

THE LAW REFORM COMMISSION

THE LAW RELATING TO SEDUCTION AND THE ENTICEMENT AND
HARBOURING OF A CHILD

INTRODUCTION

In the present Paper the Law Reform Commission examines the law relating to the seduction, enticement and harbouring of children and makes a number of recommendations for changes in the law.

The Paper is limited to an analysis of the law in the context of family relations. Thus, for example, the law relating to the harbouring of a servant outside the context of the family is not considered. Similarly, the Paper does not examine the law relating to actions by parents or by strictly "commercial" employers for loss of the services of their child or employee caused by the wrongful act of another.

The reason for concentrating on the actions for seduction, enticement and harbouring in the family context is that they contain a common element, namely, the intentional interference by an outsider with the family and with family relationships. The other actions mentioned supra raise a number of entirely different issues that would require separate treatment.

CHAPTER 1 A THE PRESENT CIVIL LAW RELATING TO SEDUCTION

Whilst in practice the action for seduction of children may be regarded to all intents and purposes as a separate tort, it falls within the law relating to master and servant, whereby the master may recover damages for the deprivation of the services of his servant by reason of the wrongful act of the defendant. The essential ingredients of the action are the existence of a "master-servant" relationship, the seduction of the servant and the deprivation of the master of the services of the servant as a result of the seduction.

Master-Servant Relationship

The clearest case of the master-servant relationship is, of course, where an express contract of service exists between two persons. But the law has taken a very broad view of what constitutes this relationship for the purposes of the action for seduction. The existence of the relationship is presumed from the fact that a woman resides with her father and performs duties ordinarily performed by an employee. Whether or not she receives wages for her work is immaterial. The fact that she is of full age or married is also immaterial. It is not even necessary that she reside in the same house as her father, provided she performs regular services for him. However, where she resides in the same house as her father, it has been held that it is sufficient to show that she rendered occasional assistance in the work of the household, or even that, in the circumstances, as, for example, where she is under age, the father had a right to her service.

The father's right of action will not be defeated merely by proof of the existence of a contract of service between the daughter and another person, provided that the terms of that contract are not inconsistent with the subsistence of the relationship of "master and servant" between father and daughter.

This aspect of the law may be summarised by stating that where a daughter is obliged, for the purpose of performing her duties under her contract with another person, to reside away from her father's home, the father will not normally be able to assert a service relationship between himself and his daughter, even though she may make periodical visits home during which she performs household duties and even though she may intend to return home when the contract with the other person comes to an end. Where the daughter is seduced by her employer, her father will have no right of action unless the employer entered the contract for the purpose of seducing her.¹

Loss of Service

To succeed in an action for seduction it is necessary to prove not merely the act of seduction but also loss of service as a result of the seduction. In the ordinary case, the loss of service will arise from the pregnancy and confinement of the seduced girl. Where the defendant admits the seduction but establishes that he is not the father of the child born to the plaintiff's daughter, he will escape liability. The plaintiff is not, however, precluded from proving that the defendant is the father

¹ Flynn v. Connell [1919] 2 I.R. 427 (K.B. Div.); Speight v. Olivera (1819) 2 Stark. 493, 171 E.R. 715.

of the child by the fact that affiliation proceedings against him failed, since the plaintiff was not a party to those proceedings and accordingly is not bound by their result. Loss of service may also be proved even though the girl has not become pregnant, as where she became ill or contracted venereal disease as a result of the seduction.

Dates at which service must exist

In an action for seduction it would appear that the plaintiff must prove that the relationship of "master and servant" existed both at the time of the seduction and at the time when the child was born. A harsh application of this rule occurred in Hamilton v. Long². The plaintiff's action failed, when her daughter had been seduced during the lifetime of the plaintiff's husband but gave birth to the child after his death. The fact that the plaintiff's daughter returns to him after the seduction in pursuance of her intention to return when her contract of service with an ordinary employer has come to an end will not enable the plaintiff to sue; nor will the fact that the daughter was dismissed on account of the seduction.

Persons entitled to sue

A woman who has been seduced may not sue for seduction, the reason being that she consented to the act of seduction.

² [1905] 2 I.R. 552 (C.A. 1903), discussed again infra pp. 5, 6, 42, 44 and 45.

The action must be brought by some person who can be considered to be the master of the seduced girl. The decisions on this aspect of the law must be treated with considerable caution in the light of recent developments in Constitutional law and in statute law regarding sex discrimination.

The general rule was that, where the girl's father was alive and she performed domestic duties in the family home, her father rather than her mother was considered to be her "master", but whether this rule still applies is open to some doubt. The rule was applied even in a case where the girl's father was "bed-ridden and doting" and the mother, who managed the family farm, was "substantially mistress of the place".³ In the leading decision of Hamilton v. Long,⁴ the matter is discussed at some length.

It is very likely that, if the issue came before the Courts today, the right of the girl's mother to sue for damages would be recognised. The reasons for this change in the law are substantially the same as those set out in respect of criminal conversation in the Commission's Working Paper No. 5 on that subject at pp. 6, 7 and 8.

Very briefly, it may be said that having regard in particular to legislative and Constitutional developments in recent years family law has changed considerably. The

³ Thompson v. Fitzpatrick (1920) 54 I.L.T.R. 184 (K.B. Div.).

⁴ Supra p. 4.

legislative developments include the granting of equal rights to each parent in respect of the guardianship and custody of their children, the establishment of equal succession rights, the imposition of equal responsibilities regarding the maintenance of their children and the removal of any contractual or delictual incapacities from married women, together with the placing of full liability on a married woman as respects her civil wrongs and responsibilities.

The old inequalities were relied on in Hamilton v. Long⁵ as a reason for continuing to hold that the husband alone was "master" of the home. Accordingly, the removal by statute of these inequalities takes away any force former arguments may have had. Moreover, recent Supreme Court decisions on the Constitution appear clearly to require that the mother's right of action be recognised on the same basis as the father's.

It is clear that a widow may sue for damages where there is a service relationship; and it would also appear that the mother of a child born out of wedlock may sue.

It has been held in England⁶ that the father of the child may sue where he is living with the mother and is "master of the household". This decision in the English case would appear to mean that the father of a child born out of wedlock might, by living with the mother, deprive her of her right of action in respect of the child's seduction

⁵ Supra p. 4.

⁶ Beetham v. James [1937] 1 K.B. 527.

and claim damages for himself, whilst at the same time having no legal obligation to maintain the child and being exempt from ever having to do so by reason of the expiration of the relevant period of limitation for the taking of affiliation proceedings. Although it may be correct to say that the father may assume in a common home with the mother of a child born out of wedlock the position of master, his doing so should not terminate the mother's right of action. Recent Constitutional and legislative developments in our jurisdiction, and the fact that the mother of a child born out of wedlock is considered in law to have greater rights and responsibilities in respect of her child than the father, appear to require that the mother's right of action should not be capable of extinction in the fashion indicated by Mr Justice Atkinson in Beetham v. James.⁷

Persons other than the parents of the seduced girl have been held entitled to sue in certain cases. A man standing in loco parentis to the girl, whom he had adopted and "bred up for several years in his house, where she was performing the offices of a menial servant (being the only one he kept)", was held entitled to sue in Irwin v. Dearman.⁸ Similarly, an aunt and an uncle, both in loco parentis to the seduced girl, have been recognised as having a right of action. Adoptive parents would, of course, have the same right of action as they would have if the girl was their child born to them in lawful wedlock.

