



## DO AMERICANS PLAY FOOTBALL?

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### ABSTRACT

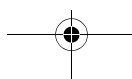
The English approach to property and periodical awards in divorce cases, as exemplified by the decision in the *McFarlane* and *Parlour* cases, is compared to the American approach, as exemplified by the Principles of the Law of Family Dissolution, adopted in 2000 by the American Law Institute (ALI). It is suggested that these two English cases seem more alike to English courts than they would to American, because the English analysis places little or no emphasis on a factor that American practice generally regards as important – the duration of the parties' relationship. The ALI's analysis urges a formulaic approach to financial settlement that emphasizes the relationship's duration, while rejecting financial *need* as a useful concept upon which to base a decision rule. In contrast, the English decision in these two cases pays little attention to duration while giving attention to *need*. The American approach is explained and defended. Finally, *O'Brien*, a well-known American precedent rejected by Mr Justice Thorpe, is discussed. It is argued that difficulties inherent in the *O'Brien* rule explain not only its widespread rejection by other American courts, but also why the English decision in *Parlour* and *McFarlane* is correct in its somewhat reluctant conclusion that different rules should apply to the division at divorce of capital and of income.

### 1. INTRODUCTION

The decision in *Parlour* was announced on the eve of the gathering that led to the papers presented in this volume. *McFarlane*, raising much the same issues, was decided in the same opinion. But *Parlour* received most of the media attention, the newspapers believing their readers more interested in star footballers than accountants. 'Footballers' is a new word for me, one I learned in reading these English press accounts. In America we would instead say 'football player'. On second thought we wouldn't because, of course, Mr Parlour does not play football as we understand that word. We (and of course our Australian colleagues) would say he plays soccer. I believe American soccer is really the same game as English football, but I can't know that for sure because I am not a fan. I wouldn't be surprised to learn from those

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*International Journal of Law, Policy and the Family*, Vol. 19, No. 2,  
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expert in both games that they are not really the same, even if the differences were subtle ones of style and culture rather than of rules.

I thought of these cross-cultural sporting complications while reading Thorpe LJ's opinion in these two cases. 'Footballer' was not the only word he used that was new to me, or that was used in a new way. I was certainly familiar with the game he was refereeing and most of the terms he used, but his use of those terms sometimes seemed novel. Was this really the same game that I knew? I wasn't quite sure. That is the question I mean to explore in this paper.

## 2. TRANSLATING MCFARLANE, PARLOUR

Both the Parlours and the McFarlanes had three minor children at the time of their divorce. As Thorpe LJ emphasizes, they were both families of unusual wealth, whose regular incomes far exceeded even their capacity to spend it. Mr Parlour earned £1.2m annually in his current football contract. While Mr McFarlane's current income of £750,000 annually was less, he enjoyed the advantage, as compared to Mr Parlour, of having no reason to expect his income to decline with advancing middle age. The McFarlanes were 44-years old, and married for 19 years, at the time of their divorce, and Mrs McFarlane, having been a very successful solicitor, had a comfortable income herself before she ceased work after the birth of the couple's second child (when she was 31). Thus, by the time of divorce the McFarlanes had already accumulated property worth £3m, which was divided equally between them. Mrs McFarlane's half-share consisted of the debt-free family home. By contrast, Mrs Parlour, aged 34 at the time of divorce, had worked before marriage as an assistant in an optical shop. She readily conceded that she had made no career sacrifice when she ceased working to care for the couple's children, and is described as without any current earning capacity. Mr Parlour, three years younger than Mrs Parlour, had only recently acquired star stature and a large contract. So the Parlours had not accumulated as much property as the McFarlanes. Mrs Parlour was given the couples' marital home, described as 'modest' in value, and a lump sum of £250,000; this package, we are told, was worth 37 percent of the couples' total capital.

Mrs McFarlane sought a maintenance order of £275,000 annually; her husband offered £100,000, and Bennett J ordered £180,000 on appeal from an order by a District Judge in the sum of £250,000. Mrs Parlour sought a maintenance award of £444,000; Bennett J gave her £120,000 (with another £30,000 for the children). Both wives sought more in their appearance before the Court of Appeal; both husbands sought reductions. Thorpe LJ, in the lead opinion, sided largely with the wives. Mrs Parlour was allowed her £444,000, but for

only four years, with the possibility that her share would fluctuate with Mr Parlour's contract. Mrs McFarlane was allowed £250,000 for five years, thus restoring the amount set by the District Judge, Thorpe LJ finding himself prevented by procedural constraints from exercising fresh discretion as to the award's amount.

As Thorpe LJ saw the matter, the central question of principle presented by these two cases was whether a periodical award was to be grounded exclusively on the claimant's need, or whether it could be used to distribute capital through an award that was in excess of 'need'. Put another way, these are families whose incomes greatly exceed their current needs, allowing them to accumulate a surplus. Should the court require continued sharing of this surplus by both spouses after the marriage has ended? Bennett J believed that allowing the wife any claim on that surplus would constitute an improper second division of capital through the periodic payment award. While not without sympathy for this view, Thorpe LJ came to a different conclusion. His analysis relies on two points primarily. First, s 25 of the Matrimonial Causes Act sets forth a list of factors for the court to consider in fashioning the periodic payment award, and this list includes considerations in addition to the claimant's need. Second, he found that the first paragraph of s 25 states a preference for a 'clean break', and a periodic award for a portion of the surplus would facilitate a clean break by allowing the wife in each case to build up the capital necessary to fund her financial independence. With this second point in mind, Thorpe LJ would set a high but short-term award so as to pay out the surplus quickly, and he would prefer an order that required the recipient to devote the surplus portion of the payments to investments establishing financial independence, rather than spending it on other items such as life insurance. The clean break would thus soon be achieved.

