more appropriate than visiting the sins of one's lawyer on one's former spouse by seeking to deny the validity of the agreement entered into in reliance on bad legal advice: see *Hall & Co.* v. *Simons* [1999] 1 F.L.R. 536, *Harris* v. *Manahan* [1997] 1 F.L.R. 205; *cf. Kelley* v. *Corston* [1998] 1 F.L.R. 986. Ironically, it will be the unrepresented, an ever increasing number in divorce litigation, who are at the greatest risk.

It can also be questioned whether this degree of judicial activism, resulting in a reluctance to surrender the pervasive interventionist powers of the ancillary relief jurisdiction, can be justified. Few agreements presented to the court to be sanctioned as consent orders are in fact rejected, and few consent orders are subsequently set aside. While Thorpe L.J. contends that "the emotional and psychological stresses" experienced by divorcing spouses are one of the factors which the judge can consider in determining whether agreement has been reached, such tenderness as the courts have shown in other contexts towards married women (or for that matter men) is no longer based on the marriage ceremony, but "reflects the underlying risk of one cohabitee exploiting the emotional involvement and trust of the other" (*Barclays Bank plc* v. *O'Brien* [1994] 1 A.C. 180, 198). Agreements to compromise property disputes between unmarried cohabitants, where the emotional and psychological stresses may be just as great, are not required to be sanctioned by the court, and in proving agreement there, normal contractual principles would certainly be applied. The divorce jurisdiction is unique, but is it so special?

STUART BRIDGE

EVERYBODY OUT

THE common law tradition strongly favours witnesses giving evidence in public. In the leading case of *Scott* v. *Scott* [1913] A.C. 417, the House of Lords ruled that at common law, even embarrassing evidence about sexual impotence in a nullity suit must be so given. Public justice is said to be essential to make sure that judges behave themselves and that witnesses tell the truth. For these two purely altruistic reasons, it is always staunchly defended by the media. In consequence, almost every statute passed to enable the judge to clear the court exempts the representatives of the press.

The continental tradition, by contrast, is much more favourable to allowing witnesses to give evidence in private. It is therefore not surprising that Article 6 of the European Convention on Human Rights, which guarantees public justice, allows exceptions which to common lawyers (and journalists) seem rather wide:

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public

https://doi.org/10.1017/S0008197399353010 Published online by Cambridge University Press

> hearing … Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

In *Richards* [1999] J.P. 246, the Court of Appeal (Criminal Division) reaffirmed that the judge in a criminal case has a general power at common law to clear the court when witnesses are giving evidence. This power exists, of course, in addition to the various statutory powers.

In this case an 18-year-old girl who was the key witness to a murder refused to testify unless the court was cleared. At first she said she was scared of the defendant's friends and relations, who were thought to be sitting in the public gallery. She later said she "just didn't feel comfortable". No stranger to the dock herself, she said she would go to prison rather than give evidence in public. In equal defiance of the judge and common law traditions, she said "I don't want to give evidence in front of the public gallery so you take it how you want it; if you want to hold me in contempt, you can hold me in contempt; if you want to clear the public gallery, you can clear the public gallery". The judge did clear the court, she gave her evidence, and the defendant was convicted.

On appeal the defendant argued that these circumstances did not justify in law the court's being cleared, in support of which he argued *Scott* v. *Scott* and Article 6 of the Convention. The Court of Appeal said that they did, and affirmed his conviction. In reaching this conclusion they quoted the words of Lord Haldane in *Scott* v. *Scott* who had said that the principle of public justice must occasionally give way to "a yet more fundamental principle that the chief object of courts of justice must be to secure that justice is done".

While this was happening in the Strand, in Westminster the Government was putting the finishing touches to its Youth Justice and Criminal Evidence Bill, which received the Royal Assent this summer. Among much else, this Act empowers the judge in a criminal case to decree a range of "special measures" for the protection of vulnerable witnesses. By section 25, one of these is the power to clear the court while they are giving evidence.

In some respects this new power is broader than the power to clear the court at common law. Thus the new power, unlike the one at common law, applies wherever the witness belongs to one of various stated categories of "eligible witness" and the order would "be likely to improve the quality of the evidence given by the witness" (s.19(2)(*a*)).

In some respects, however, the new power to clear the court is significantly narrower than the existing one. First, the precondition that the mea-

https://doi.org/10.1017/S0008197399353010 Published online by Cambridge University Press

sure should be "likely to improve the quality of the evidence given by the witness" does not, on the face of it at least, cover the even stronger case of the witness who but for the "special measure" would be unable or unwilling to give any evidence at all. Presumably this difficulty was unintended and will be overcome by robust construction. But there is a further and more important limitation: the statutory provision, unlike the common law power, does not enable the judge to order out the press. As it first appeared in the Bill, the new power expressly extended to the media. The Government backed off, however, and in its final form the media are expressly exempted from it. Any order made under this provision must allow at least one representative "of news gathering or reporting organisations" to remain in court. So it looks as if Parliament, with great song and dance, has contrived to give the judges a significantly weaker power to clear the court than the common law had given them already.

What is the relationship between the new statutory power to clear the court and the existing power at common law? Section 19(6) preserves the court's inherent powers to make orders "(*a*) in relation to a witness who is not an eligible witness, or (*b*) in relation to an eligible witness where … the order is made or the leave is given otherwise than by reason of the fact that the witness is an eligible witness". But this itself is less than wholly clear. By section 17, a frightened or intimidated witness is an "eligible witness". If when a frightened witness testifies the judge decides to clear the court (of journalists and all) on the ground that this is essential to enable justice to be done—the test for the exercise of the common law power—is the order then made "otherwise than by reason of the fact that the witness is an eligible witness"? Perhaps one day the courts will have to tell us.

J.R. SPENCER

https://doi.org/10.1017/S0008197399353010 Published online by Cambridge University Press