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THE LAW RELATING TO CRIMINAL CONVERSATION AND THE ENTICEMENT AND HARBOURING OF A SPOUSE

CONTENTS *PAGE*

CONTENTS *PAGE*

THE LAW REFORM COMMISSION

THE LAW RELATING TO CRIMINAL CONVERSATION AND THE ENTICEMENT AND HARBOURING OF A SPOUSE

CHAPTER 1 A THE PRESENT LAW

(a) Criminal Conversation

A man has a right of action for damages against a person who has had sexual relations with his wife. The action is an action for "criminal conversation". The consent of the wife to the relations does not affect the entitlement to sue; and it is not necessary that the adulterous conduct should have resulted in the separation of the spouses. However, a husband who is already separated from his wife at the time of the adultery does not appear to be entitled to sue for damages for criminal conversation, unless the separation was brought about by the conduct of the defendant.

Only consent of or connivance by the husband will constitute a bar to the action where the spouses are living together. Other conduct by the husband, however disgraceful it may be in itself, will affect only the question of damages. The same is true in regard to condonation.

The fact that the plaintiff's wife has died while the action is pending or before it is brought does not deprive the plaintiff of a verdict in his favour, but the damages may be greatly reduced.

It appears that ignorance of the fact that the plaintiff's spouse was married does not afford a good defence but that it may reduce the damages. (Lord v. Lord and Lambert /1900/ P. 297)

In actions for criminal conversation, the marriage between the plaintiff and his spouse must be "strictly proved", but, according to a decision[1] of the Northern Ireland Court of Appeal in 1933, the evidence of the parties to the marriage may be sufficient, even though better proof may be available. The action does not survive the death of either plaintiff or defendant.[2]

The principles governing the award of damages are as follows:

1. Since it would appear that the action is based on the case rather than on trespass, mere proof of adultery does not entitle the husband to damages: actual loss or injury must be shown.

2. Punitive or exemplary damages may not be awarded. "This is not to say that there may not be exceptional and particular cases where the defendant's conduct has been calculated by him to make a profit for himself which may well exceed any compensation likely to be payable to the plaintiff. In such rare and exceptional cases other considerations may apply". Maher v. Collins /1975/ I.R. 232 at 238 (Sup. Ct.)

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[1] McCarthy v. Hastings /1933/ N.I. 100.

[2] Civil Liability Act 1961 sections 6, 7(1) and 8(1).

3. In awarding compensatory damages, regard should be had to (a) the actual value of the wife to the husband and (b) the need properly to compensate the husband for the injury to his feelings, the blow to his marital honour and the hurt to his matrimonial and family life.

4. The value of the wife may be considered from two points of view: (a) the pecuniary aspect "in relation to which her future and her assistance in her husband's business and such allied matters are relevant"; and (b) the consortium aspect - "in relation to which the wife's general qualities as a wife and mother and her conduct and general character are relevant". Maher v. Collins supra at 237.

5. As respects damages for the injured feelings of the husband, "moderation rather than undue severity should be the principle. The conduct of the defendant can be of the greatest importance. Any feature of treachery, any grossness of betrayal, any wantonness of insult may deeply add to the husband's sense of injury and wrong and, therefore, call for a larger award - not as exemplary damages, but as appropriate compensation". Maher v. Collins supra at 238.

6. "The character and conduct of the husband is as fully in issue as the character and conduct of the wife". Maher v. Collins supra at 238.

7. Authorities are divided on the question whether the means of the defendant are relevant to the amount of damages to be awarded and, if so, whether evidence of the particular means of the defendant ought to be admitted. In Butterworth

v. Butterworth[3], Mr Justice McCardie sought to rationalise the authorities by holding that the means of the defendant were not, as such, material but that the way in which the defendant's wealth was employed might

> "have the most direct bearing on the question of damages. First, because it may assist in ascertaining the value of the wife[4], and, secondly, because the mode in which the adulterer may employ his fortune in seducing the wife may greatly accentuate the outrage to the husband's feelings and the blow to his honour and family pride. The mode in which a co-respondent has used his wealth forms part of his conduct, and that conduct may aggravate the injury to the husband".[5]

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[3] /1920/ P. 126; also referred to infra pp. 11, 12.

[4] Since, apparently, if it took the use of a fortune to seduce a wife, it would indicate that she was not likely to be won and would therefore indicate her greater value to a husband, as compared with a wife who yielded to the first suggestion or temptation: cf. Forster v. Forster (1864) 33 L.J.C.P. 150. In Butterworth v. Butterworth supra at p. 148 McCardie J., referring to Sir Cresswell Cresswell's direction to the jury in Forster v. Forster, stated: "I think he might correctly have added that the use of a fortune may in many cases accentuate the outrage on a husband's feelings.

[5] Butterworth v. Butterworth, supra, at 148. McCardie J. explained (id.) the apparently different approaches favoured in earlier decisions as follows: "I feel that they meant to say only that when the proper amount of damages is reached it should not be diminished or increased by the poverty or the wealth of the adulterer".

According to English decisions on damages for adultery with the wife only general evidence as to the means of the defendant might be given and the Court could not receive detailed evidence of the means or property of the defendant; but this was doubtful.

The concept of abuse of wealth by the defendant was criticised by Diplock L.J. in Pritchard v. Pritchard and Sims /1967/ P. 195 at 212-213, in a passage which merits extended quotation in the context of the "social norms" in England at the time:

> "The measure of .... compensation for injury to the husband's feelings and pride must .... take account of changing social norms. The test must be his rational resentment, not his mere idiosyncratic ire, and the factors to be taken into account in mitigation or aggravation are those which would affect the feelings of a reasonable man with an unfaithful wife in the social conditions of today. Such reasonable cuckold of the common law may be divorced from reality as well as from his wife, but the concept is needed so long as parliament preserves a cause of action which, in so far as it extends beyond proven pecuniary loss, I confess I find 'repugnant to modern and sensible ideas.'
>
> In the 18th and early 19th centuries, when the gulf between the classes was so wide, it may have been plausible to hold that a poor man's resentment was justifiably increased if the adulterer used his superior wealth or station to deprive the poor man of his chattel-wife, and so to award as compensatory damages which were in truth exemplary. When, however, McCardie J. in Butterworth v. Butterworth in 1920 accepted the use of wealth or station by an adulterer as still being a factor in aggravation of damages, he was taking his psychology from the Victorian novelette and not from life in the 1920s, and social norms have not stood still since then. I find it impossible to accept that, in these egalitarian and materialistic days, the feelings

> and pride of a reasonable man are more affronted if his wife commits adultery with an opulent baronet rather than with an impoverished dustman, a young Adonis rather than an elderly Caliban. The lower the material and physical attractions of his supplanter, the more wounding the comparison, and the greater the blow to his own self-esteem."

The question whether a wife has a right of action for criminal conversation against a woman who commits adultery with her husband has never come up for judicial decision in Ireland. If it did, it would, of course, raise Constitutional issues. The view that no action lies is founded on the argument that historically the action has been based on the "servile" position of the wife relative to her husband. Moreover, the tendency in English decisions relating to negligently caused loss of consortium and to harbouring of a spouse has been to deny a right of action to the wife on the basis that these actions are anomalous and that it is better to confine the anomaly as far as possible rather than extend it further. As against this, a strong argument may be made in favour of the view that the wife has a right of action for criminal conversation.

First, it may be said that the former concept of the action, in which the wife was supposedly akin to a chattel of her husband, has been replaced by the view that the action protects the stability of the marriage relationship.[6] This view clearly involves a right of action for each spouse.

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[6] Cf. Kelly, "The case for Retention of Causes of Action for Intentional Interference with the Marital Relationship" 48 Notre Dame Lawyer 426 at 431 (1972).

Second, the legal position of married women has changed radically from the time when the action for criminal conversation originated. Married women have now full contractual capacity[7], the same liability in tort as their husbands[8], equal succession rights[9], equal rights to guardianship and custody in respect of their children[10] and equal maintenance obligations[11]. A married woman may sue, and be sued by, her husband as if she were unmarried[12]. Also, since the Juries Act 1976 (enacted following the decision of the Supreme Court in de Burca v. A.G. [1976] I.R. 38) women are liable for jury service in the same way as men. To contend that the action for criminal conversation has remained frozen in its historical condition in the face of these statutory and Constitutional developments is unconvincing.

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[7] Married Women's Status Act 1957 section 2(1).

[8] Id.

[9] Succession Act 1965.

[10] Guardianship of Infants Act 1964 section 6(1). See also B. v. B. [1975] I.R. 54 at 61 (Sup. Ct.) where Walsh J. states that

> "[i]n [g]iving to both parents of an infant equal rights in guardianship matters, the 1964 Act] provided a statutory expression of the rights already guaranteed by the Constitution....."

[11] Family Law (Maintenance of Spouses and Children) Act 1976, section 5.

[12] Married Women's Status Act 1957 section 2(2).

Third, Article 40 of the Constitution may be considered as requiring that no sex discrimination exist in relation to the action. In de Burca v. A.G. (at p. 72) Mr Justice Walsh states, in relation to Article 40.1 of the Constitution:

> "To be of either sex, without more, is not per se to have a social function within the meaning of Article 40 of the Constitution. To be an architect or a doctor, for example, is to have a social function, but the function does not depend upon the sex of the person exercising the profession. Clearly some social functions must necessarily depend upon sex, such as motherhood or fatherhood. In the proper context, due recognition may also be given by the law to the fact that certain social functions are more usually performed by one sex rather than by the other. The essential test in each such case is the function and not the sex of the functionary".

The question, therefore, arises as to whether married women as such are performing a social function, and, if so, whether the difference of social function between husband and wife, respectively, would justify the discrimination between them that refusal to recognise the wife's claim would entail. The better view appears to be that such discrimination would not withstand Constitutional challenge.[13]

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[13] It should be said that differences between the sexes do exist in relation to criminal conversation, since adultery by a wife may lead to her giving birth to an illegitimate child, which may in turn cause further disruption in the relations between husband and wife whereas adultery by the husband does not have this immediate consequence, though, of course, the consequences for the mother of a child born of his adultery may be very severe. The emphasis on the first aspect in former times may have been linked to questions of succession to property. The argument has been used to justify discrimination between the sexes under the Indian Divorce Act: see H. Seervai, Constitutional Law of India vol. 1, 292 (2nd ed. 1975).

It is perhaps worthy of note that if the Equal Rights Amendment becomes part of the law in the United States, it "would prohibit enforcement of the sex-based

Fourth, it may be argued that the English cases on negligence causing loss of consortium and on harbouring, in which the right of action of married women was rejected, would not afford very strong support for the view that the same rules apply in relation to criminal conversation. It should be noted that criminal conversation, enticement and harbouring are all torts arising from the intentional interference with the marital relationship. When the issue whether a married woman could sue for enticement came before the English Courts, they held that she could[14], and, in Best v. Fox[15], which held that no action lay on behalf of a married woman for negligently inflicted loss of consortium, Lord Porter stressed[16] the malicious nature of the defendant's conduct in enticement and Lord Goddard noted that enticement actions depend

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13 Cont'd

definitions of conjugal function, on which the discriminatory consortium laws are based. Courts would not be able to assume for any purpose that women had a legal obligation to do housework, or provide affection and companionship, or be available for sexual relations, unless men owed their wives exactly the same duties". Brown, Emerson and Freedman, "The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women" 80 Yale Law Journal 871 at 944 (1971). For further discussion of the Equal Rights Amendment, see generally Binchy, "The American Revolution in Family Law" 27 N.I. L.Q. 371 at 377-379 (1976). For discussion of constitutional developments relating to sex discrimination in respect of negligently inflicted loss of consortium, see L. Kanowitz, Women and the Law: The Unfinished Revolution 160-166 (1969).