Some aspects of this analysis sound familiar to American ears, but the accent is clearly different. We usually refer to alimony, spousal support, or maintenance orders, rather than to periodical payments, but this difference seems merely nomenclature. Certainly the idea that this remedy, whatever its name, was once assumed to have as its purpose the satisfaction of the obligee's needs, but is now understood to have a broader role, is familiar, as is the hope to achieve a clean break. To this point the game's the same. Yet these purposes, meeting needs and achieving a clean break, seem more central in Thorpe LJ's opinion than they would in America. One consequence of this difference in focus is that the two cases look more similar to Thorpe LJ than they would to an American court, which would give more emphasis to the difference between them in marital duration. And indeed, while the law of alimony retains too much trial court discretion to permit entirely confident predictions, I believe Mrs McFarlane would have

done much better in the United States, and Mrs Parlour not nearly as well, as they each did in England. I hope to show why this is so, and also why this likely American result may be more sound.

In offering this explanation, I make regular reference to the recommendations of the ALI in its comprehensive study, completed in May 2000, entitled *Principles of the Law of Family Dissolution: Analysis and Recommendations*. American courts do not always frame the issues in the same way as they are framed in the ALI recommendations, and they are of course affected by varying state statutes which ensure that any general assertions about American rules are subject to a variety of local exceptions. At the same time, in this field most state statutes entrust their courts with considerable discretion, so that their actual practice in deciding cases can be similar across jurisdictions even when the statutory framework they reference is necessarily different. And the Institute's study concludes that whatever explanatory framework any particular court employs, the patterns of the actual judgments rendered in the majority of reported decisions are quite consistent with the results one would reach under the Institute's recommended rules. In this particular portion of the law of family dissolution – alimony or maintenance awards – the Institute sees its primary contribution as offering a conceptual framework that largely explains the prevailing practice in a more coherent fashion than do the cases themselves, and through this more coherent framework allowing for the creation of much more certain rules that leave less to judicial discretion and therefore make awards far more predictable.

Finally, at the end of this paper there is a discussion on the one American authority that is mentioned in Thorpe LJ's opinion – *O'Brien*. My purpose is not to commend it, but to clarify its status within American jurisprudence, which may be quite different than is commonly supposed in other countries.

#### A. *Need v Loss*

Comment *a* of s 5.02 of the Principles states:

Early in the no-fault reform era, one influential formulation described alimony as an award meant to provide support for the spouse in 'need' who is 'unable to support himself through appropriate employment'. Uniform Marriage and Divorce Act, ss 308(a)(1) and 308(a)(2). With time, it has become apparent that this conception of alimony's purpose has two principal difficulties. There is first the failure to provide any satisfactory explanation for placing the obligation to support needy individuals on their former spouses rather than on their parents, their children, their friends, or society in general. The absence of any explanation for requiring an individual to meet the needs of a former spouse leads inevitably to the second problem, the law's historic inability to provide any consistent principle for determining when, and to what extent, a former spouse is 'in need'. We cannot choose among

the many possible definitions of need if we do not know the reason for imposing the obligation to meet it. Some judicial opinions find the alimony claimant in 'need' only if unable to provide for her basic necessities, others if the claimant is unable to support himself at a moderate middle-class level, and still others whenever the claimant is unable to sustain the living standard enjoyed during the marriage even if it was lavish. Some opinions suggest that the measure of the claimant's need will vary with the identity of his former spouse or the length of his marriage.

These results cannot be harmonized if need is retained as the central concept, for there is nothing to explain why its definition should vary among these cases. The inference is that the explanation for alimony is something other than the relief of need. The gradual realization of this point can be seen in the great number of modern decisions allowing alimony awards without requiring need as the court itself would define it, and in other decisions terminating alimony awards despite the claimant's continued need.

The principal conceptual innovation of this Chapter of the Principles is therefore to recharacterize the remedy it provides as compensation for loss rather than relief of need. A spouse frequently seems in need at the conclusion of a marriage because its dissolution imposes a particularly severe loss on him or her. The intuition that the former spouse has an obligation to meet that need arises from the perception that the need results from the unfair allocation of the financial losses arising from the marital failure. This perception explains why we have alimony, and why all alimony claims cannot be adjudicated by reference to a single standard of need. If the payment's justification is not relief of need but the equitable reallocation of the losses arising from the marital failure, then need is not an appropriate eligibility requirement for the award. While many persons who have suffered an inequitable financial loss will be in need, others will not, and the remainder will vary in their degree of need. At the same time, some formerly married individuals may find themselves in need for reasons unrelated to the marriage and its subsequent dissolution. In that case, there may be no basis for imposing a special obligation to meet that need on their former spouses.