⁷ Id.

⁸ Irwin v. Dearman (1809) 11 East 23, 103 E.R. 912.

A brother of the seduced girl was held to have a right of action in Murray v. Fitzgerald⁹, even though he was at least ten years younger than her and though she had an interest in the farm on which they both worked, together with another brother. She had described herself as the "head of the house" but nevertheless acknowledged the younger brother to be "the man of the house at the farm".

No decision has recognised the right of a sister to sue in respect of her sister's seduction. In Clements v. Boyd¹⁰ - a decision of the old County Court - Judge Overend rejected such a claim where both sisters were over thirty years old and ran a farm together. However, the judge made it clear that his rejection was based on the absence of proof of a service relationship rather than on principle.

Meaning of Seduction

It is now proposed to deal with the act of seduction itself rather than with the basic ingredients of the legal action for seduction, which have been dealt with supra. Four types of seduction fall to be examined.

(a) Seduction of a Female by a Male

Whilst seduction in its ordinary sense imports undue persuasion by the seducer of the seduced, seduction for the purposes of an action consists of conduct ranging from rape

⁹ [1906] 2 I.R. 254.

¹⁰ (1894) 28 I.L.T.R. 44.

to cases where the "seduced" girl "has made all of the running".¹¹ Where, however, the girl's parent has encouraged or connived at the seduction no action will lie.¹²

(b) Seduction of a Female by a Female

There have been no reported cases of a parent suing in respect of a homosexual seduction of his daughter. On principle such a claim should lie, provided, of course, that the plaintiff suffered some loss of service as a result of the seduction. The same would appear to apply with regard to an indecent homosexual assault upon the plaintiff's daughter.

(c) Seduction of a Male by a Female

There does not appear to be any reported decision in which the parent of a boy who has been seduced has sued the boy's seducer. It is arguable that under existing law such a claim may well lie,¹³ assuming that the parents have lost the services of the boy for some period.

Difficulties might arise as to the evidence the Courts would require in a claim for seduction of a male. In the case of actions for seduction of a female, it is immaterial

¹¹ Judge R.S. Shove, as quoted in Scott v. Scott and Anyan [1951] P. 1 at pp. 2, 3.

¹² Reddie v. Scoolt (1794) Peake 316, 170 E.R. 169.

¹³ Cf. B. Inglis, Family Law (2 ed. 1968) 226 (referring to New Zealand law, but basing the argument on general common law principles).

that the female may have been the dominant party in the seduction. The Courts might adopt this rule in respect of the seduction of males or they might limit the right of recovery to cases where the female was clearly the dominant party.

Overall, it is suggested that whilst in theory a case may be made for recognising a right of action arising out of the seduction of a male, in practice the Courts would be very slow to make awards, save possibly in a case where a mature woman had abused her position and experience to lead an immature young boy into a life of premature sexual activity.¹⁴

(d) Seduction of a Male by a Male

It is possible to envisage an action being taken by the parents of a youth who has been encouraged by a mature adult to enter into a homosexual relationship. The fact that the policy of the criminal law is strongly opposed to such conduct, whether in private or in public, adds weight to the argument.

Evidence

The plaintiff's daughter is not a necessary witness. If she gives evidence she is not bound to answer in cross-examination questions as to whether she has had sexual relations with other men. However, evidence of specific acts of sexual relations between the plaintiff's daughter

¹⁴ Cf. Reg. v. Mason (1968) 53 Cr. App. Rep. 12.

and a person other than the defendant before the alleged seduction may be given for the defendant; but, unless such evidence establishes that the defendant is not the father of the child, it will have the effect only of mitigating damages. Evidence of the daughter's general immoral character may also be given by the defendant, but this may be rebutted. Evidence of sexual relations with other persons subsequent to the alleged seduction is not, however, admissible, "for [this conduct] might be the effect of the [defendant]'s misconduct".¹⁵

Corroboration

Corroboration is not necessary in an action for seduction. The cases where corroboration is required either by statute or by common law are mainly criminal. By statute, evidence in regard to certain sexual offences such as procurement (sections 2 and 3 of the Criminal Law Amendment Act 1885), Road Traffic Act offences, treason and personation at elections must be corroborated. In all criminal cases unsworn evidence of children must be corroborated by reason of the Children Act 1908 (section 30) as amended by the Criminal Justice (Administration) Act 1914 (section 28(2)). Corroboration is also required by statute in affiliation cases by section 3(2) of the Illegitimate Children (Affiliation Orders) Act 1930, which provides that no Justice of the District Court shall be satisfied that a person is the putative father of an illegitimate child

¹⁵ Phipson on Evidence (11th ed. by J. Buzzard, R. Amlot and S. Mitchell 1970) pp. 238-239 para. 541.

without hearing the evidence of the mother of the child "and also evidence corroborative in some material particular or particulars of the evidence of such mother". As has already been pointed out in the Commission Working Paper No. 4 on Breach of Promise of Marriage (page 2), no plaintiff in any action for breach of promise of marriage shall recover a verdict unless his or her testimony "shall be corroborated by some other material evidence in support of such promise". (See section 2 of the Evidence Further Amendment Act 1869 (Lord Denman's Act).)

The common law requires corroboration in cases of perjury. Also, the jury must be warned of the risk of convicting on uncorroborated evidence where the evidence is that of an accomplice or that of a child giving evidence on oath or the charge is one of rape or of a sexual offence other than those where corroboration is required by statute. The justification of the rule in regard to a child is the tender age of the witness and the rule might well be applied in civil cases.

There are, of course, other cases where corroboration is required or considered highly desirable by the common law. In The People (Attorney General) v. Casey (No. 2) [1963] I.R. 33 Kingsmill Moore J. (delivering the judgment of the Supreme Court) said at p. 38:

"The category of circumstances and special types of case which call for special directions and warnings from the trial judge cannot be considered as closed. Increased judicial experience, and indeed further psychological research, may extend it."

The case concerned the reliability of evidence of visual identification and the words of the learned Judge were approved by the English Lord Chancellor in D.P.P. v. Kilbourne [1973] A.C. 729 at p. 740. Casey's Case (No. 2)

was also cited in the judgment of the Court of Criminal Appeal (Haugh J.) in The People (Attorney General) v. Bond [1966] I.R. 214 at p. 216. (As to identification, see further (1) the judgment of the Court of Criminal Appeal (Walsh J.) in Attorney General v. Michael and Thomas O'Driscoll (3 March 1972, unreported), cited at pp. 191 and 192 of the Report to the English Home Secretary of the Departmental Committee (the Devlin Committee) on Evidence of Identification in Criminal Cases (April 1976) and (2) New Zealand Criminal Law Reform Committee Report on Identification (September 1978).)