14 Gray v. Gee (1923) 39 Times L.R. 429 (Darling J., addressing Special Jury), Place v. Searle [1932] 2 K.B. 497 (C.A., obiter statements of Scrutton and Slesser L.JJ.), Newton v. Hardy (1933) 49 Times L.R. 522 (K.B. Div.).

15 [1952] A.C. 716 and [1952] 2 All E.R. 394 (H.L.). For criticism of this decision, see McKay, Comment: "Is a Wife Entitled to Damages for Loss of Consortium?" 64 Dickinson Law Review 57 at 62-63 (1959).

16 Id. at 726-727.

> "on the well established legal principle that the violation of a legal right committed knowingly is a cause of action",[17]

and on the basis that "/t/here has been a conscious and wilful invasion of /the wife's/ right".[18]

Best v. Fox may, therefore, scarcely be regarded as a persuasive authority against the wife's right of action for criminal conversation, since it conceded the propriety of the general principle that, where there is intentional interference with the consortium (as in enticement and criminal conversation), the injured spouse should have a right of action.

(b) Enticement of a Spouse

It is an actionable tort wrongfully to entice one spouse away from another. The tort is wholly independent of sexually immoral factors: adultery is not an ingredient and, conversely, adulterous conduct might not give rise to an action for enticement at all (as where the spouses continue to cohabit).

The inducement to leave must be something stronger than mere solicited advice or sexual attraction, but it is not necessary that the will of the plaintiff's spouse should have been overborne by the stronger will of the defendant.

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[17] Id. at 729.

[18] Id. at 730. Cf. Anon., "The Wife's Right of Action for Loss of Consortium" 26 Harvard Law Review 74 at 75 (1912). For a convincing argument to the effect that the right to recover for negligently caused loss of consortium can be supported by a stronger moral claim than that relating to intentional interference, see Anon., "Judicial Treatment of Negligent Invasion of Consortium" 61 Columbia Law Review 1341 at 1354 (1961).

The parents of a spouse have no more right to entice him or her away than a complete stranger, although it would appear that circumstances may be recognised in relation to parents as excusing conduct that would amount to enticement in the case of similar conduct by a stranger.

For a plaintiff to succeed in an action for enticement, it is not necessary to establish an evil motive on the part of the defendant; but where the defendant can establish that he or she acted from "motives of humanity", as where the plaintiff maltreats his spouse so that she is forced to leave his house through fear of bodily injury, the defendant will not be liable.

There is no clear authority on whether a wife has a right to sue for enticement. In England in Lynch v. Knight[19] the House of Lords was divided on the issue, Lord Campbell L.C. considering that the wife had a right of action and Lord Wensleydale taking the contrary view. In Butterworth v. Butterworth[20], Mr Justice McCardie considered it "doubtful" whether a wife had the right to sue for enticement or harbouring, believing that this was on account of the fact that the rights of a husband with regard to the person and society of his wife "were different to and far greater than" the rights of a wife with respect to the society of her husband - following the opinion of Lord Wensleydale in Lynch v. Knight, supra. McCardie J. noted that in many jurisdictions in the United States a

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19 (1861) 9 H.L.C. 577, 11 E.R. 854.

20 [1920] P. 126 (McCardie J.), referred to supra pp. 4-6 and fns 3-5.

different view prevailed and that actions by women for enticement and alienation of affections were "prominent features" of the law reports of those States. He did not, however, address himself to the question whether, in the light of the substantial emancipation of married women during the period since 1861, the argument that impressed Lord Wensleydale should nevertheless continue to carry weight. This is surprising having regard to McCardie J.'s judgment twelve years later in Place v. Searle[21].

In 1923, in Gray v. Gee[22], after an extended discussion of the question, Mr Justice Darling held that a wife could sue for enticement[23] and in Place v. Searle, the same view was

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[21] [1932] 2 K.B. 497, referred to supra p. 9 fn. 14.

[22] (1923) 39 T.L.R. 429, referred to supra p. 9 fn. 14.

[23] The relevant passage from the report of Darling J.'s judgment is worth quoting:

"In this country a woman was never the chattel of her husband. He had potestas over her and his children, but potestas and proprietas were very different things. He (his Lordship) had come to the conclusion that there was no distinction to be drawn here to the effect that the husband could bring the action because his wife was his property and that the wife could not because her husband was not her property. If a man was allowed to bring such an action, why should not a woman? He could see no reason. A woman might not lose quite as much as her husband, but if another woman enticed the husband away she lost far more than necessities and far more than money could replace. This form of action had been allowed in the United States and in Canada, and although those decisions were not binding upon a Judge in this country, they laid down what was the old law of England. He thought it was entirely consistent with the principles of our common law, and he thought the reason why such an action had never been brought before was that there had been difficulties of procedure. These had now been swept away by the Married Women's Property Act, 1882. He was of opinion that the rights of the two parties were the same. The difficulty had been, not that there was not the right, but that the remedy had not been devised. The law had devised that remedy by the Act which gave a married woman the right to sue in her own name for her own benefit."

clearly expressed obiter by Scrutton[24] and Slesser L.JJ. In Newton v. Hardy[25], in 1933, Mr Justice Swift, after referring to these authorities[26], held that a wife could sue for enticement, the Judge considering that, if he had not formed that view himself, he would have held it to be the law because of the dicta in Place v. Searle, which he would have felt bound to follow. Mr Justice Swift added that

> "/I/t was true that in /Place v. Searle/ a husband was suing for the loss of the consortium of his wife, and that in such a case different arguments could be advanced from those available where a wife was the plaintiff, but it could not now be thought that the right to sue for damages for the loss of consortium was limited to the husband. The right to consortium was a mutual right of husband and wife and if anyone violated it either husband or wife could sue for damages for that wrong."

In Best v. Fox (referred to supra p. 9 fn. 15) Lord Goddard, approving of Place v. Searle, stated obiter:

> "A wife is entitled to enjoy the society, comfort and protection of her husband and to be maintained by him, and if another entices him from her so that she is bereft of those benefits, she is as much entitled to claim damages as is a husband whose wife is for any reason, save humanity, abducted or persuaded to leave his home".

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24 "It seems to be clear that at the present day a husband has a right to the consortium of his wife, and the wife to the consortium of her husband, and that each has a cause of action against a third party who, without justification, destroys that consortium": id. at 512.

25 (1933) 49 Times L.R. 522 (K.B. Div.), referred to supra p. 9 fn. 14.

26 And to the decision of the High Court of Australia in Wright v. Cedzich (1930) 43 C.L.R. 493, holding that no action lay on behalf of the wife.

It is considered that, if the issue came before an Irish Court today, the right of action on behalf of the wife would be fully recognised. Apart from the line of English decisions in favour of recognition, the factors already mentioned above in relation to criminal conversation would be likely to be strongly persuasive. Most important of these are the changed legal position of women and the recent developments in Constitutional law relating to sex discrimination. (See also infra in regard to harbouring.)

The action for enticement does not survive the death of either plaintiff or defendant.[27]

(c) Harbouring of a Spouse

It is an actionable tort for a person to harbour a man's wife[28] after notice that she has left him without his consent. Where the defendant acts from principles of humanity, as for instance to protect the wife from ill-treatment by the husband, no action lies. If the wife

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27 Civil Liability Act 1961 sections 6, 7(1) and 8(1).

28 After the decision in R. v. Jackson [1891] 1 Q.B. 671 (C.A.), which held that a husband was not entitled physically to force his wife to live with him, the view was expressed that the action for harbouring had become obsolete: N. Geary, The Law of Marriage and Family Relations 167 (1892), but this appears to have been premature. Cf. Salmond on the Law of Torts 470 fn. 13: "Quaere whether an action for harbouring would not have lain against the relatives in this case" (15th ed. (1969) by R.F.V. Heuston). (For an analysis of Jackson, see Manson "Marital Authority" (1891) 7 L.Q.R. 244.

misleads the defendant into believing that she requires sanctuary from ill-treatment, the action will not succeed. Adultery is not an ingredient of the action.

No decision has recognised the right of a wife to sue for the harbouring of her husband. In the English case of Winchester v. Fleming, this issue came squarely before the Court, and Mr Justice Devlin held that a wife did not have such a right, on the basis that "where the choice lies between leaving a decaying form of action in the shape in which it was originally constructed and adding on up-to-date extensions, the Court may refuse to embark on the task of modernization".[29]

The question arises as to whether an Irish Court would follow Winchester v. Fleming or instead adopt another approach. Whilst the matter is not free from doubt, it is suggested that it is more likely that an Irish Court would now recognise that a wife has the right to sue for the harbouring of her husband in the same way as he has a right to sue if she is harboured. It is also suggested that an Irish Court would take this view having regard in particular to the legal developments relating to the equality of the sexes and to the development of Constitutional law in recent times. (Cf. p. 14 supra in regard to enticement.)

The action for harbouring does not survive the death of either plaintiff or defendant.[30]

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[29] [1958] 2 Q.B. 159 at 265, 266.

[30] Civil Liability Act 1961 sections 6, 7(1) and 8(1).

NORTHERN IRELAND

(i) Criminal Conversation

Until 1939, the position in Northern Ireland was the same as in this jurisdiction: a husband had a right to sue his wife's paramour for damages in an action for criminal conversation. The Matrimonial Causes Act (Northern Ireland) 1939 by section 18 replaced this action by an action for damages for adultery on the lines of the 1857 legislation in England, which abolished the action for criminal conversation but introduced in its place the action for adultery with the wife. (See sections 49 and 33 of the Matrimonial Causes Act 1857 and pp. 20, 21 infra.)

The Office of Law Reform in Northern Ireland stated in 1977 that it was understood that claims for adultery were "rare" and that the damages awarded were "of comparatively small amounts". In 1975 when there were nearly five hundred divorces there were four claims for damages and only one of these was successful, £250 being awarded.[31] (A claim for adultery could be included in a divorce petition or made independently.) The Office, in its Consultative Document on Family Law, set out the reasons for abolition of the action for adultery in England and Scotland. Since this summary of reasons does not derive directly from the Reports of the English and Scottish Law Commissions, it merits quotation in full:

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[31] Office of Law Reform, The Reform of Family Law in Northern Ireland: A Consultative Document para. 46 (Belfast 1977).

"(a) The action was based on an outmoded view of marriage and implied that a husband had a proprietary right to his wife, even though in recent times less emphasis had been placed on this aspect in assessing damages. In so far as the action purported to compensate a husband for his wounded feelings, there seemed little justification for its continuance. A wife had no corresponding right of action against a woman with whom her husband committed adultery.

