Appendix VII

Domestic violence: a case study

Note: this Appendix contains a sequence of materials on domestic violence including extracts from the Court of Appeal and the House of Lords' judgments in *Davis* v. *Johnson* [1979] AC 264 at 272, to which we extensively refer in Chapters 2 and 6, and in Chapters 8 and 11.

1 Introduction

1.1 Background

The outline of the story is quite simple: largely because of the activities of and controversy surrounding Mrs Erin Pizzey and her associates in Chiswick during the early 1970s, problems of domestic violence became a focus of public attention; consequently in 1974–5 a Select Committee on 'Violence in Marriage' was set up by the House of Commons. After only five months it submitted a Report (on violence in marriage), which was followed shortly afterwards by a private Member's Bill on Domestic Violence. During its passage through Parliament, the Bill was supported by the government, sections 1 and 2 being redrafted by the government draftsmen and introduced during the Committee stage. It was enacted in 1976 as the Domestic Violence and Matrimonial Proceedings Act 1976. Section 1, one of its important provisions, gave rise to problems of interpretation; it gave county courts jurisdiction, on the application of a spouse or cohabitee, to grant injunctions with respect to molestation and, most significantly, occupation of the matrimonial home. For a time many injunctions were granted to applicants to exclude the spouse or partner from the matrimonial home, notwithstanding that he or she was the owner or tenant.

Then in *B* v. *B* the Court of Appeal held that this jurisdiction did not affect rights of property, with the result that this new remedy was only available in the rare case where the complainant, typically the woman, was the sole owner or occupier of the home, i.e. an injunction was not available to prevent the man from exercising his lawful rights to occupy the home. *B* v. *B* in the view of many, including the original supporters of the Bill, defeated the purpose of the Act. The decision in *B* v. *B* was followed in *Cantliff* v. *Jenkins* but challenged in *Davis* v. *Johnson*. In this case a majority of the full Court of Appeal (five judges, an unusual occurrence in itself) refused to follow *B* v. *B*, citing *inter alia* the report

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of the Select Committee and Hansard in support of their interpretation of the section. On appeal by the man, the House of Lords upheld the decision of the Court of Appeal on the specific issue but unanimously condemned both its interpretation of the doctrine of precedent and the use of Hansard and the Select Committee Report as aids to interpretation.

1.2 Relevance to the book

The story is relevant to our purposes for many reasons, the most important of which are as follows: first, this is a striking example of a split of opinion (8–8) by senior judges on the interpretation of a recent statute when the mischief that it was intended to remedy seemed clearly to indicate only one interpretation. The factors giving rise to this disagreement and the arguments which were advanced on each side are of interest, both at the level of technical detail and in respect of more general attitudes to statutory interpretation. Second, the Select Committee's Report is a particularly interesting example of some of the difficulties involved in defining, diagnosing and responding to social problems; it also illustrates some uses and limits of law-making in these processes. The particular legal provision which attracted so much attention was, at best, a very modest contribution to the partial alleviation of one aspect of 'the problem'. Yet this narrow remedy illustrates rather neatly how the relationship between narrowly defined 'social problems' and broader social conditions and issues is echoed, but not paralleled, by the relationship between a new piece of legislation and the existing fabric of the law. The problem of 'battered partners' is bound up with alcoholism, poor housing and various kinds of social deprivation – among other things. The provision of even short-term relief for victims of domestic violence was thought by lawyers to have undesirable implications for the law of property. Third, *Davis* v. *Johnson* is a leading case on the doctrine of precedent and the use of extrinsic aids to interpretation; it is also a dramatic and historically important example of what was at the time a continuing conflict between the House of Lords and Lord Denning and some of his brethren in the Court of Appeal.

1.3 Subsequent developments in the law

Since the House of Lords' decision in *Davis* v. *Johnson* there have been a number of further judicial and statutory responses to the problems associated with domestic violence and the occupation of the matrimonial or shared home. The law at the time of writing is contained in Part IV of the Family Law Act 1996 as amended by the Domestic Violence, Crime and Victims Act 2004. That Act followed a government consultation paper, *Safety and Justice: The Government's Proposals on Domestic Violence* (2003, Cm. 5847), which focused on improving the legal and other protection available to victims of domestic violence, particularly reforms to orders under the Family Law Act

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1996 (non-molestation and occupation orders) and providing clarity for the police when called to domestic violence incidents. The 2004 Act came into force on 1 July 2007. It is intended to introduce reform to the civil and criminal law in these areas by criminalising the breach of non-molestation orders under the 1996 Act 1996, by extending the availability of restraining orders under the Protection from Harassment Act 1997 and by making common assault an arrestable offence. Thus while there continue to be important developments concerning this issue, the utility of this case study as illustrative of some detailed points concerning the interpretation of cases and statutes and, more broadly, of judicial and legislative responses to social problems, remains compelling. Indeed, current discussions of the nature of domestic violence and of what constitute appropriate legal remedies display very similar features to those which characterized the discussions that preceded the Domestic Violence and Matrimonial Proceedings Act 1976.

2 Extracts from the Select Committee's Report

First Special Report from the Select Committee on Violence in Marriage, 1974–75 HC 533

The Select Committee appointed to consider the extent, nature and causes of the problems of families where there is violence between the partners or where children suffer non-accidental injury and to make recommendations have made progress in the matter to them referred, and have agreed to the following Report:

[…]

4. Violence in marriage is a wide and difficult subject. It involves a whole range of issues: the general attitudes of men to women and vice versa, the attitudes of spouses to one another, basic causes of violence in general, alcohol, housing problems, the law and legal services, social services and facilities, psychiatric problems, emergency services, police and other attitudes and facilities, and many more. In five months of work we have not been able to find any easy solutions. They do not exist. We have therefore decided to make a short interim report, referring only to a few of the many aspects of the problems, and leaving the bulk of the evidence which we have received to speak for itself. We have done this simply because shortage of time and resources available to us prevented us from doing otherwise.

5. A general impression must be recorded at the outset. We have been disappointed and alarmed by the ignorance and apparent apathy of some Government Departments and individual Ministers towards the extent of marital violence. Hardly any worthwhile research into either causes or remedies has been financed by the Government. Responsibility is diversified between many Government Departments. No fewer than seven are concerned: the Home Office, the Department of Health and Social Security, the Department of Education and Science, the Department of the Environment, the Lord Chancellor's Office, the Scottish Office and the Welsh Office. Only in a very few of these Departments

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does the problem of marital violence receive anything other than a very low priority either in terms of manpower or financial resources.

Definition

6. No two cases of violence between the partners in a marriage are the same. We recognize therefore that we are reporting on women in a wide variety of situations but with no single identifiable complaint with a known cure. If a definition is required, that proposed by a Committee of the Royal College of Psychiatrists is probably better than most: 'a battered wife is a woman who has suffered serious or repeated physical injury from the man with whom she lives' (Evidence, p. 100). The definition thus includes women who are cohabiting with men to whom they are not married (see para. 52). In using the word 'battered' in this Report we realize that physical violence is not necessarily any less tolerable than verbal or emotional assault, and that – particularly in the wider sense – men are 'battered' by women as well as vice versa. We will therefore be publishing as an example (as Appendix 5 to our evidence) one short letter from a husband who alleges that he has been battered. We believe, however, that we should concentrate on the problems of women, who form the vast majority of those physically battered. They are often with inadequate means and with dependent children, and in need of shelter or help or advice for themselves and their families.

The scale of the problem

7. Little indeed is known about how much violence in marriage there is, and whether or not it is increasing. What is clear is that the number of battered wives is large – much larger than may be thought – and that the demand for places in the refuges which have been opened reflects the pent up need. Several estimates, all on small samples, with inadequate information and using different definitions, have been made. For what it is worth, the Parliamentary Under-Secretary of State, Welsh Office, using the limited Colchester Study (Evidence, p. 101, para. 15) and other information, thought that there might be perhaps 5,000 battered wives in Wales each year, out of a figure of 680,000 married women (1971 census). Despite our efforts, we are unable to give any estimates of what the likely numbers are; several witnesses talked in terms of the tip of an iceberg, and this seems to us to be correct. Most witnesses agreed (and this is almost certainly correct) that all strata of society are involved, although the better-off are perhaps less likely to seek outside help in solving their problems (though they may be more ready to seek advice from solicitors). All witnesses were agreed, however, on the need for research on the scale of the problem as well as on causation and remedies (see para. 58).

The nature of the problem

8. Some people, including some in high places, still scorn the thought of a battered wife. Is it not a husband's right to beat her? Is it not her fault? Should

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she not just leave? Might she even enjoy being beaten? Such people should not forget that a large percentage of all known murders take place within the family setting: home is for many a very violent place. At least some of those murdered were maltreated wives who did not or could not leave in time.

9. We were presented with horrifying evidence of particular cases, and have no doubt that the physical injuries, often inflicted regularly over a period of many years, are very severe in many cases.

10. For example, a Mrs X gave oral evidence anonymously on 12th March. She was beaten frequently over a period of sixteen years before she left her husband. In her own words 'I have had ten stitches, three stitches, five stitches, seven stitches, where he has cut me'. 'I have had a knife stuck through my stomach; I have had a poker put through my face; I have no teeth where he knocked them all out; I have been burnt with red hot pokers; I have had red hot coals slung all over me; I have been sprayed with petrol and stood there while he has flicked lighted matches at me'. These assaults did not just take place when he was drunk, but 'at any time; early in the morning; late at night; in the middle of the night he would drag me out of bed and start hitting me, he would do it in front of the children. He never bothered if the children were there'. 'I have been to the police. I nicked my husband. He gave me ten stitches, and they held him in the nick over the weekend and he came out on Monday. He was bound over to keep the peace, that was all. On the Tuesday he gave me the hiding of my life'…

[…]

12. Perhaps as bad or even worse for the women than the physical violence are the loss of self confidence and self respect that are involved, the inability to understand what is happening, and the moral, emotional and economic problems inherent in a decision to do what appears best for their children, their menfolk and themselves. The evidence of Dr Gayford, a psychiatrist who is making a special study of the subject, and of those battered women who agreed to appear before us, was particularly moving and persuasive.

13. The practical problems of such women are never identical. Very often they include problems of homelessness, of finance, of the need for support from outside agencies and of protection by the law. What immediate steps can a woman take when she finds herself homeless and perhaps nearly penniless, with young children and perhaps in the middle of the night, as a result of domestic violence? What help and advice should be offered by the police, the local authorities and other agencies to her, to her children, to her husband? How much liaison should there be between those offering help and advice? What should be done to assist her in legal proceedings, if necessary, and in providing for her longer-term future, either back with her husband or alone in a one parent family? And what, if anything, can be done to reduce the likelihood of violence in the first place? We now attempt to deal with some aspects of these questions.

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Causation

14. We have had no evidence that the husband alone is responsible for this violence. The behaviour of the wife is relevant. So, too, is the family's environment, their housing and employment conditions, their physical and mental health, their sexual relationship and many other factors. Very little research has been done and much more is certainly necessary. What has been done has been confined to small samples and usually without the husband's co-operation; it suggests however very clearly that those women who marry (and become pregnant) very young and after short or non-existent periods of courtship are particularly at risk, that drinking of alcohol may well trigger off or accentuate violence, and that children living in an environment of domestic violence may be predisposed to violence in their own adult lives. It is hard to distinguish between cause and effect, and to discover the causal relationship between psychiatric problems, heavy drinking, sexual difficulties, violence, inability to communicate, etc.

