LETTERS

To the Editor

The Slippery Slope of Egregious Fault

The slippery slope of egregious fault which Justice Jacqueline Silbermann expanded from the nearly homicidal conduct depicted in *Havell v. Islam*, 186 Misc. 2d 726, to the simply unacceptable conduct observed in *DeSilva v. DeSilva* is an inherently dangerous and misguided precedent which should be universally rebuked rather than lauded by the matrimonial bar. (NYLJ, Aug. 31, 2006). In the context of dysfunctional divorces under *DeSilva*, conduct repugnant to one judge may now prove egregious to another and, thereby, invite more irate litigation rather than a dispassionate resolution.

Prior to the public attempt at delivering equity to a well-represented wife against her pro se husband, the egregious fault standard had historically deterred attorneys from litigating over the nastiness that defined the parties' failed relationship. Given *DeSilva's* hopeful forum, hostile matrimonial clients can now vituperate over why equity should intervene in the name of egregious fault in fact patterns that would never before be given such consideration. And now, with the wind of *DeSilva* under their alleged angelic wings, the more nefarious among us divorce lawyers can escalate with impunity otherwise pedestrian matrimonials over an egregious fault witchhunt that will primarily benefit those attorneys habitually prone to stroke the parties' antagonism.

Regarding the wastefulness connected with litigating marital fault, Chief Justice Judith Kaye has adamantly pronounced her concurrence with the matrimonial bar against New York's Fault Statutes. Basic to that stance against the Legislature's oblivious disconnection to the issue is the negativity that swells around a divorce mired in a contest over fault. Compounding the Legislature's lack of insight, through *DeSilva*, Justice Silbermann has misguidedly fed the avariciousness of the not-so-well-meaning attorneys anxious to create and capitalize on a conflict where none would have otherwise existed but for *DeSilva*.

Moreover, the 'he said/she said' character of most matrimonials, absent corroborative proof of a significant injury, should cause courts to exercise restraint when asked to dilute the thinking behind the egregious fault standard. Indeed, the alleged 'egregious conduct' in *DeSilva* was a 'spat in the face' and the throwing of a duffel bag, neither of which apparently caused an injury worth its weight in tort. The question, therefore, becomes 'why should an injury worth nothing in the contest of a personal injury action be so excessively compensated in a matrimonial?'

A superficial view of the *DeSilva* facts, enhanced by an enlivened 'battered spouse' perspective, will clearly celebrate the judge's personal sense of equity. Unfortunately, the costs, both financial and emotional, that will follow those on the bench who choose to endorse her perspective could prove devastating to families who may have suffered through marginal or dubious instances of abuse. Virtually every divorce has elements of abusive conduct, which if properly packaged, would meet Justice Silbermann's standard for egregious fault. As other judges are asked to follow the *DeSilva*, they will eventually learn why opening the floodgates to such angry litigation is far more costly to divorcing couples than the more prudent standard for egregious fault that the courts have followed for the last 20 years.

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