(b) There seemed likely to be relatively few cases where a husband suffered actual loss due to the co-respondent's adultery with his wife. This was borne out by the small number of cases in which a claim was made.

(c) Damages awarded by the courts in the majority of cases were small. This suggested that there was no serious problem for which they afforded a remedy.

(d) The existence of the action was thought to lend itself to blackmail and the possibility of collusion between husband and wife - especially where the co-respondent was a man of means. It was found that in England most awards over £1,000 were agreed figures.

(e) Since the damages awarded depended on the value of the wife there was a danger of the unedifying spectacle of the wife belittling herself (to reduce damages against a co-respondent she intended to marry) and the husband extolling her virtues (to increase his damages) while at the same time normally using divorce proceedings to reject her.

(f) Courts were reluctant to burden an impecunious co-respondent with damages that might take years to pay: they therefore tended to award damages only where the co-respondent was a man of means. This meant that, in effect, there were two standards - if the damages truly compensated the husband for his loss he should have been entitled to them regardless of the means of the co-respondent.

(g) It was sometimes argued that a wealthy co-respondent should be made to pay. This was taking a punitive view of the claim which was rejected by the courts - damages were compensatory and ought to have been the same against a poor man as against a rich one (though of course the chances of actually recovering them from a rich man would have been better)." - para. 46.

The Office of Law Reform in its Consultative Document sought views about the desirability of abolishing the action.

Since publication of the Consultative Document the Matrimonial Causes (Northern Ireland) Order 1978 has been made. This Order provides for the introduction in Northern Ireland of a divorce jurisdiction broadly similar to that in England and Wales. Prior to the Order, the petitioner had to show that the other spouse had been guilty of a matrimonial offence such as adultery, cruelty or desertion. The 1978 Order provides that the only ground of divorce shall be that the marriage has broken down irretrievably; and this may be proved by establishing one or more of the facts set out in Article 3 of the Order, including the adultery of the respondent since the date of the marriage. This means that adultery will, in effect, be a ground for divorce without the necessity to show that the petitioner finds it intolerable on that account to live with the respondent. Here the Order follows Scots and not the English law. The Order has two further similarities with the law of Scotland. First, there is no requirement for solicitors in divorce cases to certify that they have discussed the possibility of reconciliation. It seems that a provision to this effect in English law has proved to be of little value. Second, the Court in Northern Ireland now has jurisdiction to dismiss a petition for divorce

based on the adultery of the respondent, if the respondent proves that the adultery was committed with the connivance of the petitioner. Article 57 of the 1978 Order abolishes the right to claim damages for adultery.

(ii) Enticement and Harbouring

The law in relation to these torts would appear to be substantially similar to that in this jurisdiction. The Office of Law Reform in its Consultative Document stated that

> "/t/he reasons for abolition are substantially the same as those applying to the action for adultery. The actions assume that the wife is the husband's property (the action for enticement is usually for the enticement of a wife; that for harbouring can only be in respect of a wife); they open the possibility of blackmail; they involve the public display and exacerbation of domestic quarrels; and they can only have a disastrous effect on the children (if any) of the marriage. The actions have been the subject of a degree of legislative disapproval in that they are excluded from surviving the death of either party and legal aid is withheld. They have been the subject of judicial disapproval in that the courts have consistently refused to extend their scope beyond the limits set by precedent (e.g. to allow a wife to bring an action for the harbouring of her husband). It has also been pointed out that the basis of the action for harbouring was the economic process by which a wife refused food and shelter elsewhere would be compelled to return to her husband, and that this is no longer valid in an age when society is organised on the basis that everyone is in the last resort to be supported by the state."

The Office stated that it was believed that these actions were comparatively rare in Northern Ireland and it invited views about their abolition. The actions were abolished by Article 58 of the Matrimonial Causes (Northern Ireland) Order 1978.

CHAPTER 2 THE LAW IN OTHER EUROPEAN LEGAL SYSTEMS

(a) England

The common law action for criminal conversation was abolished in England in 1857. In its place a husband was given the right to claim damages against a person who committed adultery with his wife. Proceedings could be taken either in conjunction with a petition for divorce or judicial separation (which was substituted for divorce a mensa et thoro) or without making such a petition.[32] The claim for damages was generally tried on the same principles as the old action for criminal conversation, although there were some differences. Thus, for example, condonation was held to disentitle a husband from proceeding for damages. Moreover, the legislation of 1857 created a new power for the Court to direct in what manner the damages were to be applied; and the Court might direct them to be settled for the benefit of the children (if any) or even of the guilty wife.

The English Law Commission Working Paper No. 9

In 1967, the Law Commission examined the action for damages for adultery in a Working Paper, entitled Matrimonial and Related Proceedings - Financial Relief[33]. The Commission concluded their analysis of the subject by stating that

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[32] Matrimonial Causes Act 1857 sections 33 and 49.

[33] Working Paper No. 9 (1967).

> "we are inclined to the view that damages for adultery (and the action for enticement) should be abolished altogether and not replaced by any financial liability (other than for costs). However, we feel that this is not a question on which we at this stage ought to give a firm opinion. It is a matter for the moral judgment of society generally, which may feel that in outrageous cases a rich seducer should be made to pay. We shall welcome comments from the readers of this paper, both lay and legal."

The English Law Commission Working Paper No. 19

In 1968, the Law Commission returned briefly to the subject. In its Working Paper No. 19, the Commission reported that the comments so far received on its provisional proposals in Working Paper No. 9 suggested that public opinion would favour abolition of the action for enticement and of any claim for damages for adultery not coupled with a petition for divorce or judicial separation, but that there would be objection to a total abolition of claims for damages for adultery. The Commission added: "Public opinion, it is said, will demand that damages be recoverable in divorce proceedings from the wealthy seducer of a poor man's wife".[34] The Commission stated that its preference was still for total abolition of both actions, but that it was awaiting further views on the subject. In the meantime, it had "no hesitation" in proposing the total abolition of the action for enticement.

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[34] Working Paper No. 19, The Action for Loss of Services, Loss of Consortium, Seduction and Enticement para. 91 (1968).

The English Law Commission Report on Financial Provision in Matrimonial Cases (1969)

The Law Commission concluded its treatment of the subject the following year in its Report on Financial Provision in Matrimonial Cases.[35] It referred to Working Paper No. 9 in which

> "we set out the arguments for and against the retention of th/e/ remedy /of damages/ and made it clear that we were of the opinion that it should be abolished. We recognised, however, that this was essentially a social question on which opinion was likely to be divided."

The Report stated that the Commission's consultations had "confirmed that this is indeed so". It added:

> "None of the arguments advanced in the course of the consultations has caused us to resile from our view which still is that damages for adultery should be abolished. But, as already stressed, this is essentially a social question to which we are not qualified to give a final answer."

The Commission stated that consultation on the suggestion in its previous Working Paper that the actions for enticement and harbouring of a spouse should be abolished had made it "clear that this suggestion is generally accepted."

The Law Reform (Miscellaneous Provisions) Act 1970

Legislation followed one year after the publication of the Law Commission's Report with the passage of the Law Reform (Miscellaneous Provisions) Act 1970 which in section 4 abolished the right to claim damages for adultery. That

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[35] Law Com. No. 25 (1969).

legislation was introduced by a Private Member, the Government's attitude to it being described by the Solicitor-General as "one of benevolent neutrality."

The Bill as introduced proposed the abolition simpliciter of the right to claim damages for adultery, and actions for enticement, seduction and harbouring of a spouse or child. There was, however, extended debate on a proposal by Mr Leo Abse M.P. that, instead of simply abolishing the action for adultery, a new right of action should be available, for the benefit of any children of the marriage, to obtain damages against a person (male or female) in proceedings for divorce or judicial separation, where that person had committed adultery with either spouse which had "caused or contributed to the breakdown of the marriage" and where the children were likely to suffer financial hardship unless an order were made. The type of case envisaged by Mr Abse was one where a rich man or woman, through a callous display of wealth, might have seduced a married person, thereby leading to the breakdown of that person's marriage, with consequent financial hardship to the children.

The proposal was opposed primarily on the ground that, in the light of the recent divorce legislation[36], it would be anomalous to retain such strongly "punitive" considerations of fault in the approach of the law to marriage breakdown. Mr Abse's proposed amendment, although agreed to by the Special Committee, was defeated at the Report Stage in the House of Commons.

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[36] The Divorce Reform Act 1969 replaced the fault-based grounds for divorce of adultery, cruelty and desertion by a single new ground of irretrievable breakdown of marriage.

(b) Scotland

(a) Adultery

Until January 1st 1977, the position in Scotland was that a husband could sue a person for damages for committing adultery with his wife. It was not necessary that the husband should have lost the affections or society of his wife, this being a question of damages only. Moreover, condonation on his part would not disentitle him to sue.

The question whether absence of knowledge on the part of the defendant that the woman with whom he had sexual relations was married would afford him a good defence never arose directly for decision, but the view of the commentators was that it was probably necessary to establish that knowledge.

Whilst consent by the plaintiff to his wife's having sexual relations with the defendant barred an action, the fact that he had been guilty of adultery or cruelty did not disentitle him to sue.

Although no reported decision specifically recognised the right of a wife to sue for damages, the view had been expressed that "on principle there would seem to be no reason why she should not /have/ do/ne/ so".[37]

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37 E. Clive and J. Wilson, The Law of Husband and Wife, 277. See also the Scottish Law Commission Memorandum No. 18, Liability of a Paramour in Damages for Adultery and Enticement of a Spouse paras. 2.3, 2.26, 2.27, D. Walker, Principles of Scottish Private Law, 1111-1112, D. Walker, The Law of Delict in Scotland vol. 2, 718-719.

Damages were awarded on the same general principles as apply in this country, although awards ".... tend/ed/ to be low".[38]

(b) Enticement

The question whether a spouse has a right of action for enticement is still an open one. The authorities which would appear to support its existence have been described in a recent work as being "scanty, and either old or imported".[39]

Scottish Law Commission Memorandum No. 18 (1974)

The Scottish Law Commission examined the law relating to damages for adultery and enticement in its Memorandum No. 18 in 1974. After a review of the existing law, the Commission proceeded to discuss the possible changes to the law relating to damages for adultery.

The first question considered by the Commission was whether the law should be clarified to ensure that a wife should have a right of action for damages against her husband's paramour. It stated that

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38 E. Clive and J. Wilson supra, 279.

39 E. Clive and J. Wilson supra, 281. See further D. Walker, Principles of Scottish Private Law supra 1111, and D. Walker, The Law of Delict in Scotland supra 714-716, who does not express similar doubts about the existence of the right of action; and T.B. Smith, A Short Commentary on the Law of Scotland, 724, who says that "there is little authority on the point in Scotland ...." (See also Scottish Law Law Commission Memorandum No. 18 paras. 3.1 - 3.3.)