Prevention

15. The prevention of violence within marriage is as difficult as the prevention of violence in any other situation. Only when the causes of violence are better known and understood will society be in a position to prevent it. Until that Utopia is reached not a great deal can be done to prevent a man from maltreating his wife initially. The law, however it is enforced, is unlikely to stop him, at least the first time (see paras. 42–53). Most violence has a complex origin and therefore attention to only one or two problems is unlikely to be sufficient to make very much impact on the overall problem. Even so we are prepared to recommend a 3-point plan for urgent consideration.

[16–18. The Committee recommends that formal instruction be given in school about the legal aspects of family life, that the Government pursue a vigorous publicity campaign against excessive consumption of alcohol, and that steps be taken to help identify children at risk.]

Alleviation

19. The programme for prevention is inevitably a long term one. However we are convinced that some immediate action can be taken to alleviate the problem. Before turning to the Finer Committee Report and to legal aspects (including police services), we make suggestions and recommendations under the following headings: 24-hour Advisory Services, Refuges, Housing, needs of the children, needs of the husbands, financial and other supporting services, and Medical Services.

24-hour advisory services

20. The crisis centres should have three primary roles. Firstly, they should provide an emergency service, hence the 24-hour requirement. This means they

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will need to develop very close liaison with the local medical, social, legal and police services. A very important link will be with the refuges which we are proposing below, to which they will refer women who need a place of safety. Secondly, they should be specially responsible for the coordination of the local arrangements already available to women and children in distress. We have been impressed by the fact that one of the prime problems for the family in stress is the need to consult with several different professionals, in different places, employed by different agencies, very often not relating together very effectively. A battered wife needs the advice and help of a police officer, a doctor, a health visitor, a lawyer, a housing department officer, a social security officer, a clergyman, a probation officer, a marriage guidance counsellor, a citizens advice bureau worker and a social worker, just to name the most obvious. The third and non-emergency role we see for the family crisis centres is the development of specialist advisory services, education and publicity programmes, group support and meetings for women with similar problems.

[…]

The law in England and Wales

42. We have already referred in para. 41 to the recommendations of the Finer Report on law reform. No laws, however well enforced, can prevent marital assaults. We consider however that improvement of the law can be of material assistance to the problem. If the criminal law of assault could be more uniformly applied to domestic assaults there seems little doubt that it would give some protection to the battered wife. If the enforcement of the civil law could be made more satisfactory a man who had beaten his wife once might well be prevented from repeating his crime. We consider this further in the following paragraphs together with the legal problems associated with the homelessness of one or other partner that often follows assault between them.

[…]

Injunctions

45. We accepted the evidence from women and lawyers that civil injunctions restraining husbands from assaulting their wives, or ordering husbands to leave and keep away from the matrimonial home, were on occasions ‘not worth the paper they were written on’, as the present enforcement procedure of applying for the man to be committed to prison was too slow adequately to protect the woman concerned. We therefore recommend that where a Judge grants an injunction either restraining the husband from assaulting his wife or ordering him to keep away from the matrimonial home, he should have power to grant a power of arrest if, from the evidence before him, he is satisfied that there has been an assault occasioning actual bodily harm and that there seems to be a likelihood that the wife is in continuing danger of assault. When serving the injunction on the man the solicitor would also serve a copy on the

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Superintendent of the local police station. This would confer power on the police to arrest the man should it appear that he has either entered (or attempted to enter) the matrimonial home when he has been ordered to keep away, or (where the injunction restrains the husband from assault) that he has committed an assault upon his wife or that there is immediate danger of assault. There would be a duty on the police to notify the solicitor of the arrest and the solicitor would be under a duty to find a Judge to deal with the alleged breach as soon as possible, with a specified time limit. Should the injunction be discharged the solicitor would notify the police concerned. We recognize the arguments against involving the police in civil law but consider this is the only way to make enforcement effective and that the problem of battered women is exceptional enough to require an exceptional remedy.

46. It would also be helpful if there were a general practice whereby solicitors should send copies of injunctions to the local police station so that the police would be aware of the position and more ready to assist should there be further trouble. When solicitors serve any injunction, if it is feared there may be a breach of the peace, it would assist if the police were ready to accompany solicitors and/or process servers.

47. It is not satisfactory that at present women have either to start divorce proceedings or judicial separation proceedings, or undertake to the court to do so, before they may obtain an injunction in the Family Division of the High Court or Divorce County Court. The only other present means of obtaining an injunction is by claiming one in the High Court in an action founded on assault: in the County Court damages must also be claimed for injury or loss occasioned by an assault. This is, to some extent, used by cohabitees who do not have access to the Divorce Courts, but is not used, according to the President of the Family Division, Sir George Baker, by married women (Evidence, 2nd July).

48. We were grateful for the information from Sir George Baker that consideration is being given to the Rules of the Supreme Court being amended to permit a woman, married or unmarried, to apply for an injunction by means of an Originating Summons setting out that she has suffered an assault occasioning actual bodily harm, without having first to start proceedings for divorce or judicial separation. We trust that there will be no delay in making this amendment, since no legislation is involved. We also note that present powers under the Matrimonial Homes Act 1967 to regulate occupation by the spouse do not permit the husband to be even temporarily excluded from the matrimonial home, and we consider it would partly solve this problem if the Act were amended to allow such exclusion.

Magistrates' courts

49. We would also wish to see better protection given to married women who apply in matrimonial proceedings to the Magistrates' Court. Whereas Divorce

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County Courts are often up to 20 or 30 miles from the towns which they serve and in many areas Divorce Judges do not sit daily, Magistrates' Courts exist in most small towns and there are relatively few houses which are not within 5 miles of a Magistrates' Court. Most of these Courts sit frequently, 2 or 3 days weekly at least. Another factor which makes Magistrates' Courts more convenient than the County Court is that the procedure in the latter is rather cumbersome usually requiring Affidavits, and documentation in the Court Offices, all of which take some time. Generally it is only in cases where the solicitor is very familiar with this type of proceeding, and the danger has already been marked by actual injury, that injunctions will be made by the Higher Courts, when they can be made within 48 hours. We would wish to see the necessary procedure simplified, and we understand that this is already under consideration. In contrast no such documentation is required in the Magistrates' Court and where the wife is not seeking to end the marriage an immediate remedy, if immediate hearings could be made available, would often be provided more conveniently at the Magistrates' Court than in the Divorce County Court or High Court. We therefore also recommend that, as suggested by the Law Commission in its Working Paper No. 53, Magistrates are given power in matrimonial proceedings to make an injunction restraining the husband from assaulting the wife and, when necessary, temporarily excluding him from the matrimonial home. In addition, we recommend bringing the grounds for obtaining a matrimonial order in the Magistrates' Court into line with grounds for obtaining a divorce. Such a reform may well save public funds as some legal aid certificates for abortive divorce and solicitors' costs in preparing for divorce proceedings would be prevented if adequate relief of this nature was available in the Magistrates' Courts where costs are lower.

[…]

Cohabitees

52. We have not yet taken evidence relating particularly to the problem of cohabitees or common law wives, but we are aware that such women and their children are in a weaker position when they seek protection and financial relief. If the suggestion of Sir George Baker to amend the Rules of the Supreme Court to permit such women to claim an injunction in the Court is adopted their position would be somewhat improved. In addition we recommend that consideration is given to amending the Guardianship of Minors Act 1971 and 1973 so that when paternity is proved there is power, on application to the County Court or High Court, to settle any property occupied as a home. This power would enable the court to permit the parent caring for the children to have sole occupation of the property during their minority, so that a woman who is caring for the children could continue living with them in their former home, even if she had no legal interest in the property, after the breakdown of the relationship.

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Access to the law

53. We consider that if the law as it stands was fully implemented, if police practice was improved as we recommend, if all lawyers advised their clients on all remedies available to matrimonial proceedings and took all necessary steps to obtain injunctions and were on hand to enforce any breach of such injunctions, and if in addition there was liaison between all the different agencies involved, the practical problems facing battered wives would be vastly decreased. We therefore recommend that serious attention be paid by all these agencies to instructing their personnel in the remedies available to battered women, and that in addition a referral list of solicitors willing to deal with such cases in each locality be held by the police and other agencies so that women can be referred to suitable solicitors to help them at an early stage. Women should also be informed of any refuge in their areas. If the system of having a solicitor on hand at Magistrates' Courts to help defendants spreads, such a solicitor would be a suitable person to be able to tell women who came to the Court how to obtain the help they need. Many solicitors' offices are both intimidating to most women and inaccessible, not being in the areas in which they live, and usually only receiving clients on appointments days and sometimes weeks ahead. We consider that law centres are potentially admirably suited to deal with the emergency situation caused by domestic violence, being situated in the community with links with other agencies and flexible working hours, and we recommend that more law centres take on this type of work, if thought advisable transferring cases once the immediate emergency has been dealt with to local solicitors.

Summary of recommendations

Our recommendations are, in brief, as follows–

1. The Committee should be re-established very promptly in the next Session (para. 2);
2. Much more serious attention should be given within our school (and further education) system to the problems of domestic conflict (para. 16);
3. The Government should now introduce a vigorous publicity campaign against the excessive use of alcohol, and should formulate a positive policy on the advertisement of alcohol (para. 17);
4. As much as possible must be done to break the cycle of violence by attention to the welfare and special needs of vulnerable children (para. 18);
5. Each large urban area should have a well publicised family crisis centre open continuously (para. 20);
6. Specialized refuge facilities should be available very readily and rapidly (para. 21);
7. The application for grant from the National Women's Aid Federation should be sympathetically and urgently considered (para. 25);

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8. Payments to Chiswick Women's Aid should continue temporarily (para. 25);
9. Legislation, if it is necessary, should be introduced as soon as possible to clarify the duty of local authorities to provide temporary accommodation for battered women who leave home (para. 26);
10. The Finer Report proposals on local authority and private tenancies of homes should be implemented at an early date (para. 28);
11. The Department of the Environment must ensure that more refuges are provided by local authorities and/or voluntary organisations (para. 29);
12. One family place per 10,000 of the population should be the initial target (para. 29);
13. Medical schools and nursing colleges should give special attention to the social dynamics of family life, and to the medical (both physical and psychiatric) correlates of marital disharmony (para. 40);
14. Consultations should continue between the Government and the local authorities to ascertain how far the Finer Committee recommendations can be implemented in the short term without an unacceptably high demand on financial resources (para. 41);
15. Chief Constables should review their policies about the police approach to domestic violence (para. 44);
16. Each police force should keep statistics about incidents of domestic violence, and these should be recorded separately in the National Statistics supplied by the Home Office (para. 44);
17. Where a Judge grants an injunction either restraining the husband from assaulting his wife or ordering him to keep away from the matrimonial home, he should have power to grant a power of arrest if he is satisfied that there has been an assault occasioning actual bodily harm and that there seems to be a likelihood that the wife is in continuing danger of assault (para. 45);
18. Magistrates should be given power in matrimonial proceedings to make an injunction restraining the husband from assaulting the wife and, when necessary, temporarily excluding him from the matrimonial home (para. 49);
19. The grounds for obtaining a matrimonial order in the Magistrates' Court should be brought into line with grounds for obtaining a divorce (para. 49);
20. The principle laid down in the case of *Bassett v Bassett* should be uniformly applied where wives apply for an order that their husbands be ordered to leave, and, when the wife is in danger, decisions should be reached swiftly to avoid her being homeless (para. 50);
21. Serious attention should be paid by all the agencies involved in instructing their personnel in the remedies available to battered women, and a referral list of solicitors willing to deal with such cases in each locality should be held by the police and other agencies (para. 53);
22. More law centres should deal with the emergency situation caused by domestic violence (para. 53);

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23. The Scottish law of evidence should be amended in respect of assaults taking place between husband and wife in the matrimonial home (para. 55);
24. A Scottish divorce bill should be introduced in the next Session by the Government as a Government Bill (para. 57);
25. One or two crisis centres should be set up as action research projects (para. 58);
26. The Government should expedite a decision of principle as to whether to provide the finance recommended in this Report.
27. Conferences should be held up and down the country within the next nine months to consider this Report (and the Evidence to be published as soon as possible after it) and to decide for each area what the best local response to its recommendations should be (para. 64);
28. Shortly after this period of nine months the Government should report to Parliament on the action taken and the further action planned, both at national and at local level (para. 64).