The point is made most cleanly with examples. Think of the cases in which one spouse supports the other through college or professional school, with the divorce occurring soon after graduation. Some of the early cases had trouble with alimony claims on behalf of the employee spouse, for a very good reason: how could the spouse who has been the family's sole breadwinner during her partner's education claim to be *in need*? If she could support both herself and a non-working spouse, including sometimes significant schooling costs, she can surely support herself alone even more comfortably. Eventually this difficulty was ignored and today virtually all states allow her a remedy, typically

under the alimony or maintenance rubric, most often by appeal to an equitable argument based upon restitution. That is, the divorce does not put the employee-spouse in need, but it does conclude a set of facts that for other reasons should give rise to a claim. This fact pattern is indeed one of the five that give rise to compensable loss recognized by the Principles, (although it is not one of the two recognized losses relevant to the *Parlour* and *McFarlane* cases). On the other hand, consider the couple divorced after only one or two years of marriage. Imagine the wife is comfortably employed, while the husband was disabled before the marriage and still is. He is unemployable and clearly in need, but few American courts would place a long-term obligation on the wife to meet it (see *Wilson*). Here we have need but no award.

Now consider the opinions in *McFarlane*, *Parlour*. While they disagree as to how the surplus is to be treated, the division of the husband's income between a portion required to provide for 'needs' and the remaining 'surplus' is central to the analysis of both Thorpe LJ and Bennett J. The necessary premise is that the concept of 'need' has an ascertainable meaning in this context and that reference to it assists the analysis. By contrast, the Principles, having rejected entirely the proposition that 'need' is a useful or even coherent concept with which to explain or justify alimony awards, could not make any such distinction: because *none* of the award is truly based upon need, one cannot distinguish between a need-based component and some excess beyond it. The *McFarlane* case especially provides a ready example of this point. The husband in *McFarlane* proposed an award of £100,000 per annum, far lower than was seriously considered by any of the five judges asked to rule on this case. Yet even £100,000, being an income well above the English median, is obviously more than Mrs McFarlane *needed* under any but the most idiosyncratic meaning of that word. Indeed, perhaps Mrs McFarlane, a trained and experienced solicitor, has a substantial earning capacity that is far more than the English median, in which case one could quite plausibly argue that she did not *need* anything from her former husband. That is not to say that Mrs McFarlane should in fact get nothing, and not even to say that she is not entitled to a very substantial award. It is rather to say that we have no prospect of explaining her entitlement until we banish the concept of *need* entirely from our discussion of the matter. This approach was initially taken by the Canadian Supreme Court, which abandoned *need* for a compensatory rationale for alimony in *Moge*. However, the court later resuscitated the 'need' rationale in *Bracklow*. Mrs Bracklow eventually became disabled as illnesses that predated the parties' relationship worsened. The lower courts denied any award for lack of any compensatory rationale for one; the Canadian Supreme Court reversed as to her entitlement to an award but left its size and duration for later determination by the lower court. At least according to one

commentator (Rogerson, 2004), the result was to create considerable confusion in Canadian law, as the language of 'need' was revived but no more assistance was provided in understanding how to apply 'need'.

Of course, there is a purely mechanical sense in which 'need' can be used. Once we decide upon the level of financial comfort that Mrs McFarlane is entitled to enjoy on Mr McFarlane's nickel, we can offer a view as to how much she 'needs' from him to maintain that level. But if this is all 'need' means, then calculating it is a matter of arithmetic more than judgment – arithmetic we cannot do until we first set the problem by answering the real question, which is: to what is she entitled? It is that fundamental question that the concept of need does not help answer. The Principles seek an answer through the replacement rubric of 'loss'.

For marriages of some length in which there are children, two kinds of compensable losses recognized by the Principles are relevant to *McFarlane* and *Parlour*: the loss of the living standard made possible during the marriage by sharing in the other spouse's income, and the loss of the prospective earning capacity that was never developed, or was allowed to wither, because the claimant served as the primary caretaker of the couple's children. The Principles establish two factors as the dominant considerations for establishing the appropriate award in cases of this kind: the size of the earnings gap between the divorcing parties at the time of their divorce, and the duration of either their relationship, or of the period, during the relationship, in which the claimant was the primary caretaker of the couple's children. These two factors – the earnings gap and the relevant durations – are the exclusive components in formulas that yield a presumptive amount and duration of any award of compensatory payments. The court is not absolutely bound to issue an order that complies with the formula exactly, but departures are permitted only if the court identifies, in a written opinion, uncommon facts of the case that explain why the formula's application to it would yield a 'substantial injustice'. Minor injustices are by contrast tolerated, as preferable to a system in which less constrained judicial discretion leads to awards that vary widely with the judge and the day. That kind of variation constitutes its own kind of injustice, and also makes it difficult for practitioners to advise their clients of the likely result if litigation is pursued. In this regard, the system that the Principles recommend for compensatory payments is similar to the formulaic approach that federal law requires all American states to adopt with respect to child support orders; and as to which there may be increasing interest in relation to alimony (Larkin, 2004).

There are many more details that must be addressed in the actual application of this system, and I will return to some of them later when I calculate the awards that Mrs Parlour and Mrs McFarlane would

likely receive under the Principles' recommendations. But first some general observations about the ALI's way of proceeding. It puts a high value on the shift from case by case discretion to predictable rules. That shift requires acknowledging overtly some of the law's inevitable shortcomings. As the opinions in *McFarlane*, *Parlour* concede, the setting of awards in this area is as much an art as a science. On one hand, this may lead to the view that any systematization is doomed. On the other hand, it suggests even more reason to push in this direction, because judgments are otherwise even more likely to vary widely with the identity of the judge and perhaps even among judgments rendered by the same judge on different days. Any effort at systematization identifies, and therefore highlights, the compromises that must necessarily be made when one moves from general statements about the nature of the spouses' obligations to one another, to assessments of the specific dollar or pound amount of the obligation that a particular spouse has in a particular case. But it is a mistake to think that one avoids these compromises by retaining a discretionary system. To the contrary, one may exacerbate them by leaving them unexposed – hidden, as it were, behind the inevitably general language of the varying judgments of the judges who exercise that discretion.