> "/i/t has been objected that this might increase the number of cases coming before the courts but, if the principle on which the husband's right of action is based is accepted, we consider that any such increase ought also be accepted. The present tendency of legislation is to treat spouses, as far as possible, upon an equal footing and there would appear to be a strong case for removing from our law this remnant of discrimination between husband and wife. We endorse, therefore, the conclusion of the Morton Commission". (para. 2.27)

The second question considered by the Commission was whether the right to sue a paramour should be extended to the children of the marriage. The Commission opposed such an extension on the ground that, if such a right were conceded, it would presumably be the duty of the tutors in every case to initiate proceedings on behalf of the children, and that children "should not be exposed to the risk of learning in the future that their education had been facilitated by their parent's adultery".

The third question considered by the Commission was whether it should be necessary for the pursuer to establish that the co-defender knew that the person with whom he or she had had sexual relations was married. The Commission adopted the view that, in conformity with the delictual basis of the claim, the onus of proof should lie on the pursuer. This view was also favoured by the Morton Commission.[40]

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[40] The Royal Commission on Marriage and Divorce (Cmd. 9678 (1956))), so called after its Chairman, Baron Morton of Henryton, a Lord of Appeal in Ordinary - paras 463, 464. The Scottish Law Commission discussed the matter at para. 2.20 of Memorandum No. 18 (1974). (See infra p. 60 fn. 69.)

The fourth question considered by the Commission was whether a claim for damages for adultery should be competent in actions of judicial separation founded on adultery, as well as in actions of divorce. The Commission was of the view that "/t/here would appear to be no justification for making a distinction in this respect...."

The fifth question considered by the Commission was whether the Court in an action for damages for adultery should be given discretion in certain cases to reduce damages, having regard to the conduct of the pursuer and the means and circumstances of the co-defender. The Commission did not express a preference on the matter, stating that "/s/uch a proposal will require careful consideration as it introduces a new principle".

The sixth question considered by the Commission was whether the basis of the entitlement to damages should be changed so as to relate the quantum of recovery to the quantum of causal responsibility for the breakdown of the marriage. It appeared to the Commission to be "out of line with current notions of responsibility" to affix full responsibility on the paramour when the guilty spouse had participated with full consent in the adulterous relationship.

The seventh question considered by the Commission was whether the right to claim damages for adultery should be restricted to where divorce proceedings were also being taken. The Commission stated:

> "We concede that it is unfortunate that, after the conclusion of an action of divorce or of judicial separation, responsibility for the breakdown of a marriage may have to be re-examined. We consider, however, that if the right to claim damages is to subsist, any procedural limitations affecting the type of process in which they may be claimed would be inappropriate. If, as we think.... jurisdiction

> in respect of conclusions for damages or expenses should follow the normal rules for personal actions, the limitation of the right to claim damages or expenses to a subsidiary conclusion in an action of divorce or separation would present co-defenders with the temptation to place themselves temporarily outwith the jurisdiction of the court. There would also be a contrast between the liability in practice of a co-defender subject to the jurisdiction of the Scottish courts in personal actions and a co-defender not subject to that jurisdiction." (para. 2.33)

The Commission considered that there would be no real danger of pursuers deliberately choosing to raise a separate action for damages with a view to adding to the co-defender's expenses, particularly if the Court were to be given the discretion that the Commission had recommended to reduce the amount of damages having regard inter alia to the conduct of the pursuer.

The eighth question considered by the Commission was whether the jurisdiction of the Court should be changed from its delictual base to that of a matrimonial proceeding. The "tentative conclusion" of the Commission was that it should not, on the ground that such claims were "essentially of a delictual nature and should follow the usual heads of jurisdiction in delictual actions".

The ninth and final question considered by the Commission was the most important one of whether the action for damages for adultery should be abolished. The Commission's discussion of this issue merits extended quotation:

> "Whatever justifications have been offered in the past for the husband's right to claim damages from the person who has committed adultery with his wife, the question remains whether this right of action should be retained in our law. It might be said, on the one hand, that a conjectural historical basis of the action, namely the recognition of a species of right of property enjoyed by the husband in his wife's body, is out of accord with current social attitudes. It

> might also be asked whether there is any evidence to suggest that the existence of such a right of action is at the present time a deterrent to the commission of acts of adultery and whether any social ends of value would be lost by the abolition of the action. On the other hand, it might be said that in addition to its moral basis the right of action does have a practical justification, that of recouping for a wronged husband the expenses he has incurred in the action of divorce and, perhaps more importantly, that of providing a solatium to him for the injury which he has sustained. It is arguable that, while in the ordinary case the wronged spouse would not wish to seek such a remedy, there are cases where the conduct of the paramour has been so blatantly offensive, or so cruel, or so underhand that the injured person should be entitled to damages. One example is where the paramour has abused a position of authority. In such cases, it may be argued, the absence of a legal remedy might lead to anti-social acts of revenge. There are also situations[41].... where the conduct of the person who has had sexual intercourse with the pursuer's wife verges upon the commission of indecent assault or even rape. If the defender is worthwhile suing, should he not pay damages to the husband and a solatium for the injury to his feelings? It is arguable, however, that in cases verging on indecent assault or rape the real injury is suffered by the woman, to whom a right of action for solatium would clearly be open, and that it should be for her alone to decide whether to claim damages. It is also undeniable that there are some cases where actions of damages for adultery are brought for inappropriate reasons, out of spite or hatred, or where the action is brought or threatened to put pressure on the co-defender to make a financial settlement". (para. 2.35)

The Commission did not in Memorandum No. 18 take a position on the issue whether the action should be abolished, stating that

> "/t/o enable us to decide whether this right of action should remain or be abolished in Scotland the views of readers of this Memorandum on these and other relevant arguments would be welcomed".

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[41] The Commission referred to Black v. Duncan 1924 S.C. 738.

The Commission proceeded to examine in some detail whether the existing law relating to the liability of the co-defender for the expenses in divorce proceedings should be amended or abolished. In this regard, the Commission discussed largely the same questions[42] as in respect of the damages for adultery action. Again, the Commission came to no final conclusion on the matter, seeking at that stage the comments of readers on the issue.

On the question of whether the right to sue for damages for enticement should be abolished, the Commission took a clear position. It stated

> "Actions for damages for the enticement of a spouse, it is thought, are an anachronism in the present social climate and fulfil no useful purpose. They are anachronistic because they imply that one spouse has a species of proprietary right to the society of the other. They fulfil no useful purpose both because the remote chance that they may be instituted is not a serious deterrent to a third party who wishes to persuade one spouse to leave the other and because success in the action is more likely to persuade the enticed spouse to remain apart than to rejoin the other. The effect of such actions is likely to be an increase in the bitterness between those involved. They are objectionable on that account and subsidiarly because there is a danger of such actions being initiated for reasons of mere spite. In our view, therefore, it should be made clear by legislation that actions for damages for the enticement of a spouse are incompetent in Scotland." (para. 3.4)

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42 E.g. whether liability should be extended to female co-defenders, the effect of ignorance of the fact that the defender was married, the extension of the power to ordain the payment of expenses by a co-defender in actions of judicial separation based on adultery, and the possible abolition of the right to claim the expenses of the action of divorce from the co-defender subsequent to the divorce proceedings. Whether legal aid should be available to the co-defender was also considered by the Commission. (See paras 2.36-2.45 of Memorandum No. 18.)

Scottish Law Commission's Report No. 42 (1976)

By the time the Commission published its Report[43] on the subject of damages for adultery and enticement, it had become clear that legislation on divorce similar to that in operation in England since the commencement of the Divorce Reform Act 1969[44] was likely to be enacted for Scotland. The philosophy of concentrating on the fact of the breakdown of the marriage rather than on considerations of matrimonial fault appears plainly to have affected the resolution of the question whether a right to damages should continue in respect of adultery. (See paras 3 and 4 of the Report.)

The Commission stated that, in response to their Memorandum on the subject, the "great weight of the comments which were received was in favour of abolition and this accords with our own conclusions reached on a balance of the compelling arguments".

The Commission proceeded to set out and discuss five arguments, two in favour of retention of the action for damages for adultery and three in favour of abolition.

The first argument in favour of retaining the action was that the paramour should compensate the husband for his wounded private feelings and for his public disgrace arising from the act of adultery. The Commission responded to this argument by stating that

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[43] Scot. Law Com. No. 42, Family Law: Report on Liability for Adultery and Enticement of a Spouse (June 1976).

[44] Now the Matrimonial Causes Act 1973.

> "/w/hether we regard the basis of the paramour's liability as a species of affront or insult or wrong against the husband's feelings or honour (on the analogy of the Roman Law actio injuriarum), or whether we regard it as the infringement of the husband's exclusive right to the possession of his wife's body (on the analogy of the Common Law action of criminal conversation), the liability appears difficult to defend. On the one hand, the notion of compensating a husband for the wrong to his pride or honour seems open to the objection that an action for damages would simply add to his own humiliation and the family's disgrace. On the other hand, the notion of a possessory or quasi-proprietary right is seen by many as degrading the wife to the status of a piece of property". (para. 9)

The Commission pointed out that authorities "on inter alia the Common Law action of criminal conversation and the Civil Law actio injuriarum both influenced the development of the Scottish delict in its formative period".

The second argument in favour of retaining the action was based on its deterrent effect on those contemplating interfering with the stability of family relations. The Commission did not consider that this argument was convincing, contending that adultery occurred for a number of reasons, in many of which the legal implications would be either unknown or discounted. It also argued that the existence of the right to damages had not prevented an increase in the number of divorce decrees in Scotland for adultery.

The first argument in favour of abolishing the action was that the social detriment arising from such actions outweighed the social benefits. It was suggested by those consulted who favoured abolition of the action that it encouraged malicious and vindictive claims and "would set a premium on motives of revenge". The Commission

referred to the statement of the Faculty of Advocates, commenting on the Commission's Memorandum, to the effect that, on the balance of convenience, "it would seem more practicable to remove once and for all a right that has already for all practical purposes fallen into desuetude", rather than to undertake the difficult task of reforming it to bring it more in line with contemporary views. (See para. 14 of the Scottish Commission Report.)

The second argument in favour of abolishing the action has been referred to already, namely, that its retention was quite inconsistent with the social policy underlying the change from a fault-based divorce to one based on the breakdown concept. The Commission considered that "there is force in this argument".

The third argument in favour of abolishing the action was one frequently made in the United States but echoed in other jurisdictions, namely, that the action gave rise to risks of "gold-digging" proceedings and threats of blackmail. The Commission did not consider either of these risks to be relevant to the Scottish experience. It added:

> "In Scotland, the main problem is to find some acceptable justification for retaining a claim which is little used. If, however, the action of damages for adultery were to be modernised along the lines referred to briefly in paragraph 13 above and (in more detail) in our Memorandum No. 18, and if such actions were to be encouraged by the law, the possibility would arise that the abuses experienced in other jurisdictions would emerge in Scotland." (para. 16)

Para. 13 of the Report (which is worth quoting in full) is as follows:

> "13. It seems probable that the protection of family relations and of stable married life formed an important social objective in the development of the

> action of damages for adultery. We consider that objective to be one of the most important aims of the law, but we think that, in recent times, actions of damages for adultery have in practice failed to achieve their original and still important social purpose. The achievement of that purpose must be sought in other ways than by delictual claims. It is, we think, better to recognise the failure by abolishing the action than by extending to wives a title to sue a similar action against a husband's paramour or by providing for increased awards of damages or solatium against the paramour or by refurbishing and encouraging the action in other ways."