3 The Private Member's Bill

BILL to amend the law relating to matrimonial injunction; to provide the police with powers of arrest for the breach of injunction in cases of domestic violence; to provide for the obtaining of such injunction in the absence of a claim for damages; and to make further provision for the protection of the rights of victims of domestic violence.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Matrimonial injunction.

1. Notwithstanding anything to the contrary in any enactment or rule of law relating to the jurisdiction of county courts, a county court may, on the application of a party to a marriage, grant an injunction restraining the use of violence by the other party to the applicant or excluding the other party from the whole or part of the premises occupied by the parties as their home, if satisfied that such an order is necessary for the protection of the applicant.

Powers of arrest.

2 (1) Where a judge makes an order:
(a) restraining a spouse or co-habitee from using violence towards the other spouse or co-habitee; or
(b) to vacate or not to come within a specified distance of a dwelling house; or both, he may attach a power of arrest thereto if he is satisfied -
  (i) that the Respondent has assaulted the Applicant occasioning actual bodily harm; and
  (ii) there is a likelihood of further assaults.

(2) A power of arrest attached to an order under subsection (1) above shall authorize any constable to arrest a person whom he reasonably suspects to have

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disobeyed the order by having committed an assault, or by having entered the area or place specified in the order, as the case may be.
(3) Where a constable arrests a person under subsection (2) above he shall forthwith seek the direction of a judge regarding the time at which and the place to which the arrested person is to be brought before the judge, but shall in any event release the arrested person if he is not brought before a judge within 24 hours of the direction being sought.
(4) Rules of court shall be made for the purposes of this section and to provide for service of the said order duly endorsed as to service on the person to whom it is addressed and on the senior officer of a Police Station in the district where the person who applied for the said injunction resides.

Amendment of Matrimonial Homes Act 1967, c. 75.

3. In section 1(2) of the Matrimonial Homes Act 1967 (which provides for applications for orders of the court declaring, enforcing, restricting or terminating rights of occupation under the Act or regulating the exercise by either spouse of the right to occupy the dwelling-house):
 (a) for the word 'regulating' there shall be substituted the words 'prohibiting, suspending or restricting'; and
 (b) at the end of the subsection there shall be added the words 'or requiring either spouse to permit the exercise by the other of that right'.

Order restricting occupation of matrimonial home.

4(1) Where each of two spouses is entitled, by virtue of a legal estate vested in them jointly, to occupy a dwelling-house in which they have or at any time have had a matrimonial home, either of them may apply to the court, with respect to the exercise during the subsistence of the marriage of the right to occupy the dwelling-house, for an order prohibiting, suspending or restricting its exercise by the other or requiring the other to permit its exercise by the applicant.
(2) In relation to orders under this section, section 1(3) (4) and (6) of the Matrimonial Homes Act 1967 (which relate to the considerations relevant to and the contents of, and to the jurisdiction to make, orders under that section) shall apply as they apply in relation to orders under that section; and in this section 'dwelling-house' has the same meaning as in that Act.
(3) Where each of two spouses is entitled to occupy a dwelling-house by virtue of a contract, or by virtue of any enactment giving them the right to remain in occupation, this section shall apply as it applies where they are entitled by virtue of a legal estate vested in them jointly.
(4) The occupation of a dwelling-house by one spouse shall for purposes of the Rent Act 1968 (other than Part IV thereof) be treated as possession by both spouses, notwithstanding that the other spouse is excluded from occupation by an order under this section.

Short title and extent.

5(1) This Act may be cited as the Domestic Violence Act 1976.
 (2) This Act shall not extend to Northern Ireland or Scotland.

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4 Domestic Violence and Matrimonial Proceedings Act 1976

1976 CHAPTER 50
An Act to amend the law relating to matrimonial injunction; to provide the police with powers of arrest for the breach of injunction in cases of domestic violence; to amend section 1(2) of the Matrimonial Homes Act 1967; to make provision for varying rights of occupation where both spouses have the same rights in the matrimonial home; and for purposes connected therewith. [26th October 1976]

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Matrimonial injunctions in the county court.

1 (1) Without prejudice to the jurisdiction of the High Court, on an application by a party to a marriage a county court shall have jurisdiction to grant an injunction containing one or more of the following provisions, namely:

- (a) a provision restraining the other party to the marriage from molesting the applicant;
- (b) a provision restraining the other party from molesting a child living with the applicant;
- (c) a provision excluding the other party from the matrimonial home or a part of the matrimonial home or from a specified area in which the matrimonial home is included;
- (d) a provision requiring the other party to permit the applicant to enter and remain in the matrimonial home or a part of the matrimonial home;

whether or not any other relief is sought in the proceedings.
(2) Subsection (1) above shall apply to a man and a woman who are living with each other in the same household as husband and wife as it applies to the parties to a marriage and any reference to the matrimonial home shall be construed accordingly.

Arrest for breach of injunction.

2 (1) Where, on an application by a party to a marriage, a judge grants an injunction containing a provision (in whatever terms)-

- (a) restraining the other party to the marriage from using violence against the applicant, or
- (b) restraining the other party from using violence against a child living with the applicant, or
- (c) excluding the other party from the matrimonial home or from a specified area in which the matrimonial home is included,

the judge may, if he is satisfied that the other party has caused actual bodily harm to the applicant or, as the case may be, to the child concerned and considers that he is likely to do so again, attach a power of arrest to the injunction.
(2) References in subsection (1) above to the parties to a marriage include references to a man and a woman who are living with each other in the same household as husband and wife and any reference in that subsection to the matrimonial home shall be construed accordingly.

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(3) If, by virtue of subsection (1) above, a power of arrest is attached to an injunction, a constable may arrest without warrant a person whom he has reasonable cause for suspecting of being in breach of such a provision of that injunction as falls within paragraphs (a) to (c) of subsection (1) above by reason of that person's use of violence or, as the case may be, of his entry into any premises or area.
(4) Where a power of arrest is attached to an injunction and a person to whom the injunction is addressed is arrested under the subsection (3) above:

(a) he shall be brought before a judge within that period of 24 hours beginning at the time of his arrest, and
(b) he shall not be released within that period except on the direction of the judge, but nothing in this section shall authorize his detention at any time after the expiry of that period.

(5) Where, by virtue of a power of arrest attached to an injunction, a constable arrests any person under subsection (3) above, the constable shall forthwith seek the directions-

(a) in a case where the injunction was granted by the High Court, of that court, and
(b) in any other case, of a county court,

as to the time and place at which that person is to be brought before a judge.

Amendment of Matrimonial Homes Act 1967. 1967 c. 75.

3. In section 1(2) of the Matrimonial Homes Act 1967 (which provides for applications for orders of the court declaring, enforcing, restricting or terminating rights of occupation under the Act or regulating the exercise by either spouse of the right to occupy the dwelling-house),

(a) for the word 'regulating' there shall be substituted the words 'prohibiting, suspending or restricting'; and
(b) at the end of the subsection there shall be added the words 'or requiring either spouse to permit the exercise by the other of that right'.

Order restricting occupation of matrimonial home.
4(1) Where each of two spouses is entitled, by virtue of a legal estate vested in them jointly, to occupy a dwelling-house in which they have or at any time have had a matrimonial home, either of them may apply to the court, with respect to the exercise during the subsistence of the marriage of the right to occupy the dwelling-house, for an order prohibiting, suspending or restricting its exercise by the other or requiring the other to permit its exercise by the applicant.
(2) In relation to orders under this section, section 1(3) (4) and (6) of the Matrimonial Homes Act 1967 (which relate to the considerations relevant to and the contents of, and to the jurisdiction to make, orders under that section) shall apply as they apply in relation to orders under that section; and in this section 'dwelling-house' has the same meaning as in that Act.
(3) Where each of two spouses is entitled to occupy a dwelling-house by virtue of a contract, or by virtue of any enactment giving them the right to remain in occupation, this section shall apply as it applies where they are entitled by virtue of a legal estate vested in them jointly.

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Short title, commencement and extent.

5(1) This Act may be cited as the Domestic Violence and Matrimonial Proceedings Act 1976.
(2) This Act shall come into force on such day as the Lord Chancellor may appoint by order made by statutory instrument and different days may be so appointed for different provisions of this Act:

Provided that if any provisions of this Act are not in force on 1st April 1977, the Lord Chancellor shall then make an order by statutory instrument bringing such provisions into force.

(3) This Act shall not extend to Northern Ireland or Scotland.

5 *Davis* v. *Johnson* [1979] AC 264, at 272

5.1 The facts

Jennifer Davis had been living with Nehemiah Johnson for three years, and they had a 2-year-old daughter. Davis applied for and was granted the tenancy of a council flat in Hackney, but at Johnson's request, the tenancy was put in their joint names. While they lived there, Johnson beat Davis frequently, often very violently. In September 1977 she left the flat, taking their daughter, and went to Erin Pizzey's refuge for battered wives. The refuge was very overcrowded, and in October, Davis applied for an injunction under the 1976 Act to exclude Johnson from the flat, so that she could return to it. The county court judge granted the injunction, but following the Court of Appeal's decision in *Cantliff* v. *Jenkins* shortly afterwards, it was withdrawn by a county court judge upon application by Johnson.

5.2 Lord Denning MR's judgment in the Court of Appeal [1979] AC 272–83

The Act of 1976
To my mind the Act is perfectly clear. Rejecting words that do not apply, section 1 (1) says that

'on an application by a party to a marriage a county court shall have jurisdiction to grant an injunction containing … (c) a provision excluding the other party from the matrimonial home …'

Subsection (2) deals with our very case. It says:

'Subsection (1) above shall apply to a man and a woman who are living with each other in the same household as husband and wife as it applies to the parties to a marriage …'

No one, I would have thought, could possibly dispute that those plain words by themselves cover this very case. They authorized the judge in the county court to grant an injunction excluding the man from this flat. So I turn to the reasoning of the two decisions of this court which have said the contrary. I

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must take each of their reasons in order, although it will take longer than I would have wished.