I raise these difficulties by way of asking indulgence of the particular measures employed by the formulas that the ALI recommends. Its measure of the living standard loss – the difference, at the time of divorce, between the expected incomes of the respective spouses – in some ways does seem intuitive, but it surely is not the only possibility. As for the second loss – the impact of childcare on earning capacity – measure is virtually impossible. There is in consequence no choice but to settle on a proxy that is applied to all cases. As explained in Comment *e* of s 5.05, to which the interested reader may refer, a combination of theoretical and practical considerations lead the Principles to choose as that proxy the same measure that it adopts for the first loss, the earnings gap between the spouses at the time of divorce. There is similar compromise in using relational duration as the measure of whether, and in what proportion, one spouse should be held responsible to share the other's loss. Two factors especially confound this assessment of the other spouse's obligation. First, in many cases both spouses will suffer a financial loss from the divorce; it is only when the income of the potential obligor is substantially more than the other spouse that the divorce does not also reduce the obligor's living standard below the level that both partners enjoyed during the marriage. For that reason, the Principles provide for no award at all unless the income gap is 'substantial', and it suggests that this threshold is met if the income of the less affluent spouse is 75 percent or less of the other spouse's income. (Child support is of course calculated separately, as noted below.)



Our commitment to a no-fault divorce system presents a second confounding factor. The Principles, like the law of about half the American states, excludes fault from the determination of the appropriate financial settlements. The many good reasons for adopting no-fault are presented at length in Chapter One of the Principles, and I will not reargue that case here. I quickly note, though, one central reason: in the great majority of divorces there is either no fault to allocate, or, if there may be, any moral assessment of the parties' relative fault would require such close knowledge of the intimate details of their relationship, and such moral and psychological wisdom, as to be beyond judicial capacity, especially given the temporal and financial constraints under which these judgments must be made. Yet the omission of fault challenges our explanation of why we shift some losses from one spouse to the other at divorce, because loss-shifting usually involves a determination that the obligated party bears some responsibility for causing the losses in question, whether through negligent or intentional breach of duty, or for breach of promise. But of course family law has long been an exception, imposing legal duties on no basis other than the parties' relationship itself. The parental obligation is the most obvious example, but the Principles conclude that the spousal obligation is of the same kind. And upon reflection, that same conclusion must be reached in traditional fault divorce laws, given that they generally do *not* require alimony claimants to show their partner's fault, even though misconduct may be considered as a factor. This means fault is not the *basis* of the traditional alimony award either, even when it is considered relevant to fixing the amount. So the Principles (see Comment *c* of 5.04) are based upon the idea that obligations to one's former spouse, if there be any, arise from the relationship itself, and not from notions of contract breach. A small philosophical literature on relational duties (Scheffler, 1997) provides some comfort and support for this understanding.

I have explored the difference between contractual and relational duties elsewhere (Ellman, 2001) and will not repeat those observations here. But let me briefly note that while contractual obligations are well-defined and explicitly undertaken in advance, relational duties usually arise without such explicit advance understandings. (Some might feel the exchange of vows in a traditional marriage ceremony states such explicit promises, but the difficulty is that they are too general to permit one to determine which party has breached, and that in any event, the very inquiry into breach is effectively foreclosed in a no-fault system.) Nor are relational duties typically grounded upon a single event such as the execution of a contract that states the parties' undertakings. Relational duties instead arise and grow over time, as the relationship upon which they are based develops and matures. This point is exemplified by the fact that even with the parental

obligation, a child's social father, who has a relational status necessarily established over time, often supplants the biological father as the child's legal father (Ellman, 2002). The 2002 version of the model American law, the Uniform Parentage Act, has also adopted this position. The conclusion is that the marriage ceremony alone does not give rise to substantial relational obligations. Under the Principles the fact and extent of relational obligations is instead determined by the duration of the relationship.

Obviously, duration is not a perfect measure of a marriage's strength and centrality in the partners' lives; there is no perfect measure. But so long as we believe a detailed examination of the intimate details of each marriage is an impractical requirement to impose on every judge asked to decide the appropriate amount of an alimony award, relational duration has much to commend it as the default measure of the extent of the duties one may have to a former spouse after the relationship has ended. This is especially the case in a modern no-fault regime in which there are no legal barriers to either party ending the relationship at any time. Duration serves as a reasonably reliable, and eminently ascertainable, proxy: the longer the relationship upon which the claim is based, the greater is the obligation of the respondent.

We now thus have a very brief sketch of the conceptual system the Principles offer for explaining compensatory payments, its replacement for alimony or maintenance, and of the reason why such a new conception is thought necessary. I now examine in more detail how the Principles would apply to Mrs Parlour and Mrs McFarlane.