Cross on Evidence (4th ed. 1974) sets out (p. 183) the rules governing the requirement of caution in the absence of corroboration in matrimonial causes. The rules were stated in the Divisional Court in England by Sir Jocelyn Simon P. in Alli v. Alli [1965] 3 All E.R. 480. Where a matrimonial offence is alleged, the Court will look for corroboration: and the Court will normally, before finding a matrimonial offence proved, require such corroboration if, on the face of the complainant's own evidence, it is available. It is assumed that similar rules would apply in Ireland in the case of matrimonial proceedings, such as proceedings for divorce a mensa et thoro. It is, of course, open to the Court both in England and here "to act on the uncorroborated testimony of a spouse if it is in no doubt where the truth lies."

In the Law Reform Commission's view, a simple rule regarding corroboration of the evidence of a child in seduction, enticement and harbouring actions should be incorporated in any new legislation relating to such actions. The rule should be the same as that on breach of promise contained in section 2 of Lord Denman's Act 1869 (referred to supra). A similar rule should apply in respect of the proposed new family action for adultery proposed in the Commission Working Paper No. 5 - 1978.

Measure of Damages

A plaintiff may recover exemplary damages and his claim is not restricted to the actual loss which he may have sustained. Damages may be recovered for the plaintiff's hurt feelings, for the dishonour to the family and (it would appear) for the expense of maintaining the child. In awarding damages the judge or jury may take into consideration the situation in life of the parties and the conduct of the defendant, including his conduct at the trial. The Court will not admit evidence where the purpose is to show that the seduction was accomplished by means of a promise of marriage.¹⁶

B NORTHERN IRELAND

The present law in Northern Ireland is essentially the same as that set out earlier in this chapter. In March 1977, the Office of Law Reform, in its Consultative Document, The Reform of Family Law in Northern Ireland, discussed the existing law. Para. 49 (p. 27) of the Document is as follows:

"49. Actions for the seduction, enticement and harbouring of a child arose out of a third party's wrongful interference with the rights of a parent to the services of his child. The actions are based on

¹⁶ In Dodd v. Norris (1814) 3 Camp. 519 Lord Ellenborough stated:

"I think you may ask the daughter whether the defendant paid his attentions to her in an honourable way. Further than that you can on no account go. To admit evidence of a direct promise of marriage would be to allow the mother to recover damages for a breach of that promise upon the testimony of the daughter."

However, see Elliott v. Nicklin (1818) 5 Price 641, 146 E.R. 719.

what is little more than a quasi-legal fiction that a parent is entitled to compensation for the loss of the services, even of the most trivial kind, which a child ordinarily residing with him would have rendered, or been capable of rendering, had the child not been sheltered by the defendant or incapacitated by pregnancy, childbirth, impaired health or emotional distress. In fact the true purpose of the actions is to compensate the parent for wounded feelings. No action lies where a child is exclusively engaged to serve her employer and resides with him (as in domestic service), and in 1844 this led to the judicial criticism that 'the law thus affords protection to the rich man whose daughter occasionally makes his tea, but leaves without redress the poor man whose child... is sent unprotected to earn her bread among strangers. The law provides more satisfactory remedies to vindicate a parent's rights, protect a child and punish a wrongdoer. The parent can enforce his right to custody by applying for habeas corpus or through guardianship or wardship proceedings; the culprit can be punished under criminal law for any sexual offence committed or for abduction; and any child born as the result of a seduction or rape can be made the subject of affiliation proceedings."

The Document, in which it is stated that it "is believed that these actions are now comparatively rare in Northern Ireland", invited views about their abolition.¹⁷ It is understood that the question of the abolition of the action is still under consideration in Northern Ireland.

¹⁷ Para. 50 (p. 27).

CHAPTER 2 THE PRESENT CIVIL LAW RELATING TO THE
ENTICEMENT AND HARBOURING OF A CHILD

An employer, including in the normal case a parent, has a right of action where his employee, or child, is wrongfully enticed from him or harboured by another.

The case law relating to parent and child is meagre: only two decisions on the subject appear to have been reported. These will be described in some detail, after which an attempt will be made to set out what appear to be the relevant principles underlying the action today.

In Evans v. Walton,¹⁸ the English Court of Common Pleas held that, to sustain an action, it was not necessary for the parent to establish a binding contract of service. Mr Justice Willes stated that he felt

"no difficulty in holding that, upon authority, as well as in good sense, the father of a family, in respect of such service as his daughter renders him from her sense of duty and filial gratitude, stands in the same position as an ordinary master. If she is in his service, whether de son bon gré or sur retainer, he is equally entitled to her services, and to maintain an action against one who entices her away. Assuming that the service was at the will of both parties, like a tenancy at will, the relation must be put an end to in some way before the rights of the master under it can be lost."

¹⁸ (1867) L.R. 2 C.P. 615. The facts, briefly, were that the plaintiff's daughter, aged about 19 years, residing with him as a member of his family and assisting him in his business, was induced by the defendant to leave her home for some time and to live in a lodging house with the defendant.

In Lough v. Ward,¹⁹ the plaintiff's daughter, aged sixteen and a half, left his home and entered a religious communal establishment, of which the defendants, a husband and his wife, were heads. The circumstances of the girl's departure to the establishment, which was known as "The Abbey of Christ the King" were complex. She was fearful of being called up to work in a factory to aid the war effort. After her arrival at the Abbey, the girl was subject to a number of attempts by her parents to have her return home, but she refused to come home.

The plaintiff sought damages and an injunction against the defendants on the ground that they had deprived him of the services of his daughter by enticing her to leave his home and later harbouring her.

Mr Justice Cassells awarded damages of £500 and granted an injunction restraining the defendants from continuing to harbour the girl.

The judge, in deciding whether on the facts the defendants had enticed the girl from her father's services, considered that such an inference ought to be drawn from the sudden decision of the girl to join the Abbey and from the fact that, when in the Abbey, she was never allowed out of the sight of the defendants, having been "rushed.... through postulancy to novitiate without [the defendants'] ever saying so much as a word to either of her parents and without waiting for the six months prescribed by the so-called rules [of the society] to pass."

¹⁹ [1945] 2 All E.R. 338 (K.B. Div. Cassells J.). It should be noted that there was no element of sexual misconduct in this case.

Having referred to statements in decisions concerned with the enticement of a spouse, Mr Justice Cassells continued:

"I hold that there was enticement... in this case. A religious influence is very dangerous and very powerful, and never so dangerous and never so powerful as when it is exercised by superior minds and older minds over an inferior and younger mind."

The judge also was of the view that the defendants were guilty of harbouring the girl.

