

Davis v Johnson (1978)

SUSAN EDWARDS

In Women's Legal Landmarks EDS Rackley and Auchmuty 2018 Hart

*Davis v Johnson*¹ resolved once and for all the correct interpretation of the Domestic Violence and Matrimonial Proceedings Act (DVMPA) 1976, which had up until then been construed in different ways. The House of Lords held that the proprietary right of a husband to occupy the matrimonial home in the event of his physical abuse of a wife (section 1(1)(c)) or partner (section 1(2)) could be suspended, thereby excluding the husband or male partner from the property or part of it (section 1(1)(c)). The five judges (Lords Diplock, Kilbrandon, Salmon and Scarman and Viscount Dilhorne) were unanimous that the DVMPA provided a wife or partner with a remedy for protection which allowed for interference with a husband or male partner's proprietary right in cases where her life was in serious or grave danger. For the first time, the law provided protection for wives and cohabitants living in the same household. Lord Salmon stated:

In my view Parliament in passing this Act, was not concerned with the preservation of proprietary rights but with affording protection to 'battered wives'. ... I am certain that the Act of 1976 was not intended to deprive him of his proprietary rights ... but only to interfere for a fairly short period ... whilst his former mistress had the opportunity to look for accommodation.²

I. CONTEXT

In 1976, few women shared rights in the matrimonial home and few, if any, were the sole owner, sole tenant or occupier. However, prior to the enactment of the DVMPA that year the legal remedies available to a wife or unmarried partner seeking protection from domestic violence were extremely limited. A wife could apply under the Matrimonial Homes Act 1967 for injunctive relief against a husband's violence but only where proceedings for divorce or judicial separation had been initiated. For many women, divorce or separation was not an option; financial dependency, need for housing, support to children, shame, and fear of further violence were just some of the factors compelling women to remain in violent relationships and often in silence. Unmarried partners, referred to by the Lords in *Davis v Johnson* as 'mistresses' or 'cohabitees', were in a different (worse) position. There was no protection except to report the incident to the police and seek any remedy that the under-enforced criminal law might offer.

Yet the risk of violence behind closed doors was very real. One-fifth of all recorded homicides, irrespective of the relationship of victim to suspect, were committed against female spouses and cohabitants. Robert Chester and Jane Streater's study on cruelty and divorce in 1972 found that, of 8,800 English divorces granted in 1967, 94 per cent were

¹ *Davis v Johnson* [1979] AC 264; [1978] 2 WLR 553.

² *ibid*, 575D–H.

granted to wives and a third on 'cruelty' grounds. In 90 per cent of these cases repeated physical violence was reported.³ The police were reluctant, moreover, to proceed with charges for criminal assault against men as the ideology of the privacy of the home prevailed, allowing men's woeful conduct within it to continue unfettered, even in the face of brute violence against women. Perpetrators when proceeded against, if at all, faced the puny charge of breach of the peace and were subsequently fined.⁴ Mrs X who gave oral evidence to the *Select Committee on Violence in Marriage* in 1976 confirmed this use of breach of the peace even in circumstances of the most serious violence.

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 ... I have been to the police ... and they held him in over the weekend and he came out on Monday. He was bound over to keep the peace ... On the Tuesday he gave me the hiding of my life.⁵

There was evidence too of derisory sentences imposed by judges upon conviction of the perpetrator. Jo Richardson MP, presenting the Bill that was to become the DVMPA for its second reading in the House of Commons, reported a case where a husband even with two previous convictions for assaulting his wife evaded appropriate punishment:

During one attack, he tied a flex so tightly round her throat that her larynx was damaged and she had to be fed through a tube in hospital. The man was taken to court, fined £2 and told to behave himself.⁶

Domestic violence was not, as is so often imagined, only 'discovered' by second-wave feminists. First-wave feminists like Frances Power Cobbe had campaigned vigorously for the authorities to take it more seriously (for example, in her influential article 'Wife Torture in England')⁷ and to increase penalties against men who beat their wives. Their efforts led to the enactment of the Matrimonial Causes Act 1878, which enabled women to leave their violent husbands and get maintenance. In 1949, Renee Duffy, a battered wife, was convicted of the murder of her violent husband.⁸ Though her appeal against conviction was refused, overwhelming public sympathy resulted in a petition (organised by her solicitor, Frank R Johnson), supported by 12,000 signatures ensured her reprieve from a death sentence.⁹

³ Robert Chester and Jane Streater, 'Cruelty in English Divorce: Some Empirical Findings' (1972) 34(4) *Journal of Marriage and Family* 706, 708–09.