#### B. McFarlane, Parlour *Under the Principles*

We have seen that the Principles set out a fairly simple path to calculating the periodic payment award: Once the income gap at divorce (our measure of the loss) is determined, that amount is multiplied by a fraction (reflecting the other spouse's responsibility to share that loss) that grows in size with either the duration of the relationship (if the claim is the loss of living standard), or the duration of the period during which the claimant was the primary caretaker of the children (if the claim is the loss of potential earning capacity). This calculation – durational fraction multiplied by the income gap – gives one the size of the payment. The length of time over which payments will be required is also a function of the relevant relational duration. Let us make all this more clear by calculating the award that would result from the application of the Principles to the facts of McFarlane and Parlour. Consider first the McFarlane case.

Mr McFarlane's annual income at the time of divorce was £753,000. Mrs McFarlane has no income, a fact the court simply accepts. Given her once substantial earning capacity, however, and the prevalence, in

America, of market labour among married mothers, she would, under the Principles, be expected to work. Of course, no court would actually require her to work; the only question is whether income should be imputed to her in calculating her entitlement to an award. The Principles allow for the imputation of income to the custodial parent claiming compensatory payments in any case in which the youngest child is at least six years old. Nonetheless, it is not clear that this factor has much bite in this case. Mrs McFarlane has not worked since 1991, more than ten years before the judgment in this case, and it therefore seems likely that her prospects in the market are not nearly as lucrative as they might have been. Moreover, the Principles direct that one should only impute an amount that the parent could 'reasonably earn considering the parent's residential responsibility for the children'. Under these circumstances, full-time employment is not likely to be imputed. I do not know Mrs McFarlane's prospects for part-time employment as a solicitor who has not practised in more than ten years, but I imagine they are limited. For the sake of example, I shall posit that she could earn £40,000 annually, net of any childcare costs generated by her market labour. This is wild speculation on my part; in an actual case the parties would presumably develop the facts upon which the court could make a more reasoned estimate. It nonetheless serves for this example, giving us an earnings gap between the parties, at the time of divorce, of £713,000.

The parties began cohabiting in 1982, and under the Principles this is the relevant starting date of their relationship for the purpose of calculating Mrs McFarlane's entitlement to an award for the loss of the marital living standard. They separated in 2001, and I shall assume their divorce petition was also filed in that year. The marital duration is thus 19 years. Under the particular formula suggested in Appendix II of the Principles she is entitled to .01 of the earnings gap for each year of the relationship, as the measure of her husband's responsibility for her loss of marital living standard. That comes to 19 percent of £713,000 or an award of £135,470 annually. This award should be set to a duration equal to 60 percent of the relationship's duration of 19 years, or 11.4 years. Note that while this is the default award arrived at under the formula, the judge is free to order larger payments over a shorter period, so long as the total flow of payments has the same present value, and is a fair and reasonable substitute in light of the parties' situations. Assuming an interest rate of six percent, the present value of this 11-year flow of payments, compounded annually, is £1.1m. The annual payment of equivalent value, if the period were shortened to five years, as Thorpe LJ would prefer, would be £248,000.

But we are not done, for Mrs McFarlane is also entitled to an award recognizing her sacrifice in earning capacity to care for the couple's children. Their first child was born in 1989. We measure the childcare

period from this date unless Mr McFarlane can show that his wife did not provide substantially more than half of the total parental care the children received. (That is, the only question is the parents' time relative to one another, without regard to the time spent by any third-party childcare personnel they might have hired.) I assume he cannot make this showing, and that the childcare period is therefore 11 years (for this purpose we count only care during the relationship, not care projected in the future). Under the Principles' suggested formula for this category of award, we multiply the 11-year period by .015, to arrive at 16.5 percent. That percentage of the earnings gap is £117,645, which Mr McFarlane would be obliged to pay annually for six of the 11-year childcare period, or 6.6 years. Using the same method as before, one can find that the present value of this award is £592,000, and that an award of equivalent value with a duration of five years would require annual payments of £132,583. The total five-year award would thus amount to about £381,000 annually. It is apparent that this is substantially more than any of the judges who heard the McFarlane case would allow. On the other hand, this would be the entire award. It could not be extended at the conclusion of five years. It can (in accordance with 5.08 of the Principles) be adjusted during its term, as necessary to take account of significant reductions (but not increases) in Mr McFarlane's income, as well as increases or decreases in Mrs McFarlane's.

A similar calculation for the Parlours yields quite a different result. Their relationship was only of six years duration, commencing for this purpose with their cohabitation in 1995 and concluding in 2001. Whatever Mrs McFarlane's earnings prospects, Mrs Parlour's are less, and so let us simply ignore them and take the earnings gap at £1.2m. Applying the same formula, we obtain an award for six percent of the earnings gap, or £72,000, to continue for only 3.6 years. The childcare period is also six years, yielding an award of 9 percent of the earnings gap, or £108,000 (the Principles not requiring the applicant to establish actual loss of earning capacity). Thus in total Ms. Parlour is presumptively entitled, under the Principles, to a compensatory award of £180,000 for 3.6 years, considerably less than the £444,000 for four years favoured by Thorpe LJ, although more than the award of £120,000 for her that Bennett J would allow. Of course, she is separately entitled to a child support award under the Principles, which continue, subject to the possibility of variation by reason of changed circumstances, through to the youngest child's 18<sup>th</sup> birthday.