The Commission recommended "for all these reasons" that the action by a husband for damages for adultery be abolished. The Commission considered that it was not necessary to provide specifically that the wife should not have a right of action, since, although on principle she might be able to sue, "we do not think that the Scottish courts would now recognise the competence of such an action, at any rate if, as we propose, the husband's right to damages is abolished". Nor did the Commission consider that it was necessary specifically to declare incompetent the right of one spouse to sue another for damages for adultery or the right of a spouse to obtain an interdict against future acts of adultery. Neither had been recognised by a Scottish Court and the Commission did not consider that a Court in the future would recognise either right.

The Commission then turned to the subject of the paramour's liability for the expenses of an action of divorce at the instance of the pursuer. After extended discussion of the matter, it recommended that it should no longer be competent for a husband to cite his wife's alleged paramour as a co-defender in an action of divorce and that the liability of a paramour to pay the expenses of a divorce

action should arise only when he had taken part in the proceedings, the normal principle governing awards of expenses in civil litigation being applied.

Finally, the Commission turned to the subject of the action for damages for enticement. It repeated the arguments that it had made in its Memorandum (No. 18) in favour of abolishing the action and concluded that

> "/w/ith only one exception, all of those who submitted comments on our Memorandum, including the bodies representative of the legal profession, agreed with our provisional views that such actions should be abolished, if they exist. We therefore recommend that the action for enticement of a spouse should be declared by statute to be incompetent". (para. 46)

The Divorce (Scotland) Act 1976, which came into effect on 1 January 1977, provides in section 10(1)(b) that a husband may not claim or obtain damages (including solatium) from a paramour by way of reparation. It also gives effect to the Scottish Law Commission's proposals regarding the liability of a paramour for expenses in divorce actions - section 10(2). The Act does not, however, abolish the right to damages for enticement, as the Scottish Law Commission had recommended. The issue whether such an action is competent in Scotland would, therefore, still appear to be a live one.

(c) France

Adultery is in French law a civil wrong in respect of which the innocent spouse may sue the guilty spouse for damages. No action may, however, be brought against the paramour. Formerly, adultery was also a criminal offence. Different rules applied as between the husband and the wife. Whereas a guilty wife, as well as her paramour, might be sentenced to imprisonment, a guilty husband could only be fined, and

~~a guilty husband could only be fined and~~ his paramour was not punishable. Moreover, a wife could be convicted of a simple act of adultery whereas a husband could be convicted only of adultery where he had maintained a mistress in the marital home. The criminal proceedings could be brought only on the complaint of the injured spouse, and a wife's sentence could be terminated by her husband consenting to take her back into his home.

(d) Federal Republic of Germany

In German law, "there is no claim against the co-respondent for damages resulting from the termination of married life". If his or her name is known it is inserted in the judgment granting the divorce. Adultery, however, constitutes a criminal offence for which both parties may be punished. The public prosecutor is in charge of the prosecution, but prosecution is only by application of the innocent spouse. Such application "is very rarely made". The rule in German law "according to which an adulterer may not marry the adulteress" is "now of purely academic value, because the law provides that exemption may be granted from this rule and this exemption is in practice very frequently granted." (See E.J. Cohn, Manual of German Law (2nd ed. 1968) vol. I, paras 489 and 496.)

CHAPTER 3 THE LAW IN NORTH AMERICAN AND WEST INDIAN LEGAL SYSTEMS

(a) Canada (Common Law Provinces)

A Background

(1) Criminal Conversation

The common law action for criminal conversation still exists in New Brunswick, Newfoundland and Nova Scotia. In Manitoba and Saskatchewan, legislation confers jurisdiction on the Court of Queen's Bench to entertain actions for criminal conversation, the law regarding such actions being the same as that which applies in our jurisdiction. In British Columbia, there is a statutory right to damages for adultery, and in Alberta similar legislation has been enacted, which, however, specifically provides that a number of defences (including condonation, connivance, cruelty and adultery on the part of the plaintiff) will defeat the action.

In those Provinces still retaining the common law action, the existence of an absolute or discretionary bar to divorce does not of itself disentitle the plaintiff to damages. In all Provinces (other than Alberta) where damages may be claimed the action is available only to the husband. Damages are awarded on the same principles as in this country.

(2) Enticement and Harbouring

In practically all the Common Law Provinces actions for enticement and harbouring may be taken. In British Columbia

and Alberta, however, a wife may sue for enticement and the same was true in Ontario before 1978.

B Reform of the Law

The Ontario Law Reform Commission in 1969 recommended the abolition of the actions for criminal conversation, enticement and harbouring of a spouse.

In December 1977, the Ontario Court of Appeal held that the action for criminal conversation had been implicitly abolished by the Family Law Reform Act 1975, section 1 of which provides that both spouses should have legal personalities that are independent, separate and distinct from each other, and that a married person should have the same legal capacity as a single person. The Court rejected the argument that the effect of this provision was to confer a right of action on the wife, in addition to the previous right of action of the husband. Mr Justice Dubin stated:

> ".... For the present purpose, I think the statute abolishes any proprietary interest that it is said a husband previously had in his wife, and as a corollary does not grant a wife a proprietary interest in her husband". (Skinner v. Allen (1978) 18 O.R. (2d) 3, 9)

Recent legislation in Ontario abolishes the actions for criminal conversation, enticement or harbouring of a spouse, loss of consortium of a spouse and enticement, harbouring, seduction or loss of services of a child. (See section 69 of the Family Law Reform Act 1978 (which came into operation on 31 March 1978).)

The Family Law Study in Newfoundland also examined the law in these areas and recommended the abolition of those actions.[45] It noted that the actions had been developed "in recognition of the property interest which, by tradition, a husband or parent had in the services of his wife...." and that, in addition, the remedies "were designed to preserve and serve the family unit as a cornerstone of society". Having rejected the validity of the property interest theory it went on to reject the protection of the family unit theory on the grounds that the current divorce legislation was such that the husband no longer had an interest which could be protected by the remedy in criminal conversation proceedings. On the same reasoning, it concluded that the continued existence of the actions for enticement and harbouring cannot in any way be said to protect the family unit.

In Prince Edward Island, recent legislation[46] has abolished criminal conversation, enticement and harbouring of a spouse.

In Nova Scotia, the position regarding possible reform of the law is that, if legislative proposals on other aspects of family law recently before the legislature are enacted, it is contemplated that certain actions concerning the marriage relationship (including actions for criminal conversation, enticement and harbouring) will be reviewed.

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[45] Newfoundland Family Law Study, Family Law in Newfoundland (1973).

[46] Family Law Reform Act 1977 section 64.

A study of reform of the law relating to criminal conversation, enticement and harbouring has tentatively been added to the programme of the Law Reform Commission of British Columbia.

In Saskatchewan, the Law Reform Commission on 30 June 1976 recommended the abolition of the action for criminal conversation.[47]

(b) United States of America

(1) Criminal Conversation

In most jurisdictions in the United States, either spouse may sue the paramour of his or her spouse for criminal conversation. It is unnecessary to prove that the plaintiff has been deprived of sexual relations or any services of the other spouse or of any of the other spouse's affection for him or her. Recovery has been permitted even where the spouses were living apart at the relevant time.

Condonation will not bar an action but consent or connivance will afford a defence. The fact that the defendant was ignorant of the spouse's married status will not afford him or her a defence. Damages are awarded on the same general principles as in this country but punitive damages may be awarded in extreme cases.

(2) Alienation of Affections

In most States, either spouse may obtain damages from a person who, without justification and for an improper purpose, influences or advises the other spouse to leave

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47 Law Reform Commission of Saskatchewan, Third Annual Report 1976 p. 11 (1977).

the home or to behave in a manner displaying an attitude of lack of affection towards the plaintiff spouse.

The defendant's conduct must have been intentionally directed towards influencing the spouse, but it is not essential that he or she be motivated by ill will towards the plaintiff.

(3) Abolition of Actions in Certain States

In several States, the actions for criminal conversation and alienation of affections were abolished in the 1930s. Since then they have ceased to exist in a number of other States, as a result either of judicial decision or statutory intervention.

(c) West Indies

(1) Trinidad and Tobago

In 1972, the right of action for damages for adultery was abolished.[48]

(2) Bermuda

In 1977, the action for criminal conversation and the right to claim damages for adultery were abolished, together with the actions for enticement and harbouring of a spouse.[49]

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[48] Matrimonial Proceedings and Property Act 1972 section 19(2)(b).

[49] The Law Reform (Miscellaneous Provisions) Act 1977 section 4.

CHAPTER 4 THE LAW IN SOUTH AFRICA, AUSTRALIA, NEW ZEALAND AND HONG KONG

(a) South Africa

(1) Damages for Adultery

An innocent spouse may bring an action for damages against a third person with whom his or her spouse has committed adultery. The action has been available to a husband from the earliest times but "it is now also settled law" that a wife has a right of action against her husband's paramour. The right of action does not depend on taking divorce or other matrimonial proceedings. It is not affected by condonation or by the death of the guilty spouse.

The rules governing the awarding of damages are broadly similar to those operating in this country.

(2) Enticement

Where a third person mala fide entices one spouse to leave the other, the deserted spouse has a right of action for damages against him or her. Whilst up to now only a husband has succeeded in this action, the view has been expressed that on principle a wife may also sue.

The defendant must know that the relationship of husband and wife existed and he or she must have acted with the deliberate object of enticing the plaintiff's spouse to leave. It will be a good defence to establish that the defendant acted in the bona fide belief that the plaintiff's spouse was justified in leaving.

(b) Australia

Until 1976, the law relating to damages for adultery was contained in the Matrimonial Causes Act 1959-1966. That Act enabled either spouse[50] to be awarded damages for adultery, but only where a decree for dissolution of the marriage on the ground of adultery had been made. Condonation barred an award of damages. Moreover, no damages could be awarded in respect of acts of adultery committed more than three years before the petition for divorce. The legislation contained a provision (similar to that contained in section 33 of the English Matrimonial Causes Act 1857 - referred to supra p. 20) enabling any damages awarded to be settled on the children of the marriage or upon the guilty spouse. The Australian decisions under this legislation followed, generally speaking, the English cases.

A husband (but not a wife) could sue for damages for enticement. The law in Australia appears to have been similar to that in this country in relation to the rules governing recovery of damages. There do not appear to have been any reported Australian decisions relating to the harbouring of a spouse.

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[50] Prior to the Act (which applied to the entire Commonwealth of Australia), a petitioning wife could not claim damages from a co-respondent except in South Australia (Matrimonial Causes Act 1929-41 section 22) and Western Australia (Matrimonial Causes and Personal Status Code 1948-57 section 7).

On 1 January 1976, the Family Law Act 1975 came into operation in Australia. Section 120 of the Act provides as follows:

> "After the commencement of this Act, no action lies for criminal conversation, damages for adultery, or for enticement of a party to a marriage".