The comparison with the High Court jurisdiction

The judges in *B v B* [1978] Fam. 26 were much influenced by the opening and concluding words of section 1(1). For myself I think they add nothing and subtract nothing. But this is what they say: 'Without prejudice to the jurisdiction of the High Court … whether or not any other relief is sought in the proceedings.'

In *B v B* the judges seem to have thought that the High Court had little or no jurisdiction to exclude a husband from the matrimonial home. They said, at p. 34C–D, that if section 1(1) gave such jurisdiction to a county court,

> 'then it produces the quite astonishing result that the substantive law in the county court is different from the substantive law to be applied in the High Court.'

[Lord Denning then gave a series of examples of the broad jurisdiction of the Family Division of the High Court to grant injunctions to a wife in need of protection from her husband.]

Interference with rights of property

The second reason given by the judges in *B v B* [1978] Fam. 26 was that section I should be so construed as not to interfere with rights of property. It said that there was 'an elaborate legislative rode upholding the rights inter se of spouses in relation to the occupation of the matrimonial home' contained in the Matrimonial Homes Act 1967 as now amended by sections 3 and 4 of the Act of 1976; and that, in view of that code, section 1 of the Act of 1976 should be regarded as procedural only and not as interfering with the substantive rights of the parties. It did not, therefore, enable the court to exclude Mr B. since he had 'an indefeasible right as against Mrs B. to continue in occupation in virtue of his tenancy.' Nor did it enable the court in the second case [*Cantliff v Jenkins* [1978] Fam. 47] to oust Mr Jenkins because he, as joint tenant with Miss Cantliff, had a legal right as a joint tenant to be in possession.

Mr Joseph Jackson before us placed reliance on that second reason. He urged that there should be no interference with rights of property. But when pressed as to its consequences, it soon became clear that, if this view were correct, it would deprive section 1 of any effect at all. Mr Jackson said that, as between husband and wife, section 1(1) did not give the court any power to make an order excluding the husband from the matrimonial home so long as he was the owner or joint owner of the matrimonial home or the tenant or joint tenant. It could only make an order when the wife was the sole owner. But so limited, section 1(1) was not needed at all; for a wife who is the sole owner can rely on her legal right to exclude him. Then, as between a man and woman living together unmarried, Mr Jackson said that the woman could never invoke

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section 1(2) so long as the man was the owner or joint owner of the home, or the tenant or joint tenant of it: but only when the woman was the sole owner or tenant of it. But in practice the woman never is the sole owner or tenant.

So it seems to me that that second reason must be bad too. In order to give section 1 any effect at all, the court must be allowed to override the property rights of the man: and to exclude him from the matrimonial home, whatever his property rights may be.

The authority of the House of Lords

The third reason given by the court in *B v B* [1978] Fam. 26 was that on the authority of the House of Lords in *Tarr v Tarr* [1973] AC 254 there was a general principle of construction that an enactment should not be construed so as to affect the rights of property: and that, if 'battered wives' were to be enabled to turn out the men, it would mean 'a very drastic inroad into the common law rights of the property-owning spouse.' Similarly, said Mr Jackson before us, the personal rights of the deserted wife were not allowed to override the property rights of the husband: and he cited the decision of the House of Lords in *National Provincial Bank Ltd v Hastings Car Mart Ltd* [1965] AC 1175. I venture to suggest that that concept about rights of property is quite out of date. It is true that in the 19th century the law paid quite high regard to rights of property. But this gave rise to such misgivings that in modern times the law has changed course. Social justice requires that personal rights should, in a proper case, be given priority over rights of property. In this court at least, ever since the war we have acted on that principle. Whenever we have found a husband deserting his wife or being cruel to her, we have not allowed him to turn out his wife and his children and put them on the street. Even though he may have, in point of law, the absolute title to the property as owner, no matter whether it be the freehold of a fine residence or the tenancy of a council house, his property rights have been made in this court to take second place. I know that in those two cases the House of Lords reversed the decisions of this court and gave priority to property rights. But Parliament in each case afterwards passed laws so as to restore the decisions of this court. I prefer to go by the principles underlying the legislative enactments rather than the out-dated notions of the past. In my opinion, therefore, we should reject the suggestion that in this Act of 1976 Parliament intended to give priority to the property rights of the husband or the man. So the third reason, to my mind, fails.

Joint tenancies

I am afraid that I cannot see any possible justification for the decision in *Cantliff v Jenkins* [1978] Fam. 47. The woman there was joint tenant with the man. No joint tenant is entitled to oust the other from the property which they own jointly: see *Jacobs v Seward* (1872) L.R. 5 H.L. 464 and *Bull v Bull* [1955] 1 Q.B. 234. If he does so, the court will not only restore her, but will also order him out. If he were allowed to remain, it would be useless simply to allow her to return:

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because, as soon as she got in, he would turn her out again. So the court must be able to order him out. That was the very decision of this court in *Gurasz v Gurasz* [1970] P. 11.

The fifth reason – for how long?

In *Cantliff v Jenkins* [1978] Fam. 47 the Court of Appeal were influenced by the thought that an injunction under section 1 would be unlimited in point of time. They asked, at p. 51F–G, the rhetorical question 'For how long?' and answered it by saying that

> 'As a practical matter, such an injunction, unlimited in point of time, would be equivalent to a transfer of property order, continuing as long as the other party was living.'

That does not frighten me in the least. But in point of practice, I cannot imagine that, in these cases, under section 1 any injunction would last very long. It is essentially a short-term remedy to meet an urgent need. Under the guidance of their legal advisers, the parties will be able to come to a solution between themselves. Thus the council may transfer the tenancy into the woman's name. So may a private landlord. Or there may be divorce proceedings in which the court may make an order transferring the title. Or the parties may come together again. Or one or the other may form a new relationship. And so far as rent and rates are concerned, the judge can easily see to those. If the wife is on social security, she will get an allowance with which to pay these.

The phrase 'are living' in subsection (3)

The judges in *B v B* [1978] Fam. 26 felt difficulty with the words 'are living with each other in the same household.' They felt that on the literal meaning of the words they must be living with each other at the time when the woman applies to the court. They realized that in most cases the woman would have already left the house at the time when she makes her application. So the literal meaning would deprive the subsection of much of its effect.

To my mind these words do not present any difficulty. They are used to denote the relationship between the parties before the incident which gives rise to the application. If they were then living together in the same household as husband and wife, that is enough.

The proceedings in Parliament

So, in my opinion, the reasons given by the judges in those two cases were erroneous. But I wish to go further. I notice that in neither case were the judges referred to the Report of the Select Committee, nor to the proceedings in Parliament. If the judges had been referred to those, they would have discovered the intention of Parliament in passing this Act: and they would, I am sure, have given effect to that intention. This shows how important it is that a court should, in a proper case, have power to refer to the report of a select committee

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or other *travaux préparatoires*. It will enable the court to avoid an erroneous construction of the Act: and that will be for the good of all. So I will proceed to consider them in this case.

First, the House of Commons appointed a Select Committee on Violence in Marriage. They heard much evidence and presented a very informative report on July 30, 1975. It formed the basis of the Act of 1976. There is clear authority that the court can read it so as to ascertain the 'mischief which the Act was intending to remedy. Such is plain from the decision of the House of Lords in *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] A.C. 591. The House there overruled this court [1974] Q.B. 660. The decisive factor was that they were referred to the report of a committee under the chairmanship of Greer LJ. and we had not been. If we had seen it, we should not have fallen into error. While all the law lords agreed that judges could read the report so as to ascertain the 'mischief there was a difference of opinion as to whether they could read the 'recommendations' that it contained. I must say that it seems to me the whole of such a report should be open to be read. It is absurd to suggest that the judges are to be selective in their reading of it. As Lord Dilhorne observed: 'Have they to stop reading when they come to a recommendation?'; see [1975] A.C. 591, 622. And as Lord Simon of Glaisdale said, at p. 646:

> Where Parliament is legislating in the light of a public report I can see no reason why a court of construction should deny itself any part of that light and insist on groping for a meaning in darkness or half-light.'

Second, the Parliamentary debates on the Domestic Violence Bill. Some may say – and indeed have said – that judges should not pay any attention to what is said in Parliament. They should grope about in the dark for the meaning of an Act without switching on the light. I do not accede to this view. In some cases Parliament is assured in the most explicit terms what the effect of a statute will be. It is on that footing that members assent to the clause being agreed to. It is on that understanding that an amendment is not pressed. In such cases I think the court should be able to look at the proceedings. And, as I read the observations of Lord Simon of Glaisdale in *Race Relations Board v Dockers' Labour Club and Institute Ltd* [1976] A.C. 285, 299, he thought so too. I would give an instance. In the debate on the Race Relations Act 1968 there was, I believe, a ministerial assurance given in Parliament about its application to clubs: and I have a feeling that some of their Lordships looked at it privately and were influenced by it: see *Race Relations Board v Charter* [1973] A.C. 868, 899–901. I could wish that in those club cases we had been referred to it. It might have saved us from the error which the House afterwards held we had fallen into. And it is obvious that there is nothing to prevent a judge looking at these debates himself privately and getting some guidance from them. Although it may shock the purists, I may as well confess that I have sometimes done it. I have done it in this very case. It has thrown a flood of light on the position. The

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statements made in committee disposed completely of Mr Jackson's argument before us. It is just as well that you should know of them as well as me. So I will give them.

The statements in Parliament

So far as section 1(1) was concerned, the clause was inserted in the Standing Committee on June 30, 1976. In introducing it, the Member of Parliament in charge (Miss Richardson) proposed a new clause and said:

> 'The position has recently been considered by the Court of Appeal and restated in *Bassett v Bassett* … The new clause would result in a uniform practice being applied in domestic proceedings of this kind, whether or not matrimonial proceedings were in progress.'

So far as subsection (2) was concerned (dealing with unmarried women), she said:

> 'In these cases, under existing law, an injunction can be obtained only by means of an action of assault which in county courts must include, I understand, a claim for damages. Even an injunction obtained in this way would not extend to the question of the occupation of the home when the applicant is not the sole owner or the official tenant … the law should be extended to cover these cases. This is what we are seeking to do here.'

She went on to say: 'The words "living with each other in the same household" are intended to avoid a casual relationship, but to indicate a continuing state of affairs.'

It may interest you all to know that she went on to express her gratitude to those who had given her so much assistance in the drafting of the new clause, including the Lord Chancellor and his staff and the parliamentary counsel, and for the Law Commission's suggestions which had been taken into the Bill. 'I hope that now,' she said, 'we really have got it right.' This hope was completely frustrated by *B v B*. It is surely permissible for us now to get it right.

So it seems to me that on the true construction of this statute, with all the aids that we have at hand, it is plain that the deputy judge in the county court in this case was entitled to make the original order which he made, ordering the man to vacate the house and allowing the woman and her child to return to it: and, in my view, the cases in this court of *B v B* and *Cantliff v Jenkins* were wrongly decided.

