It seems to fall into a more amorphous category of definition such as that oft-cited reference to obscenity by United States Supreme Court Justice Potter Stewart in *Jacobellis v. Ohio*¹—“I know it when I see it.” The problem we face is that egregious conduct in divorce cases are hard-pressed to be “seen” in the history of reported decisions.

While abusive behavior takes all forms and is not necessarily limited to one gender, age group, religion, race, or culture, “fault” by way of conduct should be better examined and more available than it has been. We now near almost two tumultuous years of public accusations, investigative reporting, and even senatorial hearings of alleged conduct inspiring, and resulting from, the “#MeToo” and “Time’sUp” movements. From Harvey Weinstein to Bill Cosby to Les Moonves and others, charges of abusive behavior foisted upon victims of such conduct have only recently come to light after being hushed, unspoken, or even hidden in plain sight for prolonged periods. We have also seen how fear of reprisal, embarrassment, and feelings of shame or not being believed, keeps such conduct in the proverbial closet. It is time then that we look again at the word “egregious” and give greater voice to those on the receiving end of conduct long considered by too many to be relatively “innocuous”—when it is anything but.

A History of “Marital Fault”

Prior to the passage of the equitable distribution law in 1980, “alimony would be denied to a woman who committed adultery as such act of fault would—unless

properly defended under statute—penalize her ability to receive support. Since men were not then legally able to receive support, this penalty applied only to the wife.

In 1984, the Second Department then examined marital fault under the new equitable distribution law in *Blickstein v. Blickstein*.² The court reversed a Nassau County trial decision which considered marital fault in awarding the wife 60 percent of the assets. The appellate court “logically” distinguished marital fault from economic fault. It also noted that the catchall “any other factor which the court shall expressly find to be just and proper” was a compromise since the legislature could not agree whether to include marital fault as a specific factor to be considered in equitable distribution. It used a “shocking the conscience” test—“egregious or outrageous”—as to fault and equitable distribution and referenced a more lenient view toward its effect when it came to spousal support.³

It has been repeatedly emphasized that the marriage relationship is to be viewed as, among other things, an economic partnership and that upon its dissolution the accumulated property should be distributed on the basis of the economic needs and circumstances of the case and the parties (see *Conner v. Conner*, 97 A.D.2d 88, 107, 468 N.Y.S.2d 482; Governor’s Approval Memorandum, Session Laws of 1980, p. 1863; Assembly Memorandum, NY Legis Ann 292 1980, pp. 129, 130). It would be, in our view, inconsistent with this purpose to hold that marital fault should be considered in property distribution. Indeed, it would introduce considerations which are irrelevant to the basic assumptions underlying the equitable distribution law, i.e., that each party has made a contribution to the marital partnership and that upon its dissolution each is entitled to his or her fair share of the marital estate (see *Giannola v. Giannola*, 109 Misc.2d 985, 987, 441 N.Y.S.2d 341, supra). Moreover, fault is very difficult to evaluate in the context of a marriage

LEE ROSENBERG, Editor-in-Chief, is a Fellow of the American Academy of Matrimonial Attorneys, a past Chair of the Nassau County Bar Association Matrimonial Law Committee, and a partner at Saltzman Chetkof & Rosenberg LLP, in Garden City. His email address is lrosenberg@scrllp.com.

and may, in the last analysis, be traceable to the conduct of both parties (cf. Scheinkman, 1981 Practice Commentary, McKinney's Cons. Laws of N.Y., Book 14, Domestic Relations Law, C236B:13, p. 160, 1983–1984 Pocket Part).

Thus we conclude that, as a general rule, the marital fault of a party is not a relevant consideration under the equitable distribution law in distributing marital property upon the dissolution of a marriage. This is not to deny, however, that there will be cases in which marital fault, by virtue of its extraordinary nature, becomes relevant and should be considered. But such occasions, we would stress, will be very rare and will require proof of marital fault substantially greater than that required to establish a bare prima facie case for matrimonial relief. They will involve situations in which the marital misconduct is so egregious or uncivilized as to bespeak of a blatant disregard of the marital relationship—misconduct that “shocks the conscience” of the court thereby compelling it to invoke its equitable power to do justice between the parties. Thus, for example, in *D’Arc v. D’Arc*, 164 N.J.Super. 226, 395 A.2d 1270, *mod. on other grounds* 175 N.J.Super. 598, 421 A.2d 602, cert. den. 451 U.S. 971, 101 S.Ct. 2049, 68 L.Ed.2d 350), the New Jersey Superior Court considered the fact that during the pendency of the divorce proceedings the husband had offered \$50,000 for the murder of his wife, even though it had previously been held by the Supreme Court of New Jersey that fault was not to be relied upon (see *Chalmers v. Chalmers*, 65 N.J. 186, 320 A.2d 478). As the *D’Arc* court stated, “where a spouse has committed an act so evil and outrageous that it must shock the conscience of everyone, it is inconceivable that this court should not consider his conduct when distributing the marital assets equitably” (395 A.2d at p. 1278, 293 *supra*). But even in the extreme case it is to be noted that fault is only one factor among ten to be considered in determining the distribution of marital assets.