⁴ Susan Edwards, *Policing Domestic Violence* (Sage, 1989).

⁵ *Select Committee on Violence in Marriage. Together with the Proceedings of the Committee, Session 1974–75, Vol 2* (HMSO, 1975) 25.

⁶ HC Deb, 13 February 1976, vol 905 col 862.

⁷ Frances Power Cobbe, 'Wife Torture in England' (1878) *Contemporary Review*, reprinted in Susan Hamilton (ed), *Criminals, Idiots, Women, & Minors: Nineteenth-Century writing by women on women* (Broadview Press, 1995) 132–69.

⁸ *R v Duffy* [1949] 1 All ER 932.

⁹ Susan Edwards, 'Justice Devlin's legacy: Duffy – a battered woman "caught" in time' (2009) 12 *Criminal Law Review* 851–69. Women were labouring under other difficulties too. In *R v Millar* [1954] 2 QB 282 it was decided that a husband could not be guilty of rape on a wife but only guilty of common assault. This legal position persisted until it was overturned in *R v R* [1991] UKHL 12. See further **Section 5 of the Criminal Law (Rape) (Amendment) Act 1990**.

But the Women's Liberation Movement can take credit for starting to bring about real change in the treatment of domestic violence. In 1971 Erin Pizzey published *Scream quietly or the Neighbours will hear*, which detailed the testimonies of women who had fled domestic abuse.¹⁰ In 1974 she founded Chiswick Family Aid in 1974 and the National Women's Aid Federation was set up in the same year to provide support to victims of domestic violence, the first national domestic violence organisation. The burgeoning sexual politics of the 1970s also provided the political articulation of the specificities of women's oppression.¹¹ One of the seven demands of the Women's Liberation Movement called for an end to domestic violence.¹² In 1975, following the *Select Committee on Violence in Marriage*,¹³ Jo Richardson introduced a Private Member's Bill on Domestic Violence which was later supported by the Government. At 2.10pm on 13 February 1976, moving the Bill for the second time she addressed the House of Commons:

At about this time on a Friday afternoon thousands of women are dreading the thought of Friday night. To them Friday night can often mean a night of strife with the man in the house. It can mean a night that ends in injury and battering, yet relatively few people, possibly not even the neighbours, may know about it. To many women it is something that they feel they should keep within the family, so they continue to suffer it. Some women are injured on week nights, and at any time, but Fridays and weekends, when father is at home, are times to be dreaded in many families. Wife beating is as old as the hills. Unfortunately there are many who believe it is their right to beat their women and that any interference from outside is an unwarranted intrusion.¹⁴

The enactment of the DVMPA in 1976 was enormously important for all women, but especially those living in and through abusive relationships. It gave the county courts power to grant non-molestation injunctions against the abusive spouse or cohabitee and also allowed for the making of orders to exclude them for a period from the family home.

II. THE LANDMARK

So how did this eminently sensible piece of legislation just two years later come to be considered by the House of Lords?

Nehemiah Johnson and Jennifer Davis were unmarried cohabitants living together as joint tenants in a council flat at 13, Nisbet House, Homerton High Street, East London. Jennifer Davis was the victim of violence inflicted by Nehemiah Johnson which the Court of Appeal described as 'extreme', forcing her to leave with their daughter of two and a half and seek refuge in a Women's Refuge in Chiswick on the other side of London (one of the few refuges in the city). Johnson threatened to kill Davis, and said he would dump her in the river

¹⁰ Erin Pizzey, *Scream Quietly or the Neighbours will hear* (Penguin, 1974). See further **First women's refuge, 1971**.

¹¹ Kate Millet, *Sexual Politics* (Doubleday, 1970), Sheila Rowbotham, *Woman's Consciousness, Man's world* (Penguin, 1973); Del Martin, *Battered Wives* (Pocket Books, 1976); Rebecca Emerson Dobash and Russell P Dobash, *Violence Against Wives* (Open Books, 1980).

¹² See Finn Mackay, 'The 7 Demands of the UK Women's Liberation Movement' (no date): <https://finnmackay.wordpress.com/articles-i-like/the-7-demands-of-the-uk-womens-liberation-movement/>.