Two points should be noted. First, the Principles recommend that child support guidelines be based not only on estimates of the obligor's share of the typical marginal expenditure – the problematic approach of most American guidelines (see Ellman, 2004), but include as well a supplemental amount where the parental earning capacities are very disparate. As recommended by the ALI, this supplement should be

calculated on a sliding scale that increases as the disparity increases (from a base of zero for equal-earning parents) in order to ensure that the living standard of the custodial household does not fall below the level at which it becomes 'grossly inferior' (s 3.04) to the living standard enjoyed in the obligor's household. In order to coordinate child support awards with compensatory payment awards, the parental incomes upon which the former are based are adjusted to reflect the results of the latter. For further discussion of the ALI child support recommendations see Blumberg (1999). Second, the ALI recommendations provide for a cap on the percentages calculated under its suggested formulae for compensatory payments. No matter how long the applicable durations, in no event should the aggregate award – the total arrived at under the two applicable formulae combined – ever exceed the cap, which the ALI suggests be set at 40 percent of the earnings gap between the parties. Where marital durations are very long American courts have sometimes approached an equal division of current income – equivalent to a cap of 50 percent, but rarely reach it. (An apparent exception is *Clapp*, in which the court effectively divided post-divorce income equally as an initial matter, but even here it allowed the husband to retain all increments in income he might later achieve.)

There are several clear differences between the result we obtain applying the Principles, and the result that follows from Thorpe LJ's analysis. Perhaps most obviously, the idea of a 'clean break' does not have the prominent role under the Principles that it does in the English judgment. There was much discussion of clean break in America during the 1970s and 1980s, when the developing law in many states was influenced by the then recently-developed Uniform Marriage and Divorce Act. The interest in the 'clean break' approach was fuelled in large part by the UMDA's concurrent recommendation for the equitable distribution of marital property, which was in fact eventually adopted in the 42 American states that trace their marital property law to English roots. The hope was that the financially dependent spouse's new right to share in the accumulated property would render maintenance payments unnecessary. This hope was reflected in the formulation of UMDA s 308, which specified that the spouse seeking maintenance must show, among other things, that he 'lacks sufficient property to provide for his reasonable needs'. But this hope was always illusory because the proportion of divorcing couples who had enough property to permit a dependent spouse to live off of her share is very small. Nor is a clean break feasible when the divorcing couple have minor children if the law is serious about collecting child support and encouraging the continued involvement of both parents in the child's life.

This is not to say the clean-break sentiment is entirely irrelevant. A clean break is still the norm in the dissolution of short childless

marriages. And even when children are involved, eliminating long-term maintenance payments with a lump-sum settlement may achieve some psychological separation, if not a complete break, and may for this reason appeal to either or both parties. These possible advantages are the main reason why the ALI recommends allowing wide discretion to shorten the term of the periodic awards derived from the formula, by increasing their amount. But while the advantage of a clean break may help decide the form of the financial settlement, it cannot alone justify enlarging its value. Determining that value must be the first step.

There is also an important difference between the English and American analysis with respect to that value. Mrs McFarlane does far better than Mrs Parlour under the ALI rules as I believe she also would in most American courts. The ALI rules make explicit the explanation of this result: the length of the McFarlane relationship, and of the child-care period, is much greater than in the Parlour's. Mrs McFarlane's life has been more fully shaped by this relational history than Mrs Parlour's, and she has fewer years left in which to reshape it. Mrs McFarlane would no doubt enjoy extraordinary wealth under the remedies the ALI would give her; but then, she had 19 years in which to learn to expect such wealth, an expectation made all the more salient by her willingness to put aside her own promising legal career in apparent reliance upon it. Mrs Parlour, in contrast, had a relationship of only six years duration, and during the early years she could but hope for her husband's success, and surely could not assume he would eventually earn as much as he came to. The ALI remedy gives her part of her former husband's jackpot: She would receive half, not 37 percent, of the property they accumulated during the marriage, and she gets a piece of the income he will earn in the 3.6 years following its termination – just not as large a piece as she would receive under Thorpe LJ's analysis.

Some might point to Mrs Parlour's claimed role in keeping her husband sober and focused to argue that the ALI approach is not fair to her because she made her own contributions to his success. Thorpe LJ does not himself place much weight on this claim of her 'contribution' to Mr Parlour's success, and while Bennett J calls it 'vital', it does not appear, from his conclusion as to the size of the appropriate award, that he in fact gives it great emphasis. In this respect they largely echo the American position. American courts often mention such relational contributions, and they are often among the grab-bag of items that the American statutes (like s 25) list for the court's consideration, but close examination of the decided cases generally reveals that they are rarely crucial to the result. The ALI declines to give even this lip service to the contribution argument, explicitly rejecting the usefulness of the 'contribution' rationale to justify either property claims or claims by one spouse to share in the other's post-divorce income. As

the ALI points out (comment *b* to 5.04) there is no doubt that there are cases in which one spouse's career is aided in important respects by the other's moral, emotional, or logistical support, but there is also no doubt that there are other cases in which this is not true, or in which one spouse's behaviour even causes tumult or emotional tension that compromises the other spouse's career success.

If this factor is to count then we must be serious about examining it in every case, adjusting claims down as well as up, as the facts of each case suggest. This seems a poor idea, and there is little evidence that American courts do it. I suspect it is not entirely by chance that the one counterexample I know of, *Michael*, involved a househusband. The trial court denigrated his domestic efforts and denied him any claim for maintenance; on this point the appellate majority reversed. As to marital property, the trial court allowed him only 22 percent. The appellate court concluded:

While [Dennis]'s performance of traditional domestic chores was often times lax, he did prepare dinner. We are not finding that [Dennis]'s contributions entitled him to an equal division of the marital property; however, we do hold that the trial court's division of property is . . . an abuse of discretion.