A year later, the Court of Appeals in *O’Brien v. O’Brien*⁴—forever infamous for its creation of the now “enhanced earning capacity”—also addressed marital fault, citing *Blickstein* and others,

Plaintiff also contends that the trial court erred in excluding evidence of defendant’s marital fault on the question of equitable distribution. Arguably, the court may consider marital fault under factor 10, “any other factor which the court shall expressly find to be just and proper” (Domestic Relations Law § 236[B][5][d][10]; see, Scheinkman, 1981 Practice Commentary, McKinney’s Cons.Laws of N.Y., Book 14, Domestic Relations Law C236B:13, pp. 205–206 [1977–1984 Supp. Pamphlet]). Except in egregious cases which shock the conscience of the court, however, it is not a “just and proper” factor for consideration in the equitable distribution of marital property (*Blickstein v. Blickstein*, 99 A.D.2d 287, 292, 472 N.Y.S.2d 110, appeal dismissed, 62 N.Y.2d 802, see, *Stevens v. Stevens*, 107 A.D.2d 987, 484 N.Y.S.2d 708; *Pacifico v. Pacifico*, 101 A.D.2d 709, 475 N.Y.S.2d 952; *McMahan v. McMahan*, 100 A.D.2d 826, 474 N.Y.S.2d 974). That is so because marital fault is inconsistent with the underlying assumption that a marriage is in part an economic partnership and upon its dissolution the parties are entitled to a fair share of the marital estate, because fault will usually be difficult to assign and because introduction of the issue may involve the courts in time-consuming procedural maneuvers relating to collateral issues (see, *Blickstein v. Blickstein*, *supra*, 99 A.D.2d at p. 292, 472 N.Y.S.2d 110; *McMahan v. McMahan*, *supra*, 100 A.D.2d at p. 827, 474 N.Y.S.2d 974). We have no occasion to consider the wife’s fault in this action because there is no suggestion that she was guilty of fault sufficient to shock the conscience.

The Court of Appeals took on the fault issue some 25 years after *O’Brien*, in 2010’s *Howard S. v. Lillian S.*⁵ This decision came after marital fault had seen a number of cases that provided examples of conduct which fit the *Blickstein/O’Brien* definition.⁶

Although we have not had occasion to further define egregious conduct, courts have agreed that adultery, on its own, does not ordinarily suffice (see *e.g. Newton v. Newton*, 246 A.D.2d 765, 766, 667 N.Y.S.2d 778 [3d Dept. 1998]; *Lestrangle v. Lestrangle*, 148 A.D.2d 587, 588, 539 N.Y.S.2d 53 [2d Dept. 1989]). This makes sense because adultery is a ground for divorce—a basis for ending the marital

relationship, not for altering the nature of the economic partnership. *At a minimum, in order to have any significance at all, egregious conduct must consist of behavior that falls well outside the bounds of the basis for an ordinary divorce action. This is not to say that there can never be a situation where grounds for divorce and egregious conduct will overlap. However, it should be only a truly exceptional situation, due to outrageous or conscience-shocking conduct on the part of one spouse, that will require the court to consider whether to adjust the equitable distribution of the assets (see e.g. Levi v. Levi, 46 A.D.3d 520, 848 N.Y.S.2d 225 [2d Dept.2007] [attempted bribery of trial judge]; Havell v. Islam, 301 A.D.2d 339, 751 N.Y.S.2d 449 [1st Dept.2002] [vicious assault of spouse in presence of children]).*² Absent these types of extreme circumstances, courts are not in the business of regulating how spouses treat one another. (Emphasis added).