(c) New Zealand

(1) Damages for Adultery

Until 1975, the law in New Zealand was similar to that which prevailed in Australia before the Family Law Act 1975. Damages for adultery could be awarded only where a petition for divorce or separation on the ground of adultery was successful.[51] Either spouse might sue for damages. There was a provision whereby any damages awarded were to be "paid and applied in such manner as the Court directs", and in this regard the Court could direct that the whole or any part of the damages was to be settled for the benefit of any children of the marriage or for the maintenance of the wife or husband.

The principles guiding the measure of damages, as expounded in the English case of Butterworth v. Butterworth[52], were approved in New Zealand. In 1975, the right to claim damages for adultery was abolished by legislation.[53]

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[51] Matrimonial Proceedings Act 1963.

[52] [1920] P. 126 (McCardie J.), referred to supra pp. 4-6, 11, 12.

[53] Domestic Actions Act 1975 (which came into operation on 3 October 1975 and was enacted following the recommendation in the Report of the Torts and General Law Reform Committee of New Zealand 1968).

(2) Enticement and Harbouring

Whilst the action for damages for harbouring a spouse was abolished by the 1975 legislation, the same legislation established in statutory form for the first time the right of either spouse to sue for damages in respect of the enticement of the other.[54] In a case[55] after the enactment of the 1975 Act it was held that social standards of behaviour were relevant only with respect to damages, and that they were irrelevant when considering whether or not enticement had taken place.

(d) Hong Kong

Legislation in 1971[56] extended to wives the right to sue for damages for adultery. Subject to this change, the position is the same as that which prevailed in England

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[54] The 1968 Report had recommended retention of the action for enticement. The following is from p. 9 of the Report:

> "Having considered both the actions for damages for adultery and the spouse's action for enticement... the Committee is of the opinion, first, that there are strong arguments against the action for damages for adultery except in cases where the co-respondent has induced the wife or husband to leave home and has thereby caused the break-up of the marriage, second, that in those cases the action for enticement provides an adequate and more appropriate remedy and, third, that there are no serious countervailing arguments against retention of the latter action.
>
> We think that there are cases where people would rightly consider it highly unjust if the law did not provide some remedy to a husband or wife whose home was disrupted by another man or woman and we accordingly recommend the retention of the common law action for enticement of a spouse but the abolition of the action for damages for adultery".

[55] Watt v. Shelbourne (Sup. Ct. Rotorua, Chilwell J. (1977)).

[56] Matrimonial Causes Ordinance section 50(1).

before the coming into operation of the Law Reform (Miscellaneous Provisions) Act 1970.

Actions for enticement and harbouring of a spouse are still available in Hong Kong.

CHAPTER 5 POLICY ARGUMENTS REGARDING REFORM OF THE LAW

(a) Criminal Conversation

A number of arguments may be made in favour of abolishing the action for criminal conversation. These are set out and analysed below. Also discussed are arguments in favour of retaining the action and of introducing certain amendments in the law.

Arguments in Favour of Abolition of the Action

The first argument is that the "rather barbarous theoretical basis of the action", which savours of a proprietary interest in one's spouse, offends against modern notions. This argument has won judicial support in Ontario and it has been frequently made in public discussions on the subject in this country and elsewhere. The passage in the judgment of Darling J. (supra p. 12 fn. 23) is hardly ever quoted and the social arguments in para. 13 of the Scottish Law Commission Report No. 42 (1976) - quoted supra at pp. 33 and 34 - are seldom advanced. Many areas of our modern law contain legal principles of a high standard judged by contemporary views although the particular law itself derives (or is alleged to derive) historically from old rules that may well be offensive to modern sensibilities. Thus, for example, the law permitting persons to use force in the defence of others embodies the policy of encouraging altruism, which by contemporary standards is adjudged a virtue. Yet its origins are said to lie in a period when servants - and, to an extent, wives - were regarded in law as the chattels of their master or husbands. No one would propose setting aside the sound modern law

relating to the defence of others simply on account of its questionable historical pedigree. Similarly, if the action for criminal conversation[57] serves a sound policy purpose judged by the standards of today - "the protection of family relations and of stable married life" - its origins should not be of more than historical interest and should certainly not be considered as a primary ground for seeking abolition of the action.[58]

The second argument is that the action no longer confers any ulterior legal benefit upon the plaintiff. Formerly, the action was a prerequisite to entitlement to a Parliamentary divorce. Since this is no longer the case, it may be argued that at least one practical reason for its continued existence no longer applies. However, when it was abolished in England in the Matrimonial Causes Act 1857 it was replaced by an action for damages for adultery; and this action was (between 1857 and 1970) available to the husband independently of divorce proceedings.

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[57] The action is here understood as being available to both husband and wife.

[58] Cf. Kelly, "The Case for Retention of Causes of Action for Intentional Interference with the Marital Relationship" 48 Notre Dame Lawyer (1972) 426 at 431:

> "Criticism of this sort may in a real sense be misdirected. Even though the actions /for criminal conversation, enticement and alienation of affections/ were originally designed to protect a fictive right and reflected a now-antiquated view of the relation between the sexes, they have in the modern era taken on a very different and worthwhile function - that of providing a remedy for injuries of a highly sensitive nature while discouraging intentional disruptions of families".

The third argument is that the action penalises the wrong person. If adultery attacks the basis of the marriage relationship, it might be contended that the adulterous spouse should be sued for damages instead of[59] (or perhaps as well as) the defendant. The notion of placing all blame on the defendant for the adultery and none on the guilty spouse is frequently out of harmony with the facts. In many cases it is the guilty spouse who may have "made the running". The idea that the spouse is always the seduced and in some way to be perceived as a victim rather than as an autonomous person may derive from a notion of women which, whatever its validity in the past, is scarcely valid today. However, all this is really an argument for extending the action so that it will also lie against the guilty spouse - and not an argument for abolishing the action.

The fourth argument is that the action as at present constituted may easily be used as a weapon for blackmail. Whilst connivance by the plaintiff is a defence to the action and whilst the fact that the plaintiff's wife is a person of doubtful character may reduce damages, it may be argued that the risk of being named publicly as a defendant in an action for criminal conversation[60],

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59 As in France, for example: see supra p. 35.

60 In contrast to matrimonial proceedings and proceedings for maintenance, where the adulterer's name will not be published.

whatever its likely outcome, may be a reason why many people would settle the action, knowing that they had been the victim of a trap set by a conniving couple. As against this it may be argued that adulterers do not deserve much sympathy and that the risk of blackmail is likely to be apparent to most of them. Moreover, the argument that a right of action which in general serves a valuable social purpose should be abolished merely because it may lead to abuse in some cases is not a strong one, unless there is evidence that the abuse is of such serious proportions as to outweigh the benefits arising from the existence of the action. The Scottish Law Commission, which considered this point,[61] did not think that the abuses of "blackmail and extortion by means of manufactured suits in which the threat of publicity is used to force a settlement" exist in Scotland. Whilst clearly evidence of blackmail threats is of its nature difficult to come by, there does not appear to be any fraudulent abuse of a significant nature of the criminal conversation action in this country - and certainly not of such a nature as to suggest the abolition of the action on account of the blackmail aspect alone.

The fifth argument is that the action is out of harmony with the current trend towards abandoning, or at all events towards placing less emphasis upon, considerations of matrimonial misconduct in matrimonial proceedings. As has been mentioned this trend is widespread in most countries in Europe and America, and the change in the

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[61] Scottish Law Commission Report No. 42 (1976) para. 16.

divorce law of England and Scotland was relied upon by the English legislature and Scottish Law Commission as a reason for abolishing the action for damages for adultery.

In this country, the position is, of course, very different from that in most other jurisdictions. Dissolution of marriage is prohibited by the Constitution[62] and the law of divorce a mensa et thoro is based mainly on the "fault" grounds of adultery and cruelty.[63] Moreover, the defence of recrimination deprives the plaintiff of relief in these proceedings when he or she is also guilty of adultery. In one important area, however, there has recently been a change in the law. Until 1976, uncondoned adultery by the plaintiff wife constituted an absolute bar to the making of a maintenance order by the Court in her favour. In addition, where a wife committed adultery after she had obtained a maintenance order, the order had to be discharged. The position was changed by the Family

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62 Article 41.3.2°.

63 See A. Shatter, Family Law in the Republic of Ireland (1977) Ch. 8, especially 116-120, Hayes, "The Matrimonial Jurisdiction of the High Court", (1973) 8 I.J. 55 at 56-58; Duncan, "Desertion and Cruelty in Irish Matrimonial Law" (1972) 7 I.J. 213 at 222 ff. A decree of divorce a mensa et thoro against a spouse will preclude him or her from taking any share in the estate of the other as a legal right or on intestacy - Succession Act 1965 section 120(2). This exclusion extends to a spouse who was "guilty of conduct which justified the deceased in separating and living apart from" him or her for two years or more up to the death: id. section 120(2). Semble, a decree for damages for criminal conversation against a married man that caused his wife to separate from him for more than two years would preclude him from taking any such share in her estate: but this appears to be right in policy.

Law (Maintenance of Spouses and Children) Act 1976, section (3)(a) of which provides that, where the respondent spouse has condoned, connived at or by wilful neglect or misconduct conduced to the applicant spouse's adultery, the adultery is not to be a ground for refusing to make a maintenance order. Section 5(3)(b)of the Act provides that

> "/I/f the /respondent/ spouse has not condoned or connived at, or by willful neglect or misconduct conduced to, the /applicant spouse's/ adultery, the Court may, notwithstanding the adultery, make a maintenance order.... in any case where having regard to all the circumstances (including the conduct of the /respondent/ spouse), the Court considers it proper to do so."

Where a spouse who has obtained a maintenance order subsequently commits adultery, this will constitute a discretionary rather than an absolute barrier - section 6(4) of the 1976 Act.

Similarly, in proceedings under the Guardianship of Infants Act 1964, adultery does not by itself disentitle a parent to custody; and custody has in fact been granted by the Supreme Court to an adulterous parent. (See M.B.O'S. v. P.O.O'S. (1973) 110 I.L.T.R. 57.)

It might be argued that, if adultery no longer has the automatic effect of disentitling a guilty spouse to maintenance or to custody of the children, it is inappropriate to impose financial liability on the paramour. Also if the trend in the law of this country were towards concentrating less on fault in matrimonial proceedings, one of the policy factors underlying the action might be regarded by some as being no longer relevant.

The sixth argument is that the criteria by which damages for criminal conversation are awarded are offensive to contemporary standards in that they reduce the question of the emotional damage suffered by the plaintiff and of the value of his guilty spouse to commercial considerations. As against this, it may be said that the question of compensation - which may arise in a negligence or fatal accident case, for example - always involves what, from one point of view, may be considered to be an offensive process of estimating in monetary terms a person's value. Also, it must be recognised that compensation of up to £1,000 is allowed in fatal accident cases for mental distress and that the concepts of solatium in Scots law and dommage moral in French law are firmly established.

Arguments For Retention of the Action

The first argument is that the action protects family solidarity by deterring would-be adulterers from intruding into the marital relationship by fear of being sued for damages. Admittedly, this argument did not convince either the English Law Commission or the Scottish Law Commission, but, in this country, where the existence of the right of action would appear to be relatively widely known - and where the position of the family is specifically protected by the Constitution - the attitude may well be quite different. Although it is hardly the case that the existence of the right of action is a major deterrent, it is reasonable to assume that it has some deterrent effect.