He considered that the real question was: "Would this girl have left her home if the defendants had not induced her?" "I am satisfied", he said, "that she would not. She left her home as the result of a state of mind induced by the defendants." The fact that the girl may have intended never to return to her home would "only aggravate the loss of service".²⁰ The Judge added:

"It would certainly be a curious position if the extent of the liability of the defendants should have to be reduced by their successful persuasion of the girl.

.... It is because he is the father that the law recognises that he has these rights. A father has greater rights with regard to his children during infancy than any guardian or any stranger. As far as the father's religion is concerned, many cases decide that it is the father who has the right to say in what religion his children shall be brought up...."

²⁰ Id. at 347. In this context, Cassells J. id. at 347, referred to the decision of the Supreme Court in The People v. Edge [1943] I.R. 115 at 153, where Black J. stated:

"The fact, if it was a fact, that the lady had no animus revertendi would not appear to matter, and if her design - induced by the conspirators - was permanent desertion of her home, that would only aggravate the loss of service."

The Judge considered himself unable to order the girl to return to her parents, since the proceedings were not habeas corpus proceedings, but he considered that he had the power to deal with the defendants by way of injunction restraining them from harbouring her, which he accordingly granted. To indicate the court's disapproval of the defendants' conduct, the Judge awarded £500 as exemplary damages.

Since the decision in In the Matter of Tilson, Infants [1951] I.R. 1, it is quite clear that under the Constitution both parents have a joint power and duty in respect of the religious education of their children and that if they together make a decision and put it into practice it is not in the power of either parent to revoke such decision against the will of the other.

The actions for enticement and harbouring of a child may be brought by a parent²¹ in respect of his or her child under the age of majority - even against the wishes of the child. The same principles regarding the bona fide belief of the defendant regarding the child's absence from the home appear to apply in regard to the harbouring of a child as apply in regard to the harbouring of a spouse. In other words, if

²¹ The question as to which parent may sue would appear to be determined on the same principles as in the action for seduction. Presumably, a person in loco parentis may also sue notwithstanding that the emphasis in Lough v. Ward, supra, upon parental rights might suggest that the English Courts would be reluctant to recognise the right of such a person. As to rights in Ireland arising from the in loco parentis relationship, see Part IV of the Civil Liability Act 1961.

the child misleads the defendant into believing that he requires sanctuary from ill-treatment, the action will not succeed. Damages are a matter for the discretion of the Court, having regard to all the circumstances.

Constitutional Aspects

It is not considered that the rights of action for seduction, enticement and harbouring are restricted by the Constitution.

Article 40.6.1^o iii of the Constitution, whereby the State guarantees, subject to public order and morality, liberty for the exercise of the "right of the citizens to form associations and unions", cannot seriously be construed as including a guaranteed right to establish or maintain immoral personal relationships irrespective of age or status. While it might be argued that the act of seduction raises issues of private morality, it is also an area of morality in which the common good is involved in that the prevention or deterrence of intrusions into family life is a matter concerning the common good, as is also the protection of children.²²

The right of family privacy is not interfered with in such actions. The rights of the Family and the guarantee given for the protection of its constitution and authority by Article 41 would appear to require the provision of measures necessary to secure these objectives.

²² In McGee v. A.G. [1974] I.R. 284 at 312 Walsh J. stated:
 "The private morality of its citizens does not justify intervention by the State into the activities of those citizens unless and until the common good requires it."

The obligation to provide the protection guaranteed by the Constitution also meets any possible argument that might be made in relation to the actions for enticement and harbouring on the basis of Article 44.2.1^o which provides as follows:

"Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen."

It is submitted that, in a case like Lough v. Ward [1945] 2 All E.R. 338 (referred to supra p. 17), this provision would avail the defendant nothing. Also in this context, Article 44.2.5^o could not, it is suggested, be called in aid. It provides as follows:

"Every religious denomination shall have the right to manage its own affairs, own, acquire and administer property, movable and immovable, and maintain institutions for religious or charitable purposes."

The activities of a religious denomination or sect are subject to public order and morality and the disruption of family unity could well be held to offend public order and morality. Furthermore, it is submitted that a congregation, order, society or other group within or adhering to a particular church or sect is not in itself a "religious denomination" within the meaning of Article 44.2.5^o of the Constitution.

CHAPTER 3 THE PRESENT CRIMINAL LAW RELATING TO SEDUCTION
AND THE ENTICEMENT AND HARBOURING OF A CHILD

Any person having "the custody, charge, or care" of a girl under the age of sixteen years, who "causes or encourages the seduction or prostitution or unlawful carnal knowledge of that girl" is guilty of a misdemeanour.²³ For this purpose, a person is deemed to have caused or encouraged the seduction or prostitution or unlawful carnal knowledge (as the case may be) of a girl who has been seduced or become a prostitute or has been unlawfully carnally known if "he has knowingly allowed the girl to consort with, or to enter or continue in the employment of, any prostitute or person of known immoral character".²⁴

Where the Court is satisfied, on the complaint of any person, that a girl under the age of sixteen years is, with the knowledge of her parent or guardian, exposed to the risk of seduction or prostitution or of being unlawfully carnally known or of living a life of prostitution, it may adjudge her parent or guardian to enter into a recognizance to exercise due care and supervision in respect of the girl.²⁵ As to what constitutes "care" for the purposes of the section, it appears that even a temporary position of authority and control will suffice.

²³ Children Act 1908 section 17(1) as amended by the Children Act (1908) Amendment Act 1910.

²⁴ Id. section 17(2) as amended by the Children Act (1908) Amendment Act 1910 section 1.

²⁵ Id. section 18 as amended by the Children Act (1908) Amendment Act 1910 section 1.

Section 3 of the Criminal Law Amendment Act 1885 provides as follows:

"Any person who -

.....

(2) By false pretences or false representations procures any woman or girl, not being a common prostitute or of known immoral character, to have unlawful carnal connexion, either within or without the Queen's dominions

shall be guilty of a misdemeanor.... Provided that no person shall be convicted of an offence under this section upon the evidence of one witness only, unless such witness be corroborated in some material particular by evidence implicating the accused."

The forcible abduction or detention against her will of a woman of any age, with intent to marry or carnally know her or to cause her to be married or carnally known, is a felony.²⁶

A person who unlawfully takes or causes to be taken any unmarried girl who is under the age of sixteen years out of the possession and against the will of her father or mother or any other person having the lawful care or charge of her is guilty of a misdemeanour.²⁷

Section 7 of the Criminal Law Amendment Act 1885 (as amended) provides as follows:

"Any person who -

with intent that any unmarried girl under the age of eighteen years should be unlawfully and carnally known by any man, whether such carnal knowledge is intended to be with any particular man, or generally -

²⁶ Offences Against the Person Act 1861 section 54.

²⁷ Id. section 55.

takes or causes to be taken such girl out of the possession and against the will of her father or mother, or any other such person having the lawful care or charge of her"

is guilty of a misdemeanour. Under this section it was a sufficient defence to a charge if it should "be made to appear to the court or jury that the person now charged had reasonable cause to believe that the girl was of or above the age of eighteen years". This proviso was removed by section 20 of the Criminal Law Amendment Act 1935.