In his dissent, Judge Eugene F. Pigott, Jr., also addressing the majority's limitation on discovery on such claims, stated,

It is within the court's discretion to determine whether a spouse's misconduct is so egregious to justify consideration for purposes of equitable distribution. In my view, the court should make this determination with full disclosure of the misconduct.

The majority finds that discovery on the issue of fault is precluded in this case. Although neither party affirmatively moved for a ruling on the egregious misconduct claim, the majority reasons that the conduct alleged by husband is not so egregious as a matter of law to be considered for purposes of equitable distribution. In my view, this is putting the cart before the horse. Indeed, the majority has implicitly accepted the view of the First and Second Departments that a party is required to make a motion for discovery on the issue of fault (see *Ginsberg v. Ginsberg*, 104 A.D.2d 482, 479 N.Y.S.2d 233 [2d Dept.1984]; *McMahan v. McMahan*, 100 A.D.2d 826, 474 N.Y.S.2d 974 [1st Dept.1984] [two Justices dissenting]). I disagree with this approach, and rather, take the view of the Third and Fourth Departments that have no general prohibition of pretrial discovery on fault, relying on our liberal discovery

rule (see *Nigro v. Nigro*, 121 A.D.2d 833, 504 N.Y.S.2d 264 [3d Dept.1986]; *Lemke v. Lemke*, 100 A.D.2d 735, 473 N.Y.S.2d 646 [4th Dept.1984]). Under that rule, husband is entitled to discovery on the issue of fault, albeit with the court overseeing and preventing abuses by asserting its protective power (see CPLR 3103[a] [authorizing the court to issue a protective order "to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts"]). By first permitting discovery on the issue, the court may adequately consider whether the misconduct alleged does indeed "shock the conscience of the court" so as to warrant consideration for purposes of equitable distribution.⁷

In *Havell v. Islam*,⁸ cited within *Howard S.*, the First Department, in affirming a finding of marital fault, sought to find context:

It is our view that *McCann v. McCann* (156 Misc.2d 540, 593 N.Y.S.2d 917) best explains what the appellate courts mean by "egregious" and offers a framework that harmonizes those decisions with *Wenzel* and *Thompson*. The *McCann* court found a husband's conduct to be non-egregious where he deceitfully entered into a marriage based upon his promise to make every effort to have children with his wife and he subsequently refused to fulfill that promise after several years of lying, resulting in the wife, who relied on his promise, passing the age of child-bearing without having a child. *McCann*, discussing the *Blickstein* formulation, explained that "egregious" and "conscience-shocking" have no meaning outside of a specific context, and that conduct is "conscience-shocking, evil, or outrageous" only when "the act in question grievously injures some highly valued social principle." Therefore, the court concluded, conduct no matter how violent or repugnant is "egregious" only where it substantially implicates an important social value. The court further noted that the cases that have taken marital fault into consideration involved the paramount social values: preservation of human life and "the integrity of the human body" (*McCann* at 545-547, 593 N.Y.S.2d 917).

Thus, the *McCann* court, unlike the *Wenzel* and *Thompson* courts, does not include

impairment of economic independence in the definition of “egregious,” but does explain the effort on the part of those courts to lend meaning to the term in the marital fault context and to identify a harm to a significant social value. Its reading of *Blickstein* also invokes the important rule in equity that a person should not be allowed to profit from his own wrongdoing, as defendant here callously seeks to do.

The *Havell* case cites back to language in *Blickstein*, “that marital fault only be taken into consideration where “the marital misconduct is so egregious or uncivilized as to bespeak of a blatant disregard of the marital relationship—misconduct that ‘shocks the conscience’ of the court thereby compelling it to invoke its equitable power to do justice between the parties...” (Emphasis added)

In 2016, *K.K. v. P.K.M.*,⁹ citing back to *Howard S.*, found egregious fault to have occurred where the mother kidnaped the parties’ child and refused to comply with court orders requiring return and access to that child,

Defendant has *transgressed critical social norms and values*, and blatantly ignored every ruling of this Court, refusing to participate and cooperate in the administration of justice. Not only are defendant’s actions *abhorrent to societal norms, causing plaintiff to suffer immeasurable injury and harm, they are disrespectful to this Court and the judiciary as a whole*. Defendant’s conduct constitutes egregious fault and will be considered by this Court in determining equitable distribution of marital property. (Emphasis added)