The case is a fine example of why we do not in fact really want to require courts to evaluate each spouse's domestic 'contributions' as a necessary part of its decision on these financial issues. There is nonetheless one line of American cases that appear to rest at least in part on this contribution rationale, and I examine them in the next section.

### C. O'Brien: *Treating Earning Capacity as Property*

Thorpe LJ tells us that Mrs Parlour's barrister sought to persuade the court to follow what the gentleman described as the 'the leading and landmark' New York case of *O'Brien*. Thorpe LJ declined that invitation, and he was well advised to do so. In *O'Brien* the New York court treated a medical licence earned by the husband during the marriage as 'property' subject to division between the spouses under New York's then recently-enacted equitable distribution law. Obviously the court could not actually award any portion of her husband's professional credentials to the wife, so it instead accepted the testimony of an expert who gave them a dollar value by estimating the increment in the husband's earning capacity, over his lifetime, that he could be expected to realize from having added this medical credential to his undergraduate education. The court then awarded the wife 40 percent of the present value of this amount, as her equitable share of her husband's medical licence. In reaching this result, the New York court seemed to suggest that Mrs O'Brien's entitlement to this share was based at least in part upon her 'contribution' to her husband's successful medical training, a contribution which took the form, primarily, of

contributing substantially to the couples' income during her husband's years in medical school by working as a schoolteacher and tutor.

*O'Brien* is certainly well known in America, but it is hardly a leading or landmark case, at least if those labels are meant to suggest the case was influential. Quite the contrary. It did receive considerable attention when it was decided in 1985, because until then no state high court had held that a degree, licence, or other professional credential could be treated as marital property. But despite this attention, it did not generate a new trend. In *Simmons*, a 1998 opinion declining to follow *O'Brien*, the Connecticut Supreme Court surveyed the case law and found that 35 state high courts had by then considered the question, and 34 of them had rejected the *O'Brien* analysis – all but *O'Brien* itself. The ALI rejected it as well in s 4.07 of the Principles, and in 1996 the New York State Bar Association (1996) asked the legislature to overrule it. Given the change in the membership of the New York Court of Appeals since 1985, some expect the court itself will soon do that. In short, *O'Brien* is closer to a pariah than a landmark.

Now there are many good reasons for *O'Brien's* rejection. The ALI Principles (4.07 comment *c*) emphasize that degrees and licences are but one form of enhancement of earning capacity. The few decisions that recognize a marital-property interest in a degree or licence value them by projecting the probable difference, over the holder's lifetime, between the earnings of an individual with the licence or degree and the earnings of one without it. Under this formulation, the credential's value is simply the average increment in income earned by its holders. Other skills or entitlements that increase average earnings cannot be distinguished, even if their acquisition is not recognized in a formal document such as a degree. The principle that treats degrees or licences as marital property would necessarily extend, for example, to job seniority and promotions.

The last point of the quoted paragraph seems to have been well-appreciated by Mrs Parlour's barrister, for in urging the *O'Brien* analysis on the court, he was in effect inviting it to treat the increase, during their relationship, in her husband's value as a footballer, as marital property in which she had a legal property interest. Of course, spousal claims on one-another's post-divorce earnings have traditionally been treated under the rubric of alimony or maintenance rather than property. As a procedural matter this distinction makes good sense (4.07 comment *a*):

Procedurally, alimony awards are exercises of continuing equitable authority and typically remain modifiable, while a division of marital property is an ordinary civil judgment and therefore final and nonmodifiable. The finality and nonmodifiability that are critical to adjudications of property ownership make these judgments poor instruments by which to allocate future spousal earnings. Not only may the future earnings of the former spouses vary in



unpredictable ways, but also spousal claims on one another's post-dissolution income are properly affected by some post-dissolution events, such as the obligee's remarriage.....An alimony obligee's improved living standard after divorce can provide substantive grounds for terminating the alimony award, while it would violate substantive norms to require a newly fortunate spouse to return some of the marital property he or she was allocated at dissolution. Increased prosperity does not compromise previously established property rights.

Moreover, as the ALI also emphasizes in the same comment, these procedural and substantive distinctions between alimony and property are grounded in broader themes:

[There is] a broader theme from which the differences between property and alimony in part emerge. The law has treated alimony as appropriate in only a subset of divorces in which there are circumstances, sometimes temporary, that justify equitable adjustments in post-marriage income between former spouses. In contrast, marital-property claims are normally viewed as property entitlements created by the marriage alone, even if subject to equitable adjustment. The principle underlying this difference is that marriage creates property entitlements to certain things acquired during it, but does not create property entitlements against the person of the other spouse. Marriage does not create a lifetime claim by one spouse on the other's talents and labour, even though a long-term or even permanent claim on a former spouse's post-marriage earnings does result from the combination of marriage with other factors of the kind traditionally considered under the rubric of alimony and addressed in [the compensatory payment provisions] of these Principles. [This section on marital property thus] reflects the law's longstanding distinction between claims on things and claims on another's personal attributes.