The Offences against the Person Act 1861 (section 53) makes it a felony for a person "from motives of lucre" to take away or detain any woman with an interest in real or personal estate or a presumptive heiress or next-of-kin against her will with intent to marry or carnally know her or to cause her to be married or carnally known by any other person. It is also a felony for a person fraudulently to "allure, take away or detain" any such woman, being under the age of twenty-one years, out of the possession and against the will of her father, her mother, or any person having the lawful care and charge of her, with intent to marry or carnally know her, or to cause her to be married or carnally known by any other person. In either case, the offender on conviction is incapable of taking any share in the property of the woman.

CHAPTER 4 THE LAW IN ENGLAND AND WALES AND IN SCOTLAND

(a) England and Wales

In recent years there has been a movement in England and Wales for changes in the law. These culminated in the 1970 Law Reform (Miscellaneous Provisions) Act.

(1) English Law Reform Committee Eleventh Report (1963)²⁸

In 1963, the Law Reform Committee reported on the subject of loss of services, etc. in its Eleventh Report. The Report extended to all actions by employers for loss of the services of their employees as well as actions per quod consortium amisit. It recommended that the actions for loss of consortium, seduction, enticement and harbouring should be abolished. In their place, the majority recommended that an employer who had incurred expense in consequence of a tortious injury to his employee should be entitled to reimbursement from the tortfeasor to the extent that the tortfeasor's liability to the employee had been reduced in consequence of the action of the employer by, for instance, paying the employee's wages while he was absent from work as a result of incapacity.

On the action by a parent for loss of services of a child the Committee stated:

"We also think that a father or mother should be able to recover reasonable medical expenses incurred in respect of a dependent child who is injured as well as the reasonable cost of visiting such a child in hospital or elsewhere; it cannot, we think, be right

²⁸ Law Reform Committee Eleventh Report (Loss of Services, etc.) (Cmd. 2017 (1963)).

that expenses of this kind should not be recoverable if the child is too young to render services (Hall v. Hollander (1825) 4 B. & C. 660). One effect of our recommendations would be that the expenses of visits to an injured spouse or dependent child would be recoverable if they are reasonable in the circumstances. At present such expenses are recoverable by a husband or father only if the visits can be regarded as directly conducive to the injured person's recovery and thus as mitigating the damages flowing from the infringement of the right to consortium or to services. Finally, we think that a spouse or parent should be able to recover any earnings he or she may have lost in consequence of any action reasonably taken in consequence of the injury to the other spouse or to a dependent child."²⁹

The Committee in its discussion of the action for seduction set out the principal features of the action and noted that "in substance the action is one for the wrong done to the honour and feelings of the parent or other relative of the person seduced". The Committee stated:

"We think that the action for seduction as an offshoot of the action for loss of services no longer serves any useful purpose. Whether the woman seduced should have an independent remedy raises questions of policy falling outside our terms of reference. So far, however, as her parent has incurred expense as a result of a seduction amounting to or accompanied by a tortious act against the person seduced he would be able to recover in accordance with the recommendations we have made earlier."³⁰

In regard to the action for enticement of a child, the Committee stated:

"It is true that the action of enticement is also available to a father as a remedy for the enticement from home of any unmarried child under 21 who has

²⁹ Id. para. 20.

³⁰ Id. para. 22.

rendered services to his or her father while at home - Lough v. Ward [1945] 2 All E.R. 338 - but we think that a more satisfactory remedy is provided nowadays by wardship proceedings." (para. 23)

On the action for harbouring, the Committee stated that it thought that the action was "to all intents and purposes extinct" and recommended that the opportunity of any legislation to give effect to the earlier recommendations in its Report should be taken to abolish it. (para. 23)

(2) English Law Commission Working Paper No. 19 (1968)

In its Working Paper No. 19,³¹ published in 1968, the Law Commission stated that it had "no doubt that the father's (or other master's) right to damages for the seduction of his unmarried infant daughter (or other female servant) should be abolished and not replaced by any other cause of action vested in him."³² The Commission stated that this did not mean that it was satisfied with the existing affiliation law and procedure enabling the unmarried mother to recover maintenance from the putative father, and it repeated its previously expressed³³ view that "a thorough-going review" of that area of the law should be made. The Commission was "unable to share" the opinion of the Council of the Law Society that the views that the Commission expressed "cut at the very root of family stability and that it is necessary to retain some right of action in respect

³¹ Law Commission Working Paper No. 19, The Actions for Loss of Services, Loss of Consortium, Seduction and Enticement (1968).

³² Id. para. 88.

³³ Law Commission Working Paper No. 12 on Proof of Paternity and Law Commission Second Annual Report (Law Com. No. 12) para. 80.

of seduction in order to express the public disapprobation of such conduct. To remove all such rights is to open the door to any man who might otherwise be deterred from immoral conduct by the knowledge of the risk he might be running if such a right existed". (emphasis supplied) The Commission responded to this argument by noting that the Council did not dispute that the action had proved an ineffective sanction against pre-marital sexual relations.

(3) English Law Commission Report No. 25 (1969)

The Law Commission returned to the subject the following year in its Report on Financial Provision in Matrimonial Proceedings³⁴. It stated:

"In.... Working Paper No. 97 we.... referred to the.... actions for enticement, seduction and harbouring of a spouse or child, the abolition of which we suggested both there and in our Working Paper on Loss of Services. The consultations on both Papers make it clear that this suggestion is generally accepted.

We accordingly recommend that.... the actions of enticement, seduction and harbouring of a spouse or child should be abolished."³⁵

³⁴ Law Com. No. 25.

³⁵ Id. paras. 101-102. In clause 33 of the Draft Bill containing the Commission's recommendations, it is provided that "n/o person shall be liable in tort.... to a parent (or person standing in place of a parent) on the ground only of his having deprived the parent (or other person) of the services of his or her child by raping, seducing or enticing that child...." In its explanatory notes to the clause the Commission stated:

"'Raping' has been specifically mentioned as well as 'seducing' since, although this is properly regarded as an aggravated form of seduction (see Mattouk v. Massad, [1943] A.C. 588, P.C.), it seems that a spouse or parent may, in the case of rape, have an alternative basis for his claim, viz. that the rape constituted

It is to be noted that the Commission in its Working Paper No. 9 (Matrimonial and Related Proceedings - Financial Relief (1967)) appears to have restricted its discussion to actions in relation to a spouse.

(4) Law Reform (Miscellaneous Provisions) Act 1970

The actions for seduction, enticement and harbouring of a child were abolished by section 5 of the Law Reform (Miscellaneous Provisions) Act 1970, which provides that

"No person shall be liable in tort under the law of England and Wales -

....

(b) to a parent (or person standing in the place of a parent) on the ground only of his having deprived the parent (or other person) of the services of his or her child by raping, seducing or enticing that child; or

(c) to any other person for harbouring the wife or child of that other person,

except in the case of a cause of action accruing before this Act comes into force if an action in respect thereof has been begun before this Act comes into force."