The second argument is that the action gives effect to the social policy towards marriage in a jurisdiction where the Constitution prohibits the dissolution of marriage on any ground. Moreover, adultery is regarded by very many people as conduct that subverts the marriage relationship. Again, it may be argued that it is

reasonable for the law to penalise the conduct in question by sanctions that will not only deter but also record general disapproval of the conduct itself. As has been seen, the law does not go so far as it has in many other countries, where adultery has constituted a criminal offence. However, it may be contended that it is right to stigmatise adultery as a civil wrong - thus marking society's disapproval of unacceptable behaviour.

The third argument is that abolition of the action might lead to anti-social acts of revenge. This argument did not impress the English Law Commission, which rejected it as being "a little far-fetched". It argued that, at the moment the injured spouse finds out the position, he very seldom knows that he may obtain damages from the adulterer and that by the time he consults a lawyer "his first anger will be over and the danger of physical assault will generally be small".[64] The Commission was, of course, dealing with the situation in England and Wales as it saw that situation. Indeed, it may be that the grounds for dismissing the argument in favour of retaining the action are not so convincing as the English Commission thought. Its view that ".... the danger will generally be small" appears to concede that there may be cases where the danger is very real. One is, it should be remembered, speaking of the danger of serious, even deadly, assaults, and it may be argued that, if the abolition of the action were to result in any increase in the risk of such serious

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[64] English Law Commission Working Paper No. 9, para. 135 (1967).

assaults, the price of abolition is too high. Moreover, as has been mentioned, it would appear that the existence of the right of action is reasonably well-known in our jurisdiction, so that a number of spouses may be affected by this knowledge even before they consult a solicitor. Finally, since the discovery that one's spouse has committed adultery has a considerable effect on many people, the confidence of the English Law Commission that the risk of revengeful conduct will be greatly reduced as the "first anger" fades may be misplaced - especially in so far as conditions in Ireland are concerned.

The fourth - and perhaps the most important - argument is that the action gives practical effect to Article 41 of the Constitution in that it protects the privacy of family relations, a concept for which there is ample precedent in Irish law.[65]

The fifth argument is that the action serves the desirable policy end of giving the injured spouse necessary financial assistance in attempting to rear his or her children in what normally will have become a single parent family unit.

The choice between these competing arguments is not strictly a legal one. The English Law Commission recognised the matter as being one "for the moral judgment of society

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[65] See judgment of Walsh J. in McGee v. A.G. [1974] I.R. 284, 312-313 and cf. Maher v. Collins [1975] I.R. 232 at 236 (Sup. Ct., per O'Higgins C.J.): ".... the wrong done to the plaintiff was largely concerned with the invasion of the privacy of his marriage...."

generally" and "essentially a social question on which opinion /is/ likely to be divided" to which, the Commission considered, it was "not qualified to give a final answer". A major issue arises concerning the extent to which a law reform agency should seek to express publicly its value preferences when to do so may result in the moral authority of that agency being seized upon by one side or the other in the debate as conferring legitimacy upon its position. As against this, it must be pointed out that many of the choices in law reform matters are moral and social as well as legal choices and that the general public are not to be expected to look at issues such as the present one purely from the legal point of view. (See also the views on liability for adultery of the Scottish Law Commission in Memorandum No. 18 (September 1974) and in Scot. Law Com. No. 42 (June 1976) referred to extensively at pp. 24 sqq. supra.)

The Law Reform Commission is satisfied that rather than make no recommendation in the present Paper on the question whether the action for criminal conversation should be abolished, it should make one, even at risk of the value preference necessarily involved being misrepresented as a purely legal choice. The Commission's recommendation is that the action as at present constituted should be abolished, but that there should be created in its place a new action for adultery that may be taken by either spouse for the benefit of the members of the family unit to be defined as comprising each spouse and the children (including legally adopted children and children to whom either spouse is in loco parentis)). Whilst the law should so far as possible provide a buttress for stable marital relationships and stable family life, it does not appear that the present action for criminal conversation

serves the purpose effectively. The present view of the Commission is that it would effectively assist this purpose if the law were to be reformed on the lines discussed infra, and the Commission so recommends.

On that basis a family action for damages for adultery should be available; and it becomes necessary to examine possible changes in the law.

The first change that appears to be desirable is one of nomenclature only, but it is a significant one nonetheless. The expression "criminal conversation" is misleading in one part[66] and confusing in the other[67]. The description "adultery" seems to the Commission to be far more satisfactory.

The second change is one of far more substance. It concerns the question whether the present right to take proceedings independently of any matrimonial proceedings should continue or whether it should be permissible to sue for damages for adultery only when matrimonial proceedings are being taken or have been successfully pursued.

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66 The conduct in question is a civil wrong rather than a criminal offence. Formerly, in England, adultery was punishable by fine and imprisonment, but by 1730 these penalties had become obsolete.

67 The word "conversation" as meaning sexual intimacy would appear to date from 1511: The Shorter Oxford English Dictionary, vol. 1, p. 418 (3rd ed. 1973). This use has not yet become obsolete, but is hardly widespread in the community today.

The law in England and Wales and in Scotland before the recent abolition of the action for damages for adultery in those jurisdictions was the same on this aspect as in Ireland. In Australia and New Zealand, however, the policy was to restrict the action to cases where matrimonial proceedings were being taken.

In favour of introducing such a restriction is the view that to do so would reduce the risk of blackmail by conniving couples. Moreover, it might be considered unfair to a defendant that, if his conduct has not damaged the relationship between the plaintiff and his or her spouse to such an extent that the plaintiff wishes to separate, the defendant should nevertheless be exposed to an action for damages.

As against this, it must be pointed out that, under the present law, the fact that the plaintiff has not separated from his wife will generally reduce the damages. With regard to blackmail, the requirement of taking matrimonial proceedings would not seem to be likely to inhibit such threats since the blackmailing plaintiff would merely have to state that he or she plans also to take proceedings against his or her "guilty" spouse. The blackmail victim would appreciate that such proceedings would be likely to be a sham but, since he or she primarily fears exposure rather than a court verdict, the technical legal nuances about petitions for divorce a mensa et thoro accompanying the action for damages (assuming the victim knew anything about this aspect, which in most cases is extremely doubtful) would hardly be likely to affect his response in any material way.

More fundamentally, to require a plaintiff to take proceedings for divorce a mensa et thoro as a condition of recovery of damages for adultery might encourage him or her to take this step to the detriment of the children in some cases where he or she might otherwise have been able to continue living together with the guilty spouse in a family unit.

Overall, it is recommended that it would not be advisable to introduce the suggested change. No real advantage would appear likely to flow from it, and it might, as mentioned, be attended by the serious disadvantage of encouraging some spouses to bring about the destruction of the family as a unit in order to obtain pecuniary satisfaction from the defendant.

The third change in the law would be to provide that a defendant would be liable only if he or she knew or had reasonable cause to know that the plaintiff's spouse was married. It may be argued that to hold a defendant liable (albeit for greatly reduced damages) where he or she was unaware of this fact is to penalise him or her solely for breaking the moral code.[68] It is possible to conceive of cases where the defendant's belief that the spouse was unmarried would be excusable.

As against this there is the danger of permitting a defendant to escape liability too easily by a plea of ignorance of the marital status of the person with whom

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[68] The present rule may also be criticised on legal conceptual grounds on the basis that the defendant will have "committed neither an intentional wrong against the husband nor an actionable tort against the wife": J. Fleming, The Law of Torts 638 (5th ed. 1977).

he or she had sexual relations. One way of reducing the risk would be to place the onus on the defendant to establish on the balance of probabilities that he or she did not know and had no reason to suspect that the other party was married[69]. A more uncompromising response might be to argue that, in the world today, where people have become increasingly mobile and are adopting a wider range of lifestyles, it should not be assumed conclusively that any adult is unmarried, and that, in those cases where a spouse emerges unexpectedly the defendant should not be relieved of all liability.

The best solution would be to introduce a presumption, (which would come into operation when the fact of sexual relations between the defendant and the plaintiff's spouse had been established) that the defendant was aware of the marital status of that spouse. The presumption could be rebutted only if the defendant showed that he or she neither knew nor had any reasonable cause to know that the person concerned was married. The change from existing law might not be very significant, since in such a case at present it may well be that knowledge is an important element in assessing what amount of damages ought to be paid. (See per Gorell Barnes J. in Lord v. Lord and Lambert referred to supra p. 2.)

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[69] The Scottish Law Commission "thought that the pursuer must undertake the onus of proving that the co-defender knew or had reasonable cause to know that the defender was a married woman" - para. 2.20 of Memorandum No. 18 (1974). (See supra p. 26 fn. 40.)

The fourth change would be to introduce financial provisions similar to those introduced in England by the legislation in 1857, and echoed in Australia, New Zealand and some Canadian Provinces, whereby the Court would be empowered to settle damages awarded against a defendant on the members of the family, including the guilty spouse, in such manner as it considered proper. The question of what, if any, damages are to be awarded to the "guilty" spouse could depend upon the extent to which such spouse was in reality "seduced".

The introduction of a right to settle damages on the members of the family would tend to push the centre of gravity of the action from the innocent spouse's loss to that of the family as a whole. Such a development would introduce a right of compensation for the children for injury to the family and for the mental or emotional distress to which they have been subjected.

The fifth change would be to allow the Court a discretion as to the amount of the damages (if any) to be awarded to the plaintiff spouse where he or she has condoned or connived at, or by wilful neglect or misconduct conduced to, the adultery. (See supra p. 1.)

The sixth change - which, it may be argued, is not a change but rather a clarification - is that the legislation should make it clear that the action is available in respect of the adultery of either spouse.

Enticement of a Spouse

The question whether the present action for enticement should be retained, abolished or altered is a complex one, the answer to which will depend to some extent on judgments upon issues other than strictly legal ones. Discussed below are certain arguments, first in favour of abolition of the action and then in favour of its retention. There follows some consideration of what changes might with benefit be made in the law, on the assumption that the action is retained.

Arguments in Favour of Abolition of the Action

The first argument in favour of abolition of the action is that the action is said to treat the deserting spouse as the "property" of the plaintiff. This argument, has to a fair extent influenced law reform agencies in other jurisdictions.

Against this argument may be made the same objection as that already made in relation to the action for criminal conversation, namely, that the historical basis of an action should not be a reason for its abolition if retaining it would serve a social purpose judged valuable by today's standards.

The second argument in favour of abolishing the action is that it may be a source of blackmail by unscrupulous spouses. This factor was considered to have force by the law reform agencies in England and Ontario.

As against this, it may be argued that the risk of blackmail is somewhat less strong in relation to enticement than it is in relation to criminal conversation, since clearly it is easier to trap a person into a single

act of adultery than into the more complex situation of enticement. Moreover, the defence of bona fide belief that his conduct is justifiable will be likely to afford a victim of a blackmail attempt a good defence in some cases of enticement. However, although there would appear in theory to be a risk of blackmail in relation to enticement actions, there is no evidence to confirm that this risk is a real one in this country. Certainly, it is so small that it may be discounted in the formation of policy in relation to enticement.