¹³ Select Committee on Violence in Marriage, n 3 above.

¹⁴ HC Deb, 13 February 1976, vol 905 col 857.

or chop her up and put her in the freezer. The case, which was legally protracted, no doubt further compounding her mental anguish, commenced with a hearing in the Brentford County Court on 18 October 1977, almost a year to the day since the enactment of the DVMPA, and concluded on 9 March 1978.

Davis was initially successful. District Judge Paulusz, in Brentford County Court, granted her the relief she sought, restraining Johnson from assaulting or molesting her or their child and ordering him to vacate the flat. (Six days later, the Court of Appeal, in the case of *Cantliff v Jenkins*,¹⁵ determined that the DVMPA did not permit exclusion of a perpetrator where parties were joint tenants since each had equal interest in the property (by virtue of the Law of Property Act 1925). In other words, the remedy was only available in the relatively rare circumstances that the victim of violence was the sole owner or sole tenant of the property. A companion case, *B v B*,¹⁶ also ruled that the DVMPA did not apply to unmarried cohabitants). On October 26 Mr Johnson appealed the original order to another county court, where District Judge Lewis now found himself bound by the decision in *Cantliff* and rescinded that part of the original order which had required Johnson to vacate the property. Ms Davis subsequently appealed this decision to the Court of Appeal where, because of the reservations over the interpretation of the law, a court of five members instead of three was (unusually) constituted.

Lord Denning in the Court of Appeal set down in plain narrative the problem and what needed to be done 'to protect the weak and as Parliament intended'¹⁷ In his opening statement, he told it exactly as it was:

Battered wives is a telling phrase. It was invented so as to call the attention of the public to an evil. Few were aware of it. It arose when a woman suffered serious or repeated physical injury from the man with whom she lived. She might be a wife properly married to her husband; or she might only be a woman called, falsely, a 'common law wife'.¹⁸

The Court found for Ms Davis by a bare majority. Delivering the majority judgment, Denning LJ restored the original order of District Judge Paulusz requiring Mr Johnson to vacate the flat. In the course of his judgment, he held that the interpretation of statute allowed for consideration of, in this case, the findings of the *Select Committee on Violence in Marriage*:

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.¹⁹

Mr Johnson then appealed to the House of Lords, contending that section 1 of the 1976 Act did not confer on a county court jurisdiction to exclude a person from premises in which he had a proprietary interest, and that the Court of Appeal could not depart from its earlier decisions, or look to other documents which had not been relied upon by counsel, in finding the intention of Parliament. In the House of Lords, Lord Diplock recognised that the provisions in the Act had led 'to a conflict of judicial opinion'.²⁰ Lord Scarman said the

¹⁵ *Cantliff v Jenkins* [1978] 1 All ER 836.

¹⁶ *B v B* [1978] 1 All ER 821

¹⁷ *Davis v Johnson* [1979] AC 264 at 283; [1978] 1 All ER 841 (CA).

¹⁸ *ibid* at 270–71.

¹⁹ *ibid* at 276–77.

²⁰ *Davis v Johnson* [1978] 2 WLR 553 at 557 (HL).

section was difficult and obscure.²¹ Nevertheless, their Lordships were in (different shades of) agreement regarding the interpretation of section 1. Lord Diplock asserted that

under the existing substantive law a mistress is entitled to protection against the tort of assault, and if, as in the instant case, she is a joint tenant with her paramour of the premises in which she is living with him, she has a legal right to continue in peaceful occupation of them.²²

Lord Scarman added that the intention of Parliament was to strengthen remedies and protect life and limb. Lord Dilhorne said that, whilst the Act made 'drastic inroads into common law property rights of spouses',²³ he accepted that it applied to cohabitants or partners. It was conceded by all that the Act intended to 'over-ride a property right, if it be thought to be socially necessary'.²⁴ The original order of District Judge Paulusz was reinstated once and for all.