Two comments may be made in relation to this provision.

First, it does not change the law with respect to the right of a parent to recover for loss of services resulting from

35 Cont'd

a tort against the wife or daughter leading to a loss of her services. Although the action for loss of services is not generally abolished it is intended to do away with those aspects of it which concern the family relationship and it is obviously desirable to make it clear that this alternative basis cannot be relied on in such a case. To ensure that this result is achieved it has been thought desirable to refer specifically to rape, especially as it is referred to as well as seduction among the excepted proceedings in Schedule 1, Part II of the Legal Aid and Advice Act 1949."

any conduct of the defendant with respect to the daughter apart from rape, seduction, enticement, or harbouring.³⁶

Second, the provision would appear to abolish only the right of a parent (or person standing in the place of a parent) to sue for seduction, enticement and rape. Thus, an ordinary employer would still be able to sue for loss of services resulting from the seduction of an employee. More relevantly, however, a brother (or sister) of a seduced girl may still be able to sue in a case where he (or she) is not in loco parentis towards her but is "master (or mistress) of the house".³⁷ Thus, in respect of some cases where the concept of a service relationship appears to have been somewhat stretched under former law, the right of action may well not have been abolished.³⁸

(b) Scotland

(1) Seduction

A claim for seduction lies at the instance of a girl who was a virgin but who, "by the wiles and persuasion of a man" has been induced to have sexual relations with him. Certain aspects of the action are noteworthy.

- (a) The action is taken by, and for the benefit of the seduced woman, and is thus "wholly different from the English action" or the action in this country.

³⁶ One criticism that has been levelled against the English provision is that a parent whose daughter has been bitten by the neighbour's dog may recover damages from the neighbour (subject to proof of temporal loss) but, unlike the girl's contractual employer, is precluded from recovery if the daughter has been raped or seduced by the neighbour - a situation which the critic claimed illustrated the difference between law reform and changing the law.

³⁷ Cf. Murray v. Fitzgerald [1906] 2 I.R. 254 (C.A.). It seems, however, that in no English decision has the right of action of a brother or sister been recognised.

³⁸ It is, of course, quite likely that a Court would be very reluctant to hold today that a sibling was master or mistress of the seduced girl in the absence of a contract of service or of an in loco parentis relationship.

- (b) It is essential that the woman had been previously chaste. This is because the essence of the wrong is not the sexual act but the woman's loss of her virginity. Thus, a previously unchaste woman, or a widow or a married or divorced woman may not sue in Scotland for seduction, although she may have an action for circumvention and fraud in certain cases.

(2) Enticement of a Child

A parent is probably entitled to sue for damages a third person who entices his minor or pupil child away from the family. A number of aspects of the action may be noted.

- (a) The enticement may be of a child of either sex, and need not be for a sexual purpose.
- (b) The action is not based on deprivation of services but "probably upon interference with the natural parental rights to custody and upbringing".
- (c) The action would appear to lie only at the suit of a parent or other person having lawful custody of the child. It may lie even against a parent not entitled to custody who seeks to entice the child out of the custody of the parent lawfully entitled thereto.
- (d) An action would fail if the defender could establish that he had bona fide and justifiably taken the child from the possession of its parent or parents to save it from serious moral or physical dangers. Such a course would, however,

"only be reasonable in dire emergency and pending an application to have the child's custody regulated by the court".

(As to the law in Scotland, see D. M. Walker's The Law of Delict in Scotland (1966) vol. 2 and his The Law of Civil Remedies in Scotland (1974).)

CHAPTER 5 THE LAW IN OTHER EUROPEAN LEGAL SYSTEMS

(a) France

A seduced woman has a right to claim damages for seduction where the seduction was brought about by deceitful means or by abuse of a position of authority.

The deceit may consist of making a promise of marriage that the seducer does not intend to fulfil. It is necessary that the promise of marriage precede the seduction.

Abuse of authority may, for example, be practised by an employer over his servant, a teacher over a pupil or a minister of religion over a parishioner.

Mere proof of superiority of age or wealth is not normally sufficient, although it may be enough where the woman lacks experience.

Seduction is one of the instances where there may have to be a determination of paternity (la recherche de paternité), which is permitted in French law only in a limited number of cases.

(b) Switzerland

There appear to be two rights of action arising from seduction. The first falls under Article 93 of the Civil Code, which is concerned with broken engagements. The Article provides that where a breach of promise of marriage causes serious injury to the "personal interests" of an engaged party, and that party was not to blame, the Court may award him a sum of money as moral damages, if the other party was at fault. Loss of virginity is a compensatable head of damage under this Article.

The second right of action arises under Article 318 of the Code, which provides as follows:

"A sum of money may be awarded to the mother by way of moral damages where the defendant had promised to marry her, where the cohabitation constituted a criminal offence or an abuse of authority or where, at the time of cohabitation, she was still a minor."

(c) Italy

There does not appear to be any remedy at civil law for seduction.

However, a number of provisions exist in the Penal Code prohibiting conduct involving the seduction and abduction of women.

Articles 522 and 523 of the Code provide that the abduction of a woman for the purpose of marriage or for sexual relations is a criminal offence.

Under Article 524 it is an offence to abduct for the purpose of marriage or for sexual relations a girl under the age of fourteen or a woman who is physically or mentally handicapped.

Article 526 provides that a man who, on a promise of marriage, seduces a minor, but omits to inform her that he is already married, is guilty of an offence.

(d) Belgium

A woman who has had sexual relations with a man has a right of action only where she has been seduced by dishonest means. In such a case she may claim damages for the expense to which she has been put as a result of the

seduction. The action is one for damages rather than support and accordingly may be taken by a woman irrespective of her wealth. She may also take an action for support of the child born as a result of the seduction.

(e) Federal Republic of Germany

Article 825 of the Civil Code provides that a person who by means of trickery, intimidation or by misuse of a dependent relationship, induces a woman to consent to extramarital cohabitation is obliged to compensate her for any damage resulting therefrom.

Under Article 826 a person who in any manner contrary to public morality deliberately causes damage to another is obliged to compensate that other for the damage.

Under Article 174 of the Penal Code it is an offence for any person to have sexual relations

1. with a person under sixteen years of age whose upbringing, education or care has been entrusted to him,
2. with a person under eighteen years of age whose upbringing, education or care has been entrusted to him, or who is subject to him in respect of a service or work relationship, by misuse of a state of dependency connected with the situation as regards upbringing, education, care, service or work, or
3. with a child of his, or adopted by him, under eighteen years of age,

or to cause the person under his protection (i.e. any of the persons mentioned) to have sexual relations with him.

Article 182 of the Code provides as follows:

- "1. Any person who procures a girl under sixteen years of age to have sexual relations with him shall be punished by imprisonment for up to one year or a fine.

2. The offence may be prosecuted only upon petition by the parents or guardian of the seduced person. There can be no prosecution if the offender has married the girl.
3. If the offender was not yet twenty-one years of age at the time of the offence, the court may refrain from imposing a punishment under this provision.