Departure from previous decisions

I turn to the second important point: Can we depart from those two cases? Although convinced that they are wrong, are we at liberty to depart from them? What is the correct practice for this court to follow?

On principle, it seems to me that, while this court should regard itself as normally bound by a previous decision of the court, nevertheless it should be at liberty to depart from it if it is convinced that the previous decision was wrong.

What is the argument to the contrary? It is said that if an error has been made, this court has no option but to continue the error and leave it to be corrected by the House of Lords. The answer is this: the House of Lords may never have an opportunity to correct the error: and thus it may be perpetuated indefinitely, perhaps for ever. That often happened in the old days when there was no legal aid. A poor person had to accept the decision of this court because he had not the means to take it to the House of Lords. It took 60 years before the erroneous decision in *Carlisle and Cumberland Banking Co v Bragg* [1911] 1 KB 489 was overruled by the House of Lords in *Gallie v Lee* [1971] AC 1004. Even today a person of moderate means may be outside the legal aid scheme, and not be able to take his case higher: especially with the risk of failure attaching to it. That looked as if it would have been the fate of Mrs Farrell when the case was decided in this court; see *Farrell v Alexander* [1976] Q.B. 345, 359. But she afterwards did manage to collect enough money together and by means of it to get the decision of this court reversed by the House of Lords: see *Farrell v Alexander* [1977] AC 59. Apart from monetary considerations, there have been many instances where cases have been settled pending an appeal to the House of Lords: or, for one reason or another, not taken there, especially with claims against insurance companies or big employers. When such a body has obtained a decision of this court in its favour, it will buy off an appeal to the House of Lords by paying ample compensation to the appellant. By so doing, it will have a legal precedent on its side which it can use with effect in later cases. I fancy that such may have happened in cases following *Oliver v Ashman* [1962] 2 QB 210. By such means an erroneous decision on a point of law can again be perpetuated for ever. Even if all those objections are put on one side and there is an appeal to the House of Lords, it usually takes 12 months or more for the House of Lords to reach its decision. What then is the position of the lower courts meanwhile? They are in a dilemma. Either they have to apply the erroneous decision of the Court of Appeal, or they have to adjourn all fresh cases to await the decision of the House of Lords. That has often happened. So justice is delayed – and often denied – by the lapse of time before the error is corrected. The present case is a crying instance …

So much for principle. But what about our precedents? What about *Young v Bristol Aeroplane Co Ltd* [1944] K.B. 718?

The position before 1944

I will first state the position as it was before the year 1944. The Court of Appeal in its present form was established in 1873. It was then the final court of appeal. Appeals to the House of Lords were abolished by that Act and only restored a year or two later. The Court of Appeal inherited the jurisdiction of the previous courts of appeal such as the Exchequer Chamber and the Court of Appeal in Chancery. Those earlier courts had always had power to reconsider and review the law as laid down in previous decisions: and, if that law was found to be wrong, to correct it: but without disturbing the actual decision. I take this from

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the statements of eminent judges of those days who knew the position. In particular in 1852 Lord St. Leonards L.C. in *Bright v Hutton* (1852) 3 H.L. Gas. 341, 388, said in the House of Lords:

> ' … You are not bound by any rule of law you may lay down, if upon a subsequent occasion, you should find reason to differ from that rule; that is, that this House, *like every court of justice*, possesses an inherent power to correct an error into which it may have fallen.'

Likewise in 1877 Lord Cairns L.C. in *Ridsdale v Clifton* (1877) 2 RD. 276, 306–307. Then in 1880 the new Court of Appeal on two occasions departed from the earlier decisions of the Court of Appeal in Chancery. It was in the important cases of *In re Hallett's Estate* (1880) 13 Ch. D. 696 and *Mills v Jennings* (1880) 13 Ch. D. 639, given on February 11 and 14, 1880, within four days of one another. In the latter case the Court of Appeal declared in a single reserved judgment (and among their members was James L J. who had an unrivalled experience of 40 years of the practice of the court) that:

> 'As a rule, this court ought to treat the decisions of the Court of Appeal in Chancery as binding authorities, but we are at liberty not to do so when there is a sufficient reason for overruling them. As the decision in *Tassell v Smith* (1858) 2 De G. & J. 713 may lead to consequences so serious, we think that we are at liberty to reconsider and review the decision in that case as if it were being re-heard in the old Court of Appeal in Chancery, as was not uncommon (see *Mills v Jennings*, 13 Ch.D. 639, 648–649).'

Four years later in *The Vera Cruz (No 2)* (1884) 9 RD. 96, Brett M.R. with 27 years' experience of the previous practice, said, at p. 98:

> '… there is no statute or common law rule by which one court is bound to abide by the decision of another of equal rank, it does so simply from what may be called the comity among judges. In the same way there is no common law or statutory rule to oblige a court to bow to its own decisions, it does so again on the grounds of judicial comity.'

And Fry LJ. said, at p. 101:

> Bearing in mind the observations of Lord St. Leonards (he by a slip said Lord Truro) in *Bright v Hutton* (1852) 3 H.L. Gas. 341 and Lord Cairns in *Ridsdale v Clifton* (1877) 2 RD. 276, I think that we are not concluded from entertaining this case; …'

Two years later in 1886 in *Ex parte Stanford* (1886) 17 Q.B.D. 259, 269 Lord Esher M.R. [formerly Sir William Brett] called together the full court of six so as to disregard an earlier decision of a court of three. He explained his action quite clearly in *Kelly Co v Kellond* (1888) 20 Q.B.D. 569, 572 in a passage very apposite today:

> 'This court is one composed of six members, and if at any time a decision of a lesser number is called in question, and a difficulty arises about the accuracy of it,

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> I think this court is entitled, sitting as a full court, to decide whether we will follow or not the decision arrived at by the smaller number.'

Those were all judges who knew the old practice: and the principles stated by them were accepted without question throughout the next 50 years. In *Wynne-Finch v Chaytor* [1903] 2 Ch. 475 the full court overruled a previous decision of the court. Afterwards Greer LJ. repeatedly said that this court could depart from a previous decision if it thought it right to do so: see *Newsholme Bros v Road Transport and General Insurance Co Ltd* [1929] 2 K.B. 356, 384 and *In re Shoesmith* [1938] 2 K.B. 637, 644. In another case in 1941, *Lancaster Motor Co (London) Ltd v Bremith Ltd* [1941] 1 K.B. 675, the Court of Appeal again did not follow a previous decision. So much for the practice until 1944.

Young v Bristol Aeroplane Co Ltd

The change came about in 1944. In *Young v Bristol Aeroplane Co Ltd* [1944] K.B. 718 the court overruled the practice of a century. Lord Greene M.R., sitting with a court of five, laid down that this court is bound to follow its previous decision as well as those of courts of coordinate jurisdiction: subject to only three exceptions: (i) where there are two conflicting decisions (ii) where a previous decision cannot stand with a decision of the House of Lords (iii) if a previous decision was given per incuriam.

It is to be noticed that the court laid down that proposition as a rule of law. That was quite the contrary of what Lord Esher had declared in *The Vera Cruz* in 1884. He said it arose only as a matter of judicial comity.

Events have proved that in this respect Lord Esher was right and Lord Greene was wrong. I say this because the House of Lords in 1898 had held itself bound by its own previous decisions as a rule of law: see *London Street Tramways Co. Ltd v London County Council* [1898] AC 375. But yet in 1966 it discarded that rule. In a statement headed Practice Statement (Judicial Precedent) it was said:

> 'Their Lordships nevertheless recognize that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose, therefore, to modify their present practice, and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so (see [1966] 1 WLR 1234).'

That shows conclusively that a rule as to precedent (which any court lays down for itself) is not a rule of law at all. It is simply a practice or usage laid down by the court itself for its own guidance: and, as such, the successors of that court can alter that practice or amend it or set up other guide lines, just as the House of Lords did in 1966. Even as the judges in *Young v Bristol Aeroplane Co Ltd* [1944] KB 718, thought fit to discard the practice of a century and declare a new practice or usage, so we in 1977 can discard the guide lines of 1944 and set up new guide lines of our own or revert to the old practice laid down by Lord Esher.

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Nothing said in the House of Lords, before or since, can stop us from doing so. Anything said about it there must needs be obiter dicta. This was emphasized by Salmon LJ in this court in *Gallic v Lee* [1969] 2 Ch. 17, 49:

> 'The point about the authority of this court has never been decided by the House of Lords. In the nature of things it is not a point that could even come before the House for decision. Nor does it depend upon any statutory or common law rule. This practice of ours apparently rests solely upon a concept of judicial comity laid down many years ago and automatically followed ever since … Surely today judicial comity would be amply satisfied if we were to adopt the same principle in relation to our decisions as the House of Lords has recently laid down for itself by pronouncement of the whole House.'

The new guidelines

So I suggest that we are entitled to lay down new guide lines. To my mind, this court should apply similar guide lines to those adopted by the House of Lords in 1966. Whenever it appears to this court that a previous decision was wrong, we should be at liberty to depart from it if we think it right to do so. Normally – in nearly every case of course – we would adhere to it. But in an exceptional case we are at liberty to depart from it.

Alternatively, in my opinion, we should extend the exceptions in *Young v Bristol Aeroplane Co Ltd* [1944] KB 718 when it appears to be a proper case to do so. I realize that this comes virtually to the same thing, but such new exceptions have been created since *Young v Bristol Aeroplane Co Ltd.* For instance, this court can depart from a previous decision of its own when sitting on a criminal cause or matter: see the recent cases of *R v Gould* [1968] 2 QB 65 and *R v Newsome* [1970] 2 QB 711. Likewise by analogy it can depart from a previous decision in regard to contempt of court. Similarly in the numerous cases when this court is sitting as a court of last resort. There are many statutes which make this court the final court of appeal. In every jurisdiction throughout the world a court of last resort has, and always has had, jurisdiction to correct the errors of a previous decision: see *Hadfield's case* (1873) L.R. 8 CP 306, 313 and Pollock's *First Book of Jurisprudence* (1896), pp. 333–334. In the recent case of *Tiverton Estates Ltd v Wearwell Ltd* [1975] Ch. 146, we extended the exceptions by holding that we could depart from a previous decision where there were conflicting principles-as distinct from conflicting decisions – of this court. Likewise we extended the notion of per incuriam in *Industrial Properties. (Barton Hill) Ltd v Associated Electrical Industries Ltd* [1977] QB 580. In the more recent cases of *In re K. (Minors) (Children: Care and Control)* [1977] Fam. 179 and *S (BD) v S (DJ) (Children: Care and Control)* [1977] Fam. 109, this court in its jurisdiction over children did not follow the earlier decision of *In re L (Infants)* [1962] 1 WLR 886. I would add also that, when the words of the statute are plain, then it is not open to any decision of any court to contradict the statute: because the statute is the final authority on what the law is. No court can depart from the plain words of a statute. On this ground may be rested the

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decisions in *W & JB Eastwood v Herrod* [1968] 2 QB 923 and *Hanning v Maitland (No 2)* [1970] 1 QB 580, where this court departed from previous interpretations of a statute. In *Schorsch Meier GmbH v Hennin* [1975] QB 416 we introduced another exception on the principle 'cessante ratione legis cessat ipsa lex'. This step of ours was criticized by the House of Lords in *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443: but I venture to suggest that, unless we had done so, the House of Lords would never have had the opportunity to reform the law. Every court would have held that judgments could only be given in sterling. No one would have taken the point to the Lords, believing that it was covered by *In re United Railways of Havana and Regla Warehouses Ltd* [1961] AC 1007. In this present case the appellant, Miss Davis, was at first refused legal aid for an appeal, because the point was covered by the two previous decisions. She was only granted it afterwards when it was realized by the legal aid committee that this court of five had been specially convened to reconsider and review those decisions. So, except for this action of ours, the law would have been regarded as settled by *B v B* [1978] Fam. 26 and *Cantliff v Jenkins* [1978] Fam. 47: and the House of Lords would not have had the opportunity of pronouncing on it. So instead of rebuking us, the House of Lords should be grateful to us for giving them the opportunity of considering these decisions.