It is especially in short marriages such as *Parlour* that the *O'Brien* rule could make a large difference. While Mrs Parlour's claims for compensatory payments (were her divorce governed by the ALI Principles) or alimony (under the usual American practice) would be diminished by virtue of the relative brevity of her marriage, her property claims are typically unaffected by it. American jurisdictions increasingly lean toward an equal division of the assets accumulated during the marriage, and the presumption of equal division is especially strong under the ALI Principles. For most couples, of course, there is a natural and virtually automatic correlation between marital duration and the value of their marital property to be divided, because most people who accumulate assets do so gradually, over years. This is surely the case with respect to both pensions and marital homes, the two assets that in America account for most of the property to divide in middle class divorces. So in an equal division jurisdiction that assigns no relevance to marital duration – because the property is divided equally in all marriages – one still find a correlation between the duration of the marriage and the size of the property award.

There are nonetheless a few people – generally successful sports figures, entertainers, and the like, near the beginning of their career – whose incomes are far more lumpy, over time, and who therefore accumulate property in the same feast or famine style. Even very successful accountants rarely go from little or no income in one year to a £2m jackpot in the next, but successful prizefighters or film directors may. If they marry the year before the jackpot, and divorce the year after, their short-term spouse might be thought to have a windfall, in a strict equal division jurisdiction such as California. Other jurisdictions that retain equitable discretion might conclude that this is one kind of case in which the equal division presumption is overcome. But short-term marriages during which the husband wins the big prizefight are rare, and the ALI declined to reserve a residuum of judicial discretion in property allocation to deal with them. The need for enlarged discretion becomes far more critical, however, under the *O'Brien* rule, because there would be many more ‘jackpot’ cases: every short marriage during which a spouse made an important occupational advance would now contain one. But even if the spousal jackpot is fair in some cases, few would find it fair in all. Should the wife who earns her law degree during her four-year marriage to a successful physician, whose income is even higher than hers, be obliged to share her projected lifetime earnings with him (while he retains all his, since his professional credentials were conferred before the marriage)?

One can try to fix this problem with new property allocation rules, but if New York itself is an example, the result is a nightmarish combination of unconstrained discretion and wildly implausible efforts at coherent distinctions between cases that are in fact indistinguishable under the normal property rules the court purports to apply. So it is not surprising that no one has followed *O'Brien*. At the same time, the ALI concluded that if *O'Brien* claims are to be rejected, a reliable compensatory payments remedy had to be provided to deserving claimants, for it was the very discretionary, and thus unreliable, nature of the traditional alimony remedy, that undoubtedly drove lawyers to frame their claims on their adversary’s future earnings in property rather than alimony terms. For this reason, improving the reliability of the alimony remedy was an essential part of the conceptual package rejecting *O'Brien*.

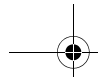
A remedy is not reliable if it is available only to claimants who can persuade a court that they contributed to their spouse’s financial success, and that is one reason why the ALI does not require such contributions to qualify for a significant alimony claim. How then does the ALI sort claims between those in which a large remedy is justified and those in which it is not? Largely by duration. One ALI’s provision allows simple reimbursement to the person in a short marriage who provided his or her spouse financial support for an educational

programme that led to a degree that enhanced the educated spouse's earnings. Here the contribution is easy to quantify – only money counts – and the remedy simple to measure – you get it back. This is in fact the dominant rule applied to such cases in the United States, adopted by the same courts that rejected *O'Brien*. Such reimbursement is small potatoes compared to a share in future income, but it acknowledges that short-term spouse's financial contribution, and when the claim is made by a spouse emerging from a brief relationship, this modest award has been seen by nearly all American authorities as fair. For a longer relationship, such as the McFarlanes', that reimbursement provision is entirely inapplicable, and thus even financial contribution, or the lack of it, is irrelevant. Whether the parties married just before the high-earning spouse began his professional education, or just after his graduation, makes no difference either. Nor should it in a marriage of 15 or 20 or 25 years. The award's size is instead based upon relational duration, as illustrated by the previously provided calculations of the awards that the ALI's rules would yield under both the Parlour and the McFarlane facts.

### 3. CONCLUSION

At the beginning of his opinion Thorpe LJ describes the issue before him in yet different terms: should there be an equal division of income, as well as capital? The question of course refers to post-divorce income, because income earned during the marriage has either been transformed into property (capital), or consumed. He seems to conclude, somewhat uneasily, that it should not. The American authorities might perhaps strengthen his resolve on this point. The presumption of an equal division of marital property – property accumulated through the labour of either spouse during the marriage – is increasingly common in the United States, and endorsed by the Principles. It is grounded on a presumption that the parties have contributed equally to the marriage enterprise as a whole, and should thus share equally in the assets distributed upon its dissolution. Eekelaar calls this the 'earned share' principle, and as he points out (2005) it is not applicable to post-divorce earnings, unless one adopts the problematic approach of *O'Brien* and treats those future earnings as a return on an abstraction called 'earning capacity' – a path that Thorpe LJ seems wisely disinclined to follow.

But if the earned-share principle is not the right guidepost for the allocation of post-divorce earnings, what is? I have suggested that no coherent answer to this question can be provided if 'need' remains central to the analysis, and commend instead consideration of the approach of the ALI Principles: that claims against post-divorce earnings



are justified as payments to compensate for certain financial losses that arise upon divorce, and which, absent such a remedy, will not be allocated fairly between the spouses. I have provided an example of how this system would apply to these particular cases. There are many details of conception and application set out in the ALI Principles that could not be addressed in this brief overview, but I hope what I have set out here is sufficient to generate further interest in them.