III. WHAT HAPPENED NEXT

Despite the victory won in *Davis v Johnson*, in the post-*Davis* period judges were reluctant to oust a man from the matrimonial home even for a short period of time; the 'grave and serious violence' threshold trigger to the remedy was rarely met. Statistics showed depressingly that few such ouster injunctions were granted.²⁵ On 1 October 1997, almost 20 years to the day since *Davis* went to the Brentford County Court, the DVMPA was repealed. Section 33(7) of the Family Law Act 1996 introduced a new creature for interpretation by the courts: the 'balance of harm' test. This required that the significant harm suffered by the applicant had to be established as being as great as or greater than the harm to the other party from being excluded before an ouster injunction could be made. The human rights of both parties were set against each other. Moreover, in balancing her need for safety and protection against his right to residence, consideration had to be given to the housing needs, financial resources, and the likely effect of any order on the health, safety or well-being of the parties (section 33(6)). Thus in *Chalmers v Johns*,²⁶ refusing an occupation order for exclusion, Thorpe LJ asserted, '[t]he order remains draconian, particularly in the perception of the respondent. It remains an order that overrides proprietary rights and it seems to me that it is an order that is only justified in exceptional circumstances'.²⁷ More recently, the 1996 Act has been amended by the Domestic Violence, Crime and Victims Act 2004, which among other things removed the distinction between married and cohabiting couples (section 2) and extended the provisions of the 1996 Act to same-sex (section 3) and non-cohabiting couples (section 4).

Unduly lenient sentences for domestic violence and domestic violence manslaughter persisted, prompting Labour MP Harriet Harman, when Solicitor General, in December 2002,

²¹ *ibid* at 579.

²² *ibid* at 564–65.

²³ *ibid* at 565.

²⁴ *ibid* at 591.

²⁵ Susan Edwards, 'Domestic Violence and Harassment' in Julie Taylor-Browne (ed), *What works in Domestic Violence* (Whiting and Birch, 2001) 199, 201.

²⁶ *Chalmers v Johns* [1999] 1 FLR 392.

²⁷ *ibid*.

to refer lenient sentences in domestic violence manslaughter back to the Court of Appeal with a view to ‘encourage judges to impose stiffer terms of imprisonment’.²⁸ They did not.²⁹

IV. SIGNIFICANCE

Without doubt *Davis v Johnson* was a turning point both in law and in judicial understanding of domestic violence. The problem of domestic violence, despite these changes, remains a significant problem in its extent and in the failings of the criminal justice response. Over a quarter of women have experienced domestic abuse since the age of 16.³⁰ On average two women in England and Wales are killed by their current or former partner every week.³¹ Cuts to Legal Aid are making it significantly harder for women to access the courts to protect themselves and their family.³² The position adopted by the House of Lords in *Davis* appears to be in retreat. The significant gains for battered women introduced and made possible by Lord Denning in the Court of Appeal and approved by the House of Lords have been realigned through the lens of ‘rights’ which, together with the ‘balance of harm’ test to be applied in applications involving a condition of exclusion (section 33(6) and (7) of the Family Law Act 1996), introduces a notional level playing-field in a land of unequals.

In February 2017 the Prime Minister, Theresa May, announced a ‘major programme of work leading towards bringing forward a Domestic Violence and Abuse Act’. This was later confirmed in the Queen’s Speech. The Act will establish a Domestic Violence and Abuse Commissioner, as well as consolidate existing protection orders. It remains to be seen whether this ambition survives the Brexit landscape, but if it does *Davis* teaches us that there will be a new generation of judges and practitioners who require continuous enlightenment and understanding of the prevalence and seriousness of domestic violence, both in the effects of violence on its victims and also the consequent homelessness which follows when women are forced to leave in order to protect their lives.

Further reading

²⁸ Attorney General’s References (Nos 74, 95 and 118 of 2002) [2002] EWCA Crim 2982.

²⁹ See also ‘Injustice that puts a low price on a woman’s life’, *The Times*, 2 September 2003.

³⁰ Crime Survey for England and Wales 2015–16, cited in Pat Strickland and Grahame Allen, *Domestic Violence in England and Wales* (HC Briefing Paper 6337, 21 June 2017).

³¹ Refuge, ‘The facts’: <http://www.refuge.org.uk/our-work/forms-of-violence-and-abuse/domestic-violence/domestic-violence-the-facts/>.

³² Louise Tickle, ‘How the UK’s legal system is failing victims of domestic violence’, *The Guardian*, 29 November 2014.

- Nicola Groves and Terry Thomas, *Domestic Violence and Criminal Justice* (Routledge, 2013).
- Rebecca Dobash and Robert Dobash, *Violence against Wives: A Case against the Patriarchy* (Open Books, 1980).