The truth is that the list of exceptions from *Young v Bristol Aeroplane Co Ltd* [1944] KB 718 is now getting so large that they are in process of eating up the rule itself: and we would do well simply to follow the same practice as the House of Lords.

Conclusion

Here we have to consider a jurisdiction newly conferred on the county courts of England for the protection of battered wives. It is most important that all the county courts up and down the country should know at once what their powers are to protect these women: and, if the jurisdiction exists, it is most important that the county courts should exercise it at once so that the law should give these women the protection which Parliament intended they should have. This is a very recent Act: it has only been in force 4½ months. It is almost inevitable in the early stages, with all the urgency attaching to the applications, that some errors may be made. If they are made, and it appears to the Court of Appeal, on further consideration, that a previous decision was clearly wrong, in my opinion we can depart from it. I would prefer to put it on the ground that this court should take for itself guide lines similar to those taken by the House of Lords; but, if this be not acceptable, I am of the opinion that we should regard it as an additional exception to those stated in *Young v Bristol Aeroplane Co Ltd* [1944] K.B. 718, especially as by so doing we can better protect the weak and do what Parliament intended.

I would therefore allow the appeal and restore the decision of the original deputy circuit judge who ordered the man to vacate the council flat.

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5.3 Extracts from the speeches of Lords Diplock and Scarman, and Viscount Dilhorne in the House of Lords

Lord Diplock: 'My Lords, this appeal is from a judgment of the Court of Appeal which, by a majority of three out of five members who sat (Lord Denning M.R., Sir George Baker P. and Shaw L.J.; Goff and Cumming-Bruce L.JJ. dissenting), purported to overrule two recent previous decisions of its own as to the meaning of a statute.

Put in a nutshell, the basic question of statutory construction that has given rise to so acute a conflict of judicial opinion is whether section 1 of the Domestic Violence and Matrimonial Proceedings Act 1976 does no more than provide additional, expeditious and more easily available remedies to prevent threatened invasions of existing legal rights originating from other sources, whether statutory or at common law, or whether it also, of itself, creates new legal rights as well as new remedies for threatened invasion of them. The former I will call the 'narrower,' the latter the 'broader' meaning. In *B v B (Domestic Violence: Jurisdiction)* [1978] Fam. 26 on 13 October 1977, the Court of Appeal consisting of Megaw, Bridge, and Waller L.JJ. decided unanimously that it bore the narrower meaning: it gave additional remedies but created no new legal rights. In *Cantliff v Jenkins (Note)* [1978] Fam. 47 on 20 October 1977, the Court of Appeal then consisting of Stamp, Orr, and Ormrod L.JJ., while holding itself to be bound by the decision in *B v B* since it regarded that case as indistinguishable, took occasion, again unanimously, to express its concurrence with the reasoning of Bridge L J. in *B v B* and added, for good measure, an additional reason in support of the narrower meaning placed upon the section in that previous judgment. For my part, I think that *Cantliff v Jenkins* was distinguishable from *B v B* but it is conceded that the facts in the instant case are indistinguishable from those held by the Court of Appeal in *Cantliff v Jenkins* to be relevant to its decision in that case. So, when the instant case came before the Court of Appeal, there was a preliminary question which fell to be determined; and that was whether the court was bound by its previous decisions in *B v B* and *Cantliff v Jenkins.* The view of a majority of three was that it was not so bound, though their individual reasons for so holding were not identical. This opened the way to a fresh consideration of the meaning of the statute by all five members. On this question they were divided four to one. Gumming Bruce L.J. sided with the six Lords Justices who in the two previous cases had adopted the narrower meaning of section 1; the remainder were of opinion that it bore the wider meaning and did create new legal rights as well as new remedies for threatened violation of them. So, of the members of the Court of Appeal who sit regularly in civil matters (of whom there are now 17) there were seven who had adopted the narrower meaning of the section, three who, together with the President of the Family Division, had preferred the wider meaning, and a silent minority of seven regular members of the Court of Appeal whose views had not been expressed by the conclusion of the hearing of the instant case in the Court of Appeal.

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I draw attention to this arithmetic because if the view expressed by Lord Denning M.R., Sir George Baker P. and Shaw L.J. that the Court of Appeal was not bound by its own previous decisions is correct, this would apply to its decision in the instant case; and had there been no appeal to your Lordships' House to cut the Gordian knot, it would have been open to the Court of Appeal in any subsequent cases to give effect to the wider or the narrower construction of section 1 of the Domestic Violence and Matrimonial Proceedings Act 1976 according to the preference of the majority of the members who happened to be selected to sit on that particular appeal.

My Lords, the difference of judicial opinion as to the true construction of the section has spilled over into this House; for although I agree that on the facts of this case it may be that the order of the Court of Appeal could be upheld, and that the actual decision of *Cantliff v Jenkins* was wrong, I nevertheless find myself regretfully compelled to part company with the rest of your Lordships and to align myself with the seven Lords Justices who have expressed their preference for the narrower meaning. This cannot affect the disposition of the instant appeal nor will it affect the application of the Act in subsequent cases; for the section means what a majority of this House declares it means. But it does make the score of appellate opinions in favour of the broader and the narrower meanings eight all.

Although on the question of the construction of section 1 of the Domestic Violence and Matrimonial Proceedings Act 1976 this House has not been able to reach unanimity, nevertheless on what in the instant case was the first question for the Court of Appeal, viz. whether it was bound by its own previous decisions, I understand us to be unanimous, so I too will deal with it first.

So far as civil matters are concerned the law upon this question is now clear and unassailable. It has been so for more than 30 years. I do not find it necessary to trace the origin and development of the doctrine of stare decisis before the present structure of the courts was created in 1875. In that structure the Court of Appeal in civil actions has always played, save in a few exceptional matters, an intermediate and not a final appellate role. The application of the doctrine of stare decisis to decisions of the Court of Appeal was the subject of close examination by a Court of Appeal composed of six of its eight regular members in *Young v Bristol Aeroplane Co Ltd* [1944] K.B. 718. The judgment of the court was delivered by Lord Greene M.R. Its effect is summarized accurately in the head note as being that:

> 'The Court of Appeal is bound to follow its own decisions and those of courts of co-ordinate jurisdiction, and the 'full' court is in the same position in this respect as a division of the court consisting of three members. The only exceptions to this rule are: – (1) The court is entitled and bound to decide which of two conflicting decisions of its own it will follow; (2) the court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot, in its opinion, stand with a decision of the House of Lords; (3) the court is not bound to follow a decision of its own if it is satisfied that the decision was given per incuriam, e.g.,

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> where a statute or a rule having statutory effect which would have affected the decision was not brought to the attention of the earlier court.'

The rule as expounded in the *Bristol Aeroplane case* was not new in 1944. It had been acted upon on numerous occasions and had, as recently as the previous year, received the express confirmation of this House of Viscount Simon L.C. with whose speech Lord Atkin agreed: see *Perrin v Morgan* [1943] A.C. 399, 405. Although prior to 1944 there had been an occasional deviation from the rule, which was why a court of six was brought together to consider it, there has been none since. It has been uniformly acted upon by the Court of Appeal and re-affirmed, notably in a judgment of a Court of Appeal of five, of which Lord Denning as Denning L.J. was a member, in *Morelle Ltd v Wakeling* [1955] 2 Q.B. 379. This judgment emphasized the limited scope of the per incuriam exception to the general rule that the Court of Appeal is bound by its own previous decisions. The rule has also been uniformly accepted by this House as being correct. Because until recently it has never been questioned, the acceptance of the rule has generally been tacit in the course of recounting the circumstances which have rendered necessary an appeal to your Lordships' House; but occasionally the rule has been expressly referred to, as by Viscount Simon L.C. in the *Bristol Aeroplane case* itself [1944] A.C. 163, 169, and by Lord Morton of Henryton and Lord Porter in *Bonsor v Musicians' Union* [1956] A.C. 104, 120, 128.

Furthermore, the provisions of the Administration of Justice Act 1969 which authorize 'leap-frog' appeals in civil cases direct from the High Court to this House are based on the tacit assumption that the rule as stated in the *Bristol Aeroplane case* is correct. One of the two grounds on which a High Court judge may authorize a 'leap-frog' appeal is if he is satisfied that a point of law of general importance involved in his decision:

> 'is one in respect of which the judge is bound by a decision of the Court of Appeal or of the House of Lords in previous proceedings, and was fully considered in the judgments given by the Court of Appeal or the House of Lords (as the case maybe) in those previous proceedings (section 12(3) (b)).'

The justification for by-passing the Court of Appeal when the decision by which the judge is bound is one given by the Court of Appeal itself in previous proceedings is because that court also is bound by the decision, if the point of law was fully considered and not passed over per incuriam.

So the rule as it had been laid down in the *Bristol Aeroplane case* [1944] K.B. 718 had never been questioned thereafter until, following upon the announcement by Lord Gardiner L.C. in 1966 [*Practice Statement (Judicial Precedent)* [1966] 1 W.L.R. 1234] that the House of Lords would feel free in exceptional cases to depart from a previous decision of its own, Lord Denning M.R. conducted what may be described, I hope without offence, as a one-man crusade with the object of freeing the Court of Appeal from the shackles which the doctrine of stare decisis imposed upon its liberty of decision by the application of the rule laid down in the *Bristol Aeroplane case to* its own

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previous decisions; or, for that matter, by any decisions of this House itself of which the Court of Appeal disapproved: see *Broome v Cassell & Co Ltd* [1971] 2 Q.B. 354 and *Schorsch Meier GmbH v Hennin* [1975] Q.B. 416. In his judgment in the instant appeal, Lord Denning M.R. refers to a number of cases after 1966 in which he suggests that the Court of Appeal has either refused to apply the rule as laid down in the Bristol Aeroplane case or has added so many other exceptions to the three that were stated by Lord Greene M.R. that it no longer operates as a curb on the power of the Court of Appeal to disregard any previous decision of its own which the majority of those members who happen to be selected to sit on a particular appeal think is wrong. Such, however, has not been the view of the other two members of the Court of Appeal who were sitting with the Master of the Rolls in any of those cases to which he refers. Where they felt able to disregard a previous decision of the Court of Appeal this was only because, in their opinion, it fell within the first or second exception stated in the *Bristol Aeroplane* case.