(f) German Democratic Republic

It appears that a civil action will not lie for seduction.

Under the criminal law, it is an offence for a person by exploiting the distress of another or by abusing his occupational position or activity to coerce that other to have sexual relations. Similarly, it is an offence for an adult to exploit moral immaturity by gifts, promises of advantages etc. so as to have sexual relations with young persons.

(g) Sweden

There would not appear to be any civil remedy for seduction.

The Swedish Penal Code provides in Article 2 of Chapter 6 that it is an offence to make a person engage in sexual relations by unlawful coercion or by gross abuse of that person's dependency. The Penal Code also provides as follows:

"A person, who, by promising or giving compensation, obtains or tries to obtain a temporary sexual relationship with a person under eighteen years of age or, if he is of the same sex, under twenty years, shall be sentenced for seduction of youth to pay a fine or to imprisonment for at most six months."
(Article 8 of Chapter 6)

Where a person, without authorisation, separates a child under fifteen years from the person who has care of the child, he is guilty of an offence. The Code also provides:

"The same shall apply if a spouse without noteworthy reason arbitrarily takes away a child under fifteen years of age who is placed in charge of both spouses, or if a spouse or other person who is to be in charge of the child without authorization seizes the child and thus takes the law into his own hands."
(Article 4 of Chapter 7)

(h) Greece

Article 921 of the Civil Code provides that, if by means of a criminal act or in consequence of threats or of lying promises, or by an abuse of a position of authority, a man has dishonoured a woman by having sexual relations with her, he must pay damages in a sum adequate having regard to her marriage prospects.

Article 919 provides that whoever intentionally damages another by an act contrary to public morality is liable for damages.

Article 339 of the Penal Code provides that it is a criminal offence to commit an unchaste act with a person under sixteen years of age or to cause that person to commit or undergo such an act through deception.

It is also an offence for a person (such as a guardian, servant or teacher) having charge of a minor to commit an unchaste act with the minor. Similarly, but without the restriction regarding minority, Article 343 provides:

"The following shall be punished by imprisonment for not less than one year:

- (a) a public servant who, through the abuse of his position, commits an unchaste act with a person under his authority; and

(b) a person appointed or otherwise employed in penitentiaries or other places of detention, in schools, educational institutions, hospitals, clinics or any kind of sanatorium, or other institutions maintained for the relief of the needy, who commits an unchaste act with another person who has been admitted to the institution."

(i) Turkey

Article 423 of the Penal Code makes it an offence to seduce a maiden under promise of marriage. However, where the defendant marries the girl, the prosecution will be suspended, unless the marriage terminates in divorce within five years. The Court may also order payment of compensation, the amount of which is determined by taking into consideration the social standing of the victim and the scope and nature of the offence.

(j) Czechoslovakia

Article 95(1) of the Family Code provides:

"The father of a child whose mother he has not married shall pay an appropriate maintenance contribution to the mother for a period of twenty-six weeks as well as an appropriate contribution towards the cost of her pregnancy and confinement."

There is a limitation period of three years from the date of confinement: id. Article 95(3).

No other civil remedy appears to be available.

Article 242 of the Penal Code makes it an offence to abuse the defencelessness of a woman in order to have sexual relations with her. It is an offence to exploit the dependence of a person under eighteen years or a person entrusted to one's care so as to induce that person to have sexual relations.

(k) Yugoslavia

The right to sue for seduction on foot of a promise of marriage was recognised in the law of Yugoslavia before the Second World War, but there is no express provision on the matter in the present law. However, it appears that compensation may still be awarded if a man has taken wrongful advantage of a woman. The basis of recovery seems to be one of deceit rather than one of the reduction of marriage prospects.

(l) Bulgaria

A civil action for "non-property damage" may be maintained where the plaintiff has been induced to have sexual relations under a promise of marriage. Only the person who has been so induced may sue, and the action does not survive her death. This limitation is in harmony with the general principles of recovery of damages in the Bulgarian law as to delictual liability.

CHAPTER 6 THE LAW IN NORTH AMERICAN LEGAL SYSTEMS

(a) Canada

(i) Common Law Provinces

The law relating to seduction in the common law provinces of Canada³⁹ is in a number of respects different from the law in this country, although the main elements are the same in each law.

At common law, the position in Canada is very similar to that in this country. Thus, the action is based in theory, not on the act of seduction itself, but on the loss of service suffered by the plaintiff, the "master" of the girl seduced. However, "loss of service has been generally inferred rather than directly proved, where pregnancy has been shown to exist, or a child has been born...."⁴⁰

³⁹ See generally the Ontario Law Reform Commission Study on Family Law: Vol. 6, Torts, 189 ff. (1968), and the Report on Family Law, Part 1: Torts, 90 ff. (1969).

⁴⁰ Green v. Wright (1865) 24 U.C.R. 245 at 247 (C.A.) per Draper C.J. An action may be taken during the girl's pregnancy. In L'Esperance v. Duchene (1850) 7 U.C.R. 146 (C.A.) Robinson C.J. states at p. 147:

"Few things, perhaps, could be less desirable than that parties should be encouraged to suppose that an action for seduction could be maintained upon the mere proof of criminal intercourse, not followed by the birth of a child, nor even by pregnancy."

That statement has been represented as supporting the proposition that an action for seduction exists only where pregnancy results from the seduction. However, the statement may not be inconsistent with permitting recovery even in the absence of pregnancy, provided loss of service has resulted, as, for example, where the girl was confined to hospital as a result of the seduction.

Where the girl when seduced is in the service of another person, her parents will not generally have a right of action, although there is some authority in favour of granting a remedy where the girl had an animus revertendi.

Although in theory "the gist of the action is loss of service and is maintainable by any one who has suffered that loss"⁴¹ the father of the seduced girl has generally been considered to have an exclusive right of action.⁴² In Entner v. Benneweiss⁴³, decided in 1894, the Court considered that

"the common law right to service is given to the man who is deemed the head of the family. That relation is not changed because of his personal infirmity or decrepitude, as it is a legal result flowing from the family status. There is no divided right or co-ordinate power of control during the joint-lives; all is in the husband. That being so, the right of action as master is vested in him during his life, and it does not pass to his widow as such upon his death".

The Court would recognise the mother's right of action only if

"it could be further proved that the married woman had separate estate in which was the common abode, or that by some transaction apart from the husband, there was a condition of real service between her and her daughter".

However, in Nickells v. Goulding,⁴⁴ decided over thirty years previously, the Court had recognised the right of a mother to sue where she was a widow and her daughter was residing

⁴¹ Gould v. Erskine (1891) 20 O.R. 347 at 349 (Ch. Div. Robertson J.).

⁴² Cf. Smith v. Crooker (1863) 23 U.C.R. 84 (C.A.).

⁴³ (1894) 24 O.R. 407 at 409 (Ch. Div. Boyd C.).