Clearly, based on the language of *Howard S.*, and other cited cases such as *McCann v. McCann* and *Levi v. Levi*, acts of extreme physical violence such as existed in *Havell* and also in *Pierre v. Pierre*¹⁰ and *Alice M. v. Terrance T.*¹¹ and are not the *sine qua non* for a finding of egregious conduct, as the standard is broader. In addressing issues of discovery on egregious conduct regarding the husband’s commission of sexual misconduct as to his wife’s daughter and granddaughter from a prior marriage, the Nassau County Supreme Court in *Eileen G. v. Frank G.*,¹² noted an important footnote in *Howard S.* and elaborated,

... “to the extent [the Appellate Division decision appealed from] can be read to limit egregious conduct to behavior involving extreme violence, the definition should not be so restrictive.” *This clearly leaves the matter open to an individual assessment of each case in which such conduct is alleged, without a narrow reference to one particular type of conduct or injury.*

The Court therefore must disagree with the defendant that because the injury to the plaintiff was solely psychological, and that the conduct was directed to a third party, such conduct never could be considered.

Under *Howard S.*, the common thread is and remains whether the conduct leading to injury of the plaintiff was “outrageous” or “conscience-shocking.” Further, there is nothing in the *Howard S.* decision that would have a court apply standards applicable to personal injury actions—e.g., whether the conduct was directed to a party personally—to determinations of egregious marital fault. The Court’s citation to the case in which there was an attempt to bribe the trial judge indicates otherwise. It should also be noted that psychological damage caused by egregious conduct was cited by the *Havell* court as a proper basis for consideration of marital fault in the economic arena. *Havell v. Islam*, 301 A.D.2d 339, 344–345, 751 N.Y.S.2d 449, *supra*. Indeed, one of the cases the *Havell* court cited as sufficient concerned the rape by the husband of the wife’s 17-year old stepdaughter, an act of sexual misconduct akin to what is presented here.

As noted, in the present case the actions are alleged to be molestation of the plaintiff’s 8 year-old grandchild. It cannot seriously be argued that this could never be a sufficient basis under *Howard S.* for a finding of “outrageous” or “conscience-shocking” conduct, no matter what disclosure of the underlying facts might reveal. The facts therefore must be developed, and this is the role of pre-trial discovery. (Emphasis added)

In 2015’s *R.S. v. B.L.*,¹³ the New York County Supreme Court found egregious conduct where the wife—as a lawyer and member of the bar—forwarded the husband’s mail to a post office box in her name in apparent violation of several federal laws.

Shocking the Conscience

In evaluating a separation agreement the seminal *Christian v. Christian* references unconscionability where the inequity is “so strong and manifest as to shock the conscience and confound the judgment of any (person) of common sense” citing to *Mandel v. Liebman*, 303 N.Y. 88. *Mandel* in turn cites back to *Osgood v. Franklin*¹⁴ in the Chancery Court from 1816 which cites back further to “Sir

Th. Clarke, in *How v. Weldon*, 2 Vesey, 516. Lord Thurlow, in 1 Bro. 9. Lord Ch. B. Eyre, in 2 Bro. 179, note. Lord Eldon, in 9 Vesey, 246. Sir William Grant, in 16 Vesey, 517.”

Fast-forwarding, in a reference to governmental conduct which shocks the conscience in violation of due process, the Appellate Division, First Department in *Chavis v. City of New York*,¹⁵ cited to the U.S. Supreme Court decision in *County of Sacramento v. Lewis*¹⁶ where “the Supreme Court held that for executive action to violate substantive due process, it must be ‘so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.’” (Emphasis added) This language, in the same context, has been cited as recently as the U.S. Supreme Court’s June 18, 2018 decision in *Rosales-Mireles v. U.S.*¹⁷

What, then, should shock the “contemporary conscience” given the world we live in?

Discovery and a Greater Consideration of Egregious Conduct

In a recent *N.Y. Times* article, “Stress Test,”¹⁸ the author addresses the effect of behavior which becomes the “new normal,”

As soon as we accept something as the human condition, we stop talking about it or holding others to account; we simply adapt, admit defeat, lower our expectations.

In our divorce and family law cases, we almost daily see good people do very bad things and bad people do even worse. The problem is that we (bench and bar alike) are jaded and almost always beyond the ability to be truly shocked. This is also seen in the increased level of incivility in our courts and in society which are also now the “new normal.”