When *Miliangos v George Frank (Textiles) Ltd* [1975] Q.B. 487 was before the Court of Appeal Lord Denning M.R. appears to have reluctantly recanted. That was a case in which Bristow J. had held that he was bound by a decision of this House in *In re United Railways of Havana and Regla Warehouses Ltd* [1961] A.C. 1007, despite the fact that the Court of Appeal had purported to overrule it in the *Schorsch Meier case.* On appeal from his decision Lord Denning M.R. disposed of the case by holding that the Court of Appeal was bound by its own previous decision in the *Schorsch Meier case.* He added, at p. 503:

> 'I have myself often said that this court is not absolutely bound by its own decisions and may depart from them just as the House of Lords from theirs: but my colleagues have not gone so far. So that I am duty bound to defer to their view.'

The reasons why his colleagues had not agreed to follow him are plain enough. In an appellate court of last resort a balance must be struck between the need on the one side for the legal certainty resulting from the binding effect of previous decisions, and, on the other side the avoidance of undue restriction on the proper development of the law. In the case of an intermediate appellate court, however, the second desideratum can be taken care of by appeal to a superior appellate court, if reasonable means of access to it are available; while the risk of the first desideratum, legal certainty, if the court is not bound by its own previous decisions grows even greater with increasing membership and the number of three-judge divisions in which it sits – as the arithmetic which I have earlier mentioned shows. So the balance does not lie in the same place as in the case of a court of last resort. That is why the Lord Chancellor's announcement about the future attitude towards precedent of the House of Lords in its judicial capacity concluded with the words: 'This announcement is not intended to affect the use of precedent elsewhere than in this House.'

Much has been said in the instant case about the delay and expense which would have been involved if the Court of Appeal had treated itself as bound by

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its previous decision in *B v B* [1978] Fam. 26 and *Cantliff v Jenkins* [1978] Fam. 47, so as to make it necessary for the respondent to come to this House to argue that those decisions should be overruled. But a similar reasoning could also be used to justify any High Court or county court judge in refusing to follow a decision of the Court of Appeal which he thought was wrong. It is true that since the appeal in the instant case was from the county court, not the High Court, the 'leap-frog' procedure was not available, but since it was conceded that the instant case was indistinguishable from *Cantliff v Jenkins*, there was no need for anything but the briefest of hearings in the Court of Appeal. The appeal to this House could in that event have been heard before Christmas instead of in January: and at less cost. The decision could have been announced at once and the reasons given later.

Of the various ways in which Lord Denning M.R.'s colleagues had expressed the reasons for continuing to regard the rule laid down in the *Bristol Aeroplane case* [1944] K.B. 718 as salutary in the interest of the administration of justice, I select those given by Scarman L.J. in *Tiverton Estates Ltd v Wearwell Ltd* [1975] Ch. 146, 172–173, in the Court of Appeal.

The Court of Appeal occupies a central, but, save for a few exceptions, an intermediate position in our legal system. To a large extent, the consistency and certainty of the law depend upon it. It sits almost always in divisions of three: more judges can sit to hear a case, but their decision enjoys no greater authority than a court composed of three. If, therefore, throwing aside the restraints of *Young v Bristol Aeroplane Co. Ltd.*, one division of the court should refuse to follow another because it believed the other's decision to be wrong, there would be a risk of confusion and doubt arising where there should be consistency and certainty. The appropriate forum for the correction of the Court of Appeal's errors is the House of Lords, where the decision will at least have the merit of being final and binding – subject only to the House's power to review its own decisions. The House of Lords, as the court of last resort, needs this power of review: it does not follow that an intermediate appellate court needs it and, for the reasons I have given, I believe the Court of Appeal is better without it, save in the exceptional circumstances specified in *Young v Bristol Aeroplane Co Ltd.*'

My own reason for selecting this passage out of many is because in the following year in *Farrell v Alexander* [1976] Q.B. 345 Scarman LJ. again referred to it in dissociating himself from the view, to which Lord Denning M.R. had by then once again reverted, that the Court of Appeal was not bound by any previous decision of its own that it was satisfied was wrong. What Scarman LJ. there said, at p. 371, was:

> '… I have immense sympathy with the approach of Lord Denning M.R. I decline to accept his lead only because I think it damaging to the law in the long term – though it would undoubtedly do justice in the present case. To some it will appear that justice is being denied by a timid, conservative, adherence to judicial precedent. They would be wrong. Consistency is necessary to certainty – one of

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> the great objectives of law. The Court of Appeal – at the very centre of our legal system – is responsible for its stability, its consistency, and its predictability: see my comments in *Tiverton Estates Ltd v Wearwell Ltd* [1975] Ch. 146, 172. The task of law reform, which calls for wide-ranging techniques of consultation and discussion that cannot be compressed into the forensic medium, is for others. The courts are not to be blamed in a case such as this. If there be blame, it rests elsewhere.'

When *Farrell v Alexander* ([1977] A.C. 59) reached this House Scarman L.J.'s way of putting it was expressly approved by my noble and learned friends Viscount Dilhorne, at p. 81, and Lord Simon of Glaisdale at p. 92, while the other member of this House who adverted to the question of stare decisis, Lord Russell of Killowen, at p. 105, expressed his 'unreserved disapproval' of that part of Lord Denning M.R.'s judgment in which he persisted in his heterodox views on the subject.

In the instant case Lord Denning M.R. in effect reiterated his opinion that the Court of Appeal in relation to its own previous decisions should adopt the same rule as that which the House of Lords since the announcement in 1966 has applied in relation to its previous decisions. Sir George Baker P., on the other hand, preferred to deal with the problem of stare decisis by adding a new exception to the rule in the *Bristol Aeroplane case* ([1944] K.B. 718), which he formulated as follows:

> 'The court is not bound to follow a previous decision of its own if satisfied that that decision was clearly wrong and cannot stand in the face of the will and intention of Parliament expressed in simple language in a recent statute passed to remedy a serious mischief or abuse, and further adherence to the previous decision must lead to injustice in the particular case and unduly restrict proper development of the law with injustice to others.'

Shaw L.J. phrased the exception rather differently. He said:

> 'It would be in some such terms as that the principle of stare decisis should be relaxed where its application would have the effect of depriving actual and potential victims of violence of a vital protection which an Act of Parliament was plainly designed to afford to them, especially where, as in the context of domestic violence, that deprivation must inevitably give rise to an irremediable detriment to such victims and create in regard to them an injustice irreversible by a later decision of the House of Lords.'

My Lords, the exception as stated by Sir George Baker P. would seem wide enough to cover any previous decision on the construction of a statute which the majority of the court thought was wrong and would have consequences that were regrettable, at any rate if they felt sufficiently strongly about it. As stated by Shaw L.J. the exception would appear to be what might be termed a 'one-off' exception. It is difficult to think of any other statute to which it would apply.

In my opinion, this House should take this occasion to re-affirm expressly, unequivocably and unanimously that the rule laid down in the *Bristol*

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Aeroplane case [1944] K.B. 718 as to stare decisis is still binding on the Court of Appeal.

I come now to the construction of section 1 of the Domestic Violence and Matrimonial Proceedings Act 1976 under which the applicant, Miss Davis, sought an injunction against the respondent, Mr Johnson, to exclude him from the council flat in Hackney of which they were joint tenants.

I am in agreement with your Lordships that upon the facts that I have summarized the county court judge had jurisdiction to grant an injunction excluding Mr Johnson temporarily from the flat of which he and Miss Davis were joint tenants. I reach this conclusion notwithstanding that, in disagreement with your Lordships, I remain unpersuaded that section 1(2) bears the broader meaning rather than the narrower one. As my opinion that the narrower meaning is to be preferred will not prevail I shall resist the temptation to add to or elaborate upon the reasons given by Bridge L.J. in *B v B* [1978] Fam. 26 for that preference. There are, however, two initial matters of more general application to the interpretation of statutes that arise out of the judgment of the Court of Appeal. Upon these I wish to comment.

I have had the advantage of reading what my noble and learned friends Viscount Dilhorne and Lord Scarman have to say about the use of Hansard as an aid to the construction of a statute. I agree with them entirely and would add a word of warning against drawing too facile an analogy between proceedings in the Parliament of the United Kingdom and those *travaux préparatoires* which may be looked at by the courts of some of our fellow member states of the European Economic Community to resolve doubts as to the interpretation of national legislation or by the European Court of Justice, and consequently by English courts themselves, to resolve doubts as to the interpretation of Community legislation. Community legislation viz. Regulations and Directives, are required by the Treaty of Rome to state reasons on which they are based, and when submitted to the Council in the form of a proposal by the Commission the practice is for them to be accompanied by an explanatory memorandum by the Commission expanding the reasons which appear in more summary form in the draft Regulation or Directive itself. The explanatory memoranda are published in the Official Journal together with the proposed Regulations or Directives to which they relate. These are true *travaux préparatoires;* they are of a very different character from what is said in the passion or lethargy of parliamentary debate; yet a survey of the judgments of the European Court of Justice will show how rarely that court refers even to these explanatory memoranda for the purpose of interpreting Community legislation.

A closer analogy with *travaux préparatoires* is to be found in reports of such bodies as the Law Commissions and committees or commissions appointed by government or by either House of Parliament to consider reforming particular branches of the law. Where legislation follows upon a published report of this kind the report may be used as an aid to identify the mischief which the legislation is intended to remedy; but not for the purpose of

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construing the enacting words in such a way as to conform with recommendations made in the report as to the form the remedy should take: *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] A.C. 591. This does not mean, of course, that one must shut one's eyes to the recommendations, for a suggestion as to a remedy may throw light on what the mischief itself is thought to be; but it does not follow that Parliament when it legislates to remedy the mischief has adopted in their entirety, or, indeed, at all, the remedies recommended in the report.

This is well illustrated in the instant case. The report on which the Domestic Violence and Matrimonial Proceedings Act 1976 was undoubtedly based is the Report of the Select Committee of the House of Commons on Violence in Marriage published in July 1975 (H.C. 553/1). It deals almost exclusively with the plight of married women exposed to violence by their husbands and resulting homelessness for themselves and their children. In the single paragraph referring to unmarried couples described (regrettably I think) as 'cohabitees,' the members of the committee disclaim any particular knowledge of the problem, on which they had not taken evidence. Nevertheless they recommended that so far as the grant of injunctions against violence by their paramours was concerned mistresses should have the same procedural rights as married women. As regards homelessness of mistresses, however, all the committee recommended was that the Guardianship of Minors Acts should be amended to provide that where there was a child of the illicit union of which paternity could be proved, the court should have power to make orders giving the mistress while she was caring for the children during their minority sole right of occupation of the premises which had been occupied by the unmarried couple as their home. Whatever section 1(2) of the Act may do it does not do that ([1979] A.C. 322–331).