The third argument in favour of abolishing the action is that it offends current notions of individual responsibility to penalise the defendant for enticing a spouse when the spouse should on one view be regarded as a free agent and therefore solely answerable for his or her conduct in leaving the plaintiff. Since it is not necessary that the will of the deserting spouse be overborne by the defendant it may be argued that there is no justification for holding the defendant responsible.

As against this, it may be contended that, whether the deserting spouse is or is not regarded as a free agent fully responsible for his or her actions, the responsibility of the defendant for intentionally disrupting the marriage relationship and the life of the family should not be ignored. The defendant is held liable just as he would be for inducing any other person - who may be perfectly responsible for his actions - to break a commercial contract. In any event, there is no question of the conduct of the enticed spouse being looked on with favour by the law. Generally, his or her conduct will

constitute desertion and disentitle him or her to rights relating to maintenance[70], succession[71] and the family home[72].

The fourth argument in favour of abolishing the action for enticement is that of the difficulty of setting limits. Whilst it is relatively easy to condemn the man who uses his wealth to entice a wife away from her home for sexual motives, it is less easy to contend that a mother-in-law, for example, should be held liable in damages for conduct that may combine genuine concern for her daughter's welfare with less worthy sentiments of dislike of her son-in-law. More difficult still are cases where the departure of the spouse raises issues involving social and moral values, as, for example, where a woman leaves her husband to join an unorthodox religious sect[73] or where a man leaves his wife to join a commune. While the motives of the defendant may be sincerely in accordance with his or her unconventional values, they may be completely out of harmony with dominant cultural and social norms. The

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70 Family Law (Maintenance of Spouses and Children) Act 1976 sections 5(2) and 6(2).

71 Succession Act 1965 section 120(2) and (3).

72 Family Home Protection Act 1976 section 4(3).

73 Cf. Lough v. Ward [1945] 2 All E.R. 338. For a comprehensive analysis of the social and constitutional aspects of legal steps taken by parents in the United States to remove their children from marginal religious groups (such as Hare Krishna, Children of God and Scientologists) see Spendlove, "Legal Issues in the Use of Guardianship Procedures to Remove Members of Cults" 18 Arizona Law Review 1095 (1976).

Court in such cases might be called on to make a judgment between differing values in breach (it might be argued) of the democratic principle that all members of society should be free, so far as possible, to choose their own life-styles, provided these life-styles do not offend against the law or the natural or Constitutional rights of others.

This argument appears to have some merit, but it should be noted that the difficulty in drawing the line is a problem that affects almost all legal areas and that the reasoning is not sufficiently strong to justify the abolition of the action for enticement on this ground alone.

The fifth argument in favour of abolishing the action is that it causes an increase in bitterness between the parties and more problems for the children. One may envisage a case where a wife may have left her husband on the prompting of her parents, to whom she has returned accompanied by the children and with whom she and they are living. It may be argued that to expose her parents to a claim for damages does no good to anyone. It merely confers on the plaintiff the dubious benefit of gratifying what may be no more than a thirst for satisfaction; and is, in particular, likely to result in harm to the children, who may be forced from their grandparents' home as a result of the decree for damages.

Against this, it may be said that to regard the action for enticement rather than the act of desertion as the culprit is to ignore the ultimate cause of the bitterness and hostility. Whether a spouse who has been deserted elects to take proceedings for enticement - and the overwhelming majority of deserted spouses in fact elect not to do so - a situation of bitterness and distress, as well as one

likely to harm the children, already exists. The action may do nothing to alleviate the situation; but the possibility of exacerbating it must be balanced against the possible deterrent effect that the action may have, as well as the legitimate interest that the injured spouse has in seeking damages to compensate him or her for his or her loss.

Moreover, the argument based on bitterness and harm to the children cuts both ways. One may envisage situations where the absence of the right of action would cause considerable hardship, as, for example, where a rich man entices away a woman from her husband and family. The husband may have to employ a housekeeper, severely depleting the economic resources of the family; and the children may have to go hungry and unsupervised. The absence of a right of action might be considered to be likely to cause even greater bitterness, harm and hardship than the bitterness or harm resulting from a deserted spouse's electing to seek damages for enticement.

Arguments in Favour of Retaining the Action for Enticement

The first argument in favour of retention of the action is that it is proper that spouses should be protected against intentional interference with their relationship by a third person seeking to entice one of them away from the family home. If marriage is regarded by the law as a lifelong union and if dissolution is prohibited by the Constitution, it is surely defensible for the law to support public policy by penalising intruders into the families of others.

The second argument in favour of retaining the action is that its existence is likely to deter persons from intruding into the marriage relationship. This argument may well have less force than that relating to deterrence in the case of the adultery action. A person contemplating adultery might be more easily dissuaded than a person contemplating encouraging a spouse to leave the family home, the latter conduct being of a more complex nature. Moreover, the existence of an action for adultery is more likely to be widely known in the community than the existence of the action for enticement, so that the deterrent powers of the former are likely to be more effective.

Recommendation

On consideration of the arguments on each side of the question whether the action for enticement should be retained, and with due regard to the fact that social policy should not be ignored in legal considerations, it is the view of the Law Reform Commission and it is accordingly recommended that the action for enticement of a spouse be retained, but broadened to become a family action that may be taken by either spouse for the benefit of the members of the family unit (to be defined as comprising the parents and the children (including legally adopted children and children to whom either parent is in loco parentis)).

On the assumption that the action is retained, it is desirable to introduce a procedure (proposed supra p. 61 in relation to the action for adultery) whereby the Court

would be empowered to settle part or all of any damages awarded on the children of the plaintiff's family. Because this proposal commends itself to the Commission in its consideration of the action for adultery it commends itself also in relation to the action for enticement. In this regard, it is thought advisable to ensure that damages should be capable of being awarded to the plaintiff's spouse where that spouse's will had been effectively overborne by the defendant.

Harbouring of a Spouse

Considered below are the arguments in favour of abolishing the action for harbouring a spouse and those in favour of retaining it. Also the possible changes that might be made in the law, on the assumption that the action is retained, are examined.

The arguments in favour of retention of the action are two:

First, it may be said that, if enticement should continue to be a civil wrong it is not unreasonable that harbouring should also be retained, on the basis that to give passive support to a deserting spouse is different in degree rather than in kind from actively encouraging the spouse to leave. If the evil to be avoided is the breakdown of the family relationship, it may be argued that hindering a possible reconciliation is not significantly different from actively inducing the initial separation.

Second, it may be said that, so long as the action for restitution of conjugal rights remains, it is not unreasonable that legal supports for that action should exist in the form of the existing action for harbouring. In theory, a deserting spouse may, under existing law, be faced with the option of returning to a spouse with whom he or she finds it impossible to live in harmony or going to prison for a period of indefinite duration. So long as this remains the law, it may be argued that it is defensible to continue to restrict still further the range of practical options open to a deserting spouse by retaining the action for harbouring.

The Law Reform Commission considers that neither of these arguments is substantial and that they are outweighed by strongly countervailing social policies.

With regard to the first argument, it may be said that the difference between harbouring and enticement is one of substance. To entice a person from the home is to contribute to the rupture of the family relationship. To harbour a spouse who has already left the home is, however, an act of considerably different significance: the damage has already been done and the harbourer is merely assisting the spouse who has left the home to give effect to his or her decision to leave. In any event, the spouse may have just cause for leaving and it would be quite undesirable to expose charitably disposed persons acting in good faith (e.g., operators of homes for battered wives) to the possibility of actions for harbouring.

With regard to the second argument, the present Paper is not the proper place to discuss the desirability or otherwise of the retention of the action for restitution of conjugal rights, although it should be said that the existence of the action for harbouring is not necessary to render effective the action for restitution of conjugal rights. A person against whom an order for restitution of conjugal rights has been made has the choice of returning home or going to prison. Normally, he or she should seek a divorce a mensa et thoro or a separation agreement. The fact that, at the time the order is made, he or she is being harboured by another does not affect his or her position. In all this it should, however, be remembered that orders for restitution of conjugal rights are extremely rare in this country.

The arguments against retention of the action are as follows:

First, the notion of starving a spouse into returning to the home is not in accordance with society's ideas of justice and fair play.

Second, the practical effectiveness of the action has disappeared as a result of the development of the State social assistance services.

Third, the likelihood of the existence of the action deterring potential defendants - assuming that such deterrence would serve a valuable social purpose - is thought to be very remote. The action is virtually unknown in Irish society.

These arguments appear to be so much stronger than those supporting the retention of the action that the Law Reform Commission recommends that the action for harbouring be abolished by statute.

Conclusions

The question of whether the law should provide that the family actions for adultery and enticement of a spouse recommended supra in this Chapter may be heard otherwise than in public will be examined by the Commission in the context of family law actions generally. Furthermore, this Paper does not include a general scheme of a Bill to implement the recommendations of the Commission because it is considered that the drafting of the necessary legislation will be a relatively straightforward task once the principles on which it is to be based are settled following comments on this Paper and on other Papers dealing with torts affecting family relations that the Commission will publish shortly.

CHAPTER 6 SUMMARY OF RECOMMENDATIONS

Criminal Conversation

1. The present action for criminal conversation should be abolished. (Page 56)

2. There should be created a family action for adultery on the lines set out hereunder. (Pages 57 sqq.)

(1) The action should be for damages for adultery.

(2) The action should be available to either spouse for the benefit of the members of the family unit (to be defined as comprising each spouse and the children (including legally adopted children and children to whom either spouse is in loco parentis)).

(3) A rebuttable presumption that the defendant was aware that the plaintiff's spouse was married should be introduced; the presumption would be rebutted only where the defendant showed that he or she neither knew nor had any reasonable cause to believe that the spouse was married;

(4) Damages should be capable of being awarded (in part or in whole) to the plaintiff's children, and, in appropriate cases, to the adulterous spouse, the Court being required to assess the damages payable to each member of the family;

(5) The legislation should make it clear that the action is available to each spouse independently of any proceedings for divorce a mensa et thoro.

(6) The Court should have a discretion as to the amount of the damages (if any) to be awarded to the plaintiff spouse where he or she has condoned or connived at, or by wilful neglect or misconduct conduced to, the adultery.

Enticement

The present action for enticement of a spouse should in terms be retained as a family action for damages with the amendments to the existing law set out hereunder.
(Pages 67, 68)

(1) The action should be available to either spouse for the benefit of the members of the family unit to be defined as comprising each spouse and the children (including legally adopted children and children to whom either spouse is in loco parentis)).

(2) Damages should be capable of being awarded separately to each of the children and in appropriate cases to the enticed spouse.

(3) The Court should be required to assess the damages payable to each member of the family.

(4) The Court should have a discretion as to the amount of the damages (if any) to be awarded to the plaintiff spouse where he or she has condoned or connived at, or by wilful neglect or misconduct conduced to, the enticement

Harbouring

The action for harbouring of a spouse should in terms be abolished, as it is in modern circumstances totally unreal.
(Page 71)