While inclusion of claims for domestic tort or marital fault should certainly not be regularly offered up for consideration, courts should more often recognize that conduct less than all-out physical assault (which is often not reported) can and should constitute conduct which shocks the contemporary conscience. That collective conscience should be shocked more often than it is. As Judge Pigott suggested in his dissent in *Howard S.*, discovery on these issues, when properly raised, should be the rule, rather than the exception.

As the world hurls through 2018, with a 24/7 news/internet/social media cycle that daily exposes us to conduct regularly stretching the boundaries of previously unacceptable behavior, should such conduct be deemed “business as usual”? Have we just grown numb and accepting? Is the coordinated pushback against the public revelations of “MeToo” to be the standard or do we

recognize that certain conduct, which was often part of the “run of the mill,” “boys being boys,” or “just another divorce case” categories, is simply unacceptable.

The light cannot shine upon conduct that occurs in the darkness unless the door is first allowed to be opened.

Endnotes

1. 378 U.S. 184 (1964).
2. 99 A.D.2d 287 (2d Dep’t 1984), *appeal dismissed*, 62 N.Y.2d 802 (1984).
3. The fault in *Blickstein* was the husband’s abandonment of the wife. Notably, the current versions of DRL §§ 236(B)(5-a) and (6)—as to spousal support as well as DRL § 240 as to custody now make reference to “domestic violence,” albeit with limitations.
4. 66 N.Y.2d 576 (1985).
5. 14 N.Y.3d 431 (2010).
6. The appellate decision in *Howard S.* at 62 A.D.3d 187 (1st Dep’t 2009) also noted several prior cases in which egregious conduct was not found. “...conduct that courts have found not to be egregious includes adultery (see *Lestrangle v. Lestrangle*, 148 A.D.2d 587, 588 [1989]), alcoholism (see *Weilert v. Weilert*, 167 A.D.2d 463 [1990]), abandonment (see *Wilson v. Wilson*, 101 A.D.2d 536 [1984], *lv. denied*, 64 N.Y.2d 607 [1985]), and verbal harassment coupled with several acts of minor domestic violence (see *Kellerman v. Kellerman*, 187 A.D.2d 906 [1992]).”
7. Notably, this case was decided before no-fault divorce, so Judge Pigott’s remarks also noted that fault was then required to be demonstrated as a prerequisite to the divorce.
8. 301 A.D.2d 339 (1st Dep’t 2002).
9. 52 Misc. 3d 1220(A) (Sup. Ct. Westchester Co. 2016).
10. 145 A.D.3d 586 (1st Dep’t 2016). “Here, defendant stabbed plaintiff wife two times with a steak knife, slammed her head against the toilet and put it into the bowl, causing her to enter a coma, require months of hospitalization and five surgeries, and rendering her disabled. He pleaded guilty to attempted assault in the first degree. This conduct is so egregious as to warrant a reduction in the equitable distribution award to defendant husband.”
11. 50 Misc. 3d 1204(A) (Sup. Ct. Kings Co. 2015). “If the Court has ever been presented with facts and circumstances demonstrating egregious conduct by one spouse against another spouse it is the case at bar. The case at bar is not a case of “broken dreams” where one spouse merely violated the bounds of the marital relationship. The facts presented to the Court, including the credible and compelling testimony presented by plaintiff, reveal that during the marriage defendant engaged in egregious conduct against the plaintiff because he perpetrated violent attacks against her that violated the integrity of the human body, including but not limited to his attack against her that resulted in his conviction for rape in the first degree. Without a doubt, defendant’s rape of plaintiff during the marriage shock the conscious of the Court and his subsequent conviction of rape in the first degree unequivocally evidences that defendant callously imperiled the value our society places on human life and the integrity of the human body.”
12. 34 Misc. 3d 381 (Sup. Ct. Nassau Co. 2011). The court ordered discovery relating to the granddaughter only, based on the contents of the submissions before it.
13. 46 Misc. 3d 1218(A) (Sup. Ct. N.Y. Co. 2015), *aff’d*, 151 A.D.3d 609 (1st Dep’t 2017).
14. 1 NY Ch. Ann. 275 (1816).
15. 94 A.D.3d 440 (1st Dep’t 2012).
16. 523 U.S. 833 (1998).
17. U.S., 138 S.Ct. 1897 (2018).
18. N. Renner, *Stress Test*, *N.Y. Times Magazine*, Sept. 30, 2018 at 17.