Lord Scarman: My Lords, the central question in this appeal is as to the construction of s. 1 of the Domestic Violence and Matrimonial Proceedings Act 1976. … A layman could be forgiven for thinking that the section was tailor-made to enable a county court judge to make the order that was made in this case. But in three cases reaching the Court of Appeal in the last few months Lords Justices have taken a different view. They found the section difficult and obscure. In *B v B* [1978] Fam. 26 the court (Megaw, Bridge and Waller L.JJ.) accepted the submission that the provisions of section 1 of the Act do not alter in any way the substantive law affecting parties' rights to occupy premises and that, in considering the question whether relief can be granted under the section, the court must consider the respective rights and obligations of the parties unaffected by the provisions of the section. In the result, the court in *B v B* held that an unmarried woman could not obtain under the section an order excluding from the home the man with whom she was living, unless she could show that she had a right by the law of property to exclusive possession of the premises. In other words, while she could get relief against molestation, as specified in subsection (l)(a) and (b), she could not get an order enabling her to occupy the home under (c) or (d) of the subsection.

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In *Cantliff v Jenkins* [1978] Fam. 47 another division in the Court of Appeal followed this decision.

In the present case a specially constituted five-judge bench of the Court of Appeal has by a majority (4 to 1) rejected the interpretation put upon the section by the court of *B v B* and has held that the full range of relief set out in subsection (1), i.e., orders containing all or any of the relief set out in (a) (b) (c) and (d) of the subsection, is available to an unmarried woman, who can bring herself within subsection (2).

For reasons which I shall briefly outline, I have reached the conclusion that the case of *B v B* was wrongly decided. In my view the relief specified in (a) (b) (c) and (d) of the subsection is available to an unmarried family partner. I would, therefore, dismiss the appeal.

The Act is a short one, its substance being contained in four sections. section 1 enables the county court to grant the injunctive relief specified in subsection (1), irrespective of whether the applicant is married or unmarried. Section 2 enables a court which grants an injunction in matrimonial proceedings or under section 1 to add to it in certain circumstances a power of arrest. Sections 3 and 4 amend the Matrimonial Homes Act 1967 so as to eliminate two weaknesses in that Act revealed by recent judicial decisions. Section 5 declares the short title, commencement and extent of the Act. That is all there is to it.

Section 1 consists of two subsections. Subsection (1) enables a party to a marriage to make application to a county court. It is without prejudice to the jurisdiction of the High Court and it empowers a county court (any county court, whether or not invested with divorce jurisdiction) to grant an injunction 'whether or not any other relief is sought'. Clearly the subsection provides a new remedy additional to, but not in substitution for, what already exists in the law.

Subsection (2) enables an unmarried woman (or man) who is living with a man (or woman) in the same household as husband and wife to apply to the county court under subsection (1) and expressly provides that reference in subsection (1) to the matrimonial home shall be construed as a reference to the household in which they are living together. This reference indicates to my mind that those provisions of subsection (1), which make available to married people an injunction excluding the other party from the matrimonial home and an injunction requiring the other party to permit the applicant to enter and remain in the matrimonial home, are intended to be available also to unmarried partners.

The availability of paragraphs (c) and (d) of subsection (1) to unmarried partners without any express restriction to those who have a property right in the house had an important bearing on the answer to the question which I consider to be crucial to a correct understanding of the scope of the section; i.e., what is the mischief for which Parliament has provided the remedies specified in subsection (1)? It suggests strongly that the remedies are intended to protect people, not property: for it is highly unlikely that Parliament could have intended by the sidewind of subsection (2) to have introduced radical changes

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into the law of property. Nor is it necessary so to construe the section. The personal rights of an unmarried woman living with a man in the same household are very real. She has his licence to be in the home, a right which in appropriate cases the courts can and will protect: see *Winter Garden Theatre (London) Ltd v Millennium Productions Ltd* [1948] A.C. 173, per Viscount Simon at pp. 188–191; *Binions v Evans* [1972] Ch. 359, per Lord Denning M.R. at p. 367 and *Tanner v Tanner* [1975] 1 W.L.R. 1346. She has also her fundamental right to the integrity and safety of her person. And the children living in the same household enjoy the same rights.

Bearing in mind the existence of these rights and the extent to which they are endangered in the event of family breakdown, I conclude that the mischief against which Parliament has legislated by section 1 of the Act may be described in these terms: – conduct by a family partner which puts at risk the security, or sense of security, of the other partner in the home. Physical violence, or the threat of it, is clearly within the mischief. But there is more to it than that. Homelessness can be as great a threat as physical violence to the security of a woman (or man) and her children. Eviction – actual, attempted or threatened – is, therefore, within the mischief: likewise, conduct which makes it impossible or intolerable, as in the present case, for the other partner, or the children, to remain at home.

Where, in my opinion, the seven Lords Justices fell into error, is in their inference that because the section is not intended to give unmarried family partners rights which they do not already enjoy under existing property law it cannot be construed as conferring upon the county court the power to restrict or suspend the right of possession of the partner who does have that right under the property law or to confer for a period a right of occupancy which overrides his right of occupancy which overrides his right of possession. I find nothing illogical or surprising in Parliament legislating to over-ride a property right, if it be thought to be socially necessary. If in the result a partner with no property right who obtains an injunction under paragraph (c) or (d) thereby obtains for the period of the injunction a right of occupation, so be it. It is no more than the continuance by court order of a right which previously she had by consent: and it will endure only for so long as the county court thinks necessary. Moreover, the restriction or suspension for a time of property rights is a familiar aspect of much of our social legislation: the Rent Acts are a striking example. So far from being surprised, I would expect Parliament, when dealing with the mischief of domestic violence, to legislate in such a way that property rights would not be allowed to undermine or diminish the protection being afforded. Accordingly I am unmoved by the arguments which influenced the Court of Appeal in *B v B* [1978] Fam. 26 and *Cantliff v Jenkins* [1978] Fam. 47. Nor do I find it surprising that this jurisdiction was given to the county court but not the High Court. The relief has to be available immediately and cheaply from a local and easily accessible court. Nor am I dismayed by the point that the section, while doing no more for married women than strengthen remedies for existing rights,

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confers upon an unmarried woman protection in her home including a right of occupation which can for a period over-ride the property rights of her family partner.

For these reasons, my conclusion is that section 1 of the Act is concerned to protect not property but human life and limb. But, while the section is not intended to confer, and does not confer upon an unmarried woman property rights in the home, it does enable the county court to suspend or restrict her family partner's property right to possession and to preserve to her a right of occupancy (which owes its origin to her being in the home as his consort and with his consent) for as long as may be thought by the court to be necessary to secure the protection of herself and the children.

How, then does the section fit into the law? First, the purpose of the section is not to create rights but to strengthen remedies. Subsection (2) does, however, confer upon the unmarried woman with no property in the home a new right. Though enjoying no property right to possession of the family home, she can apply to the county court for an order restricting or suspending for a time her family partner's right to possession of the premises and conferring upon her a limited right to occupancy. In most cases the period of suspension or restriction of his right and of her occupancy will prove, I expect, to be brief. But in some cases this period may be a lengthy one. The continuance of the order will, however, be a matter for the discretion of the county court judge to be decided in the light of the circumstances of the particular case.

Secondly, the section is concerned to regulate relations between the two family partners. It does not, for instance, prevent the property owner from disposing of his property. It does not confer upon an unmarried woman any right of occupation of the family home comparable with that which a married woman has and can protect against all the world under the Matrimonial Homes Act 1967.

Thirdly, and most importantly, the grant of the order is in the discretion of the country court judge. It is for him to decide whether, and for how long, it is necessary for the protection of the applicant or her child. Normally he will make the order 'until further order,' each party having the right to apply to the court for its discharge or modification. The remedy is available to deal with an emergency; it is, as my noble and learned friend, Lord Salmon has said, a species of first aid. The order must be discontinued as soon as it is clear, upon the application of either or both family partners, that it is no longer needed.

For these reasons I would dismiss the appeal. I have had the advantage of reading in draft the speeches of my noble and learned friends. Lord Diplock and Viscount Dilhorne. I agree with what my Lord, Lord Diplock, has said on the principle of *stare decisis* in the Court of Appeal. I also agree with what my Lord, Viscount Dilhorne, has said on the use of Parliamentary material in the interpretation of statutes, and would wish to add only a few observations of my own.

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There are two good reasons why the courts should refuse to have regard to what is said in Parliament or by Ministers as aids to the interpretation of a statute. First, such material is an unreliable guide to the meaning of what is enacted. It promotes confusion, not clarity. The cut and thrust of debate and the pressures of executive responsibility, essential features of open and responsible government, are not always conducive to a clear and unbiased explanation of the meaning of statutory language. And the volume of Parliamentary and ministerial utterances can confuse by its very size. Secondly, counsel are not permitted to refer to Hansard in argument. So long as this rule is maintained by Parliament (it is not the creation of the judges), it must be wrong for the judge to make any judicial use of proceedings in Parliament for the purposes of interpreting statutes.

In *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] A.C. 591 this House clarified the law on the use by the courts of *travaux préparatories*, Reports such as are prepared by the Law Commission, by Royal Commissions, by law reform bodies and Select Committees of either House which lead to legislation may be read by the courts to identify the mischief, including the weaknesses in the law, which the legislation is intended to remedy or reduce. The difficulty, however, remains that one cannot always be sure, without reference to proceedings in Parliament which is prohibited, that Parliament has assessed the mischief or understood the law in the same way as the reporting body. It maybe that, since membership of the European Communities has introduced into our law a style of legislation (regulations having direct effect) which by means of the lengthy recital (or preamble) identifies material to which resort may be had in construing its provisions, Parliament will consider doing likewise in statutes where it would be appropriate, e.g., those based on a report by the Law Commission, a Royal Commission, a departmental committee, or other law reform body. ([1979] A.C. 345–50.)

Viscount Dilhorne: 'There is one other matter to which I must refer. It is a well and long established rule that counsel cannot refer to Hansard as a aid to the construction of a statute. What is said by a Minister or by a member sponsoring a Bill is not a legitimate aid to the interpretation of an Act: see *Crates on Statute Law*, 7th ed. (1971), pp. 128–129. As Lord Reid said in *Beswick v Beswick* [1968] A.C. 58, 73–74:

> 'In construing any Act of Parliament we are seeking the intention of Parliament and it is quite true that we must deduce that intention from the words of the Act… For purely practical reasons we do not permit debates in either House to be cited: it would add greatly to the time and expense involved in preparing cases involving the construction of a statute if counsel were expected to read all the debates in Hansard, and it would often be impracticable for counsel to get access to at least the older reports of debates in Select Committees of the House of Commons; moreover, in a very large proportion of cases such a search, even if practicable, would throw no light on the question before the court.'

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If it was permissible to refer to Hansard, in every case concerning the construction of a statute counsel might regard it as necessary to search through the Hansards of all the proceedings in each House to see if in the course of them anything relevant to the construction had been said. If it was thought that a particular Hansard had anything relevant in it and the attention of the court was drawn to it, the court might also think it desirable to look at the other Hansards. The result might be that attention was devoted to the interpretation of ministerial and other statements in Parliament at the expense of consideration of the language in which Parliament had thought to express its intention.

While, of course, anyone can look at Hansard, I venture to think that it would be improper for a judge to do so before arriving at his decision and before this case I have never known that done. It cannot be right that a judicial decision should be affected by matter which a judge has seen but to which counsel could not refer and on which counsel had no opportunity to comment. ([1979] A.C. 337.)