⁴⁴ (1862) 21 U.C.R. 366 at 369 (C.A. Robinson C.J.).

with her when she was seduced. In the more recent decision of Oakes v. Hindman,⁴⁵ the Ontario High Court in 1934 did not dissent from the statement of the law in Entner v. Benneweiss⁴⁶ although Mr Justice Kerwin distinguished it from the case before him on the basis that in Entner,

"the girl was living at home, and although it is not stated in the report, part of the Chancellor's reasons for judgment.... would indicate that she was a minor".

Oakes v. Hindman⁴⁷ is of particular interest since its facts resembled those in the Irish decision of Hamilton v. Long⁴⁸ (which it discusses).⁴⁹ Recovery was allowed, however, since the plaintiff's mother, who ran her husband's hotel before and after his death, was held to be sufficiently in charge of the business to be considered the "real mistress" of the hotel.

Persons in loco parentis to the seduced girl have a right of action, as have adoptive parents. The mother of an illegitimate child will also have a right of action in respect of the child's seduction.⁵⁰

⁴⁵ /1934/ D.L.R. 190; /1934/ O.R. 642 (High Ct Kerwin J.). See also O'Brien v. Ellis (1903) 2 O.W.R. 685 (High Ct) (cited and discussed in Oakes v. Hindman at 645).

⁴⁶ Supra

⁴⁷ Supra

⁴⁸ /1905/ 2 I.R. 552 (C.A.); discussed supra at pp. 4, 5 and 6 and infra at pp. 44, 45.

⁴⁹ Supra at 644. See also Stouer v. Skene (1918) 44 O.L.R. 609 at 612-613 (High Ct Lennox J.).

⁵⁰ Apparently the father of an illegitimate child may not sue: Biggs v. Burnham (1844) 1 U.C.R. 106 at 107-108 (C.A., per Robinson C.J.) on the basis that he does

"not stand in loco parentis as regards this remedy; nor on any other ground than an uncle or brother would do, or indeed any stranger in blood".

Legislation

Legislation was enacted in a number of Provinces⁵¹ introducing a statutory right of action as a supplement to the common law action. It has two principal features: firstly it enables a parent (normally the father but on his death the mother) to sue in respect of the seduction of his unmarried daughter even where no service relationship exists between them, and secondly it enables an unmarried woman to sue in respect of her own seduction where damage has resulted from it.

(ii) Quebec

Sexual intercourse outside marriage does not in itself give rise to an action for damages. Only where a girl has been "seduced" in the sense of being taken advantage of will she have a right of action. This type of seduction, known as séduction déloyale, may arise where the defendant has used fraud or a false promise of marriage or has abused a position of authority in order to obtain the girl's consent. The evidence grounding the claim may be circumstantial.

Damages may be awarded for the shame of giving birth to a child out of lawful wedlock as well as for economic loss (such as the loss of earnings) resulting from the seduction. The defendant may also be liable for lying-in expenses. There is a limitation period of two years.

⁵¹ The legislation was first introduced in Ontario by the Imperial Seduction Act 1937 and continued to apply with enlargements (cf. The Seduction Act in Revised Statutes Ontario 1970) until the abolition of the action in 1978 by the Family Law Reform Act 1978 section 69. Similar legislation also exists in Alberta (The Seduction Act, Revised Statutes Alberta 1970), Manitoba (The Seduction Act, Revised Statutes Manitoba 1970) and Saskatchewan (The Seduction Act, Revised Statutes Saskatchewan 1965).

The father of the seduced girl also will have an action for damages against her seducer. The action is based on Article 1053 of the Civil Code. He may claim damages for all injuries suffered by him as a direct consequence of the seduction, including moneys paid out by him for his daughter's confinement as well as the loss of his family's reputation. Where, however, the seduction was facilitated by his own lack of supervision of the girl, damages may be reduced or denied altogether.

(b) The United States

Seduction

The action for seduction is based on principles largely similar to those in Irish law. There are, however, some striking differences in certain States.

The action is generally based on the theoretical interference with the parent's right to his daughter's services, although, in approximately a third of the States, legislation has removed the necessity of proving this element in the action. The action may normally be taken by the father, since he is considered legally entitled to the child's services. In certain circumstances, however, the mother is permitted to sue - where the mother has the right to the child's custody or where the father resides outside the State, or where he is dead or has abandoned his family. The Irish decision of Hamilton v. Long⁵² does not appear to have

⁵² [1905] 2 I.R. 552; discussed supra at pp. 4, 5, 6 and 42.

found support in the United States where "it has been held that the mother, after the death of the father, may maintain an action for the seduction of a daughter accomplished during the lifetime of the father...."⁵³

It is likely that in future the right of a mother to sue for the seduction of her child will be recognised on a more general basis, having regard to the recent moves towards equalisation of spousal rights and responsibilities,⁵⁴ especially in relation to their support obligations⁵⁵ and their right to the custody of their children.⁵⁶

The mother of a child born out of wedlock has a right of action in respect of the child's seduction, and her subsequent marriage will not defeat her claim unless her husband "... assumed parental rights or obligations or placed himself in loco parentis to her child".⁵⁷

Persons standing in loco parentis to the seduced girl also have a right of action. Thus, actions for seduction have been successfully maintained by the seduced girl's grandparents, stepfather, adoptive parent, aunt, cousin and brother-in-law. An engaged person, however, has no right

⁵³ Corpus Juris Secundum vol. 79, 962, referring to the Tennessee decision of Parker v. Meek 3 Sneed 29.

⁵⁴ See generally Binchy, "The American Revolution in Family Law" (1976) 27 Northern Ireland Law Quarterly 371 at 371-379.

⁵⁵ Id. at 390-391.

⁵⁶ Id. at 412.

⁵⁷ Bunker v. Mains (1942) 28 A. 2d 734.

of action in respect of the seduction of his fiancée.⁵⁸ As in Ireland, a master who is not related to the seduced girl and who is not standing in loco parentis towards her may sue where there is a contract of service between him and the girl.

At common law, the general rule is that the girl who has been seduced has no right of action. The rejection of her claim has been based on three grounds: first, that the principle of volenti non fit injuria should be applied; secondly, that the rule as regards those in pari delicto is applicable; and thirdly, that since the action is based on loss of services it should not be extended to the seduced girl. However, the girl's right of action has been allowed where she was the victim of force, duress, fraud⁵⁹ or an overpowering influence,⁶⁰ where a promise of marriage was used as an inducement to sexual relations,⁶¹ or where a confidential relationship existed between the parties.⁶²

⁵⁸ Davis v. Londit (1914) 144 N.W. 1089 (Sup. Ct. Minn.);
Cf. Brame v. Clark (1908) 62 S.E. 418 (Sup. Ct. N.C.).

⁵⁹ Slawek v. Stron (1974) 215 N.W. 2d 9 (Sup. Ct. Wisc.).

⁶⁰ Kirkpatrick v. Parker (1939) 187 So. 620, 121 A.L.R. 1481 (Sup. Ct. Fla.) where Whitfield, Presiding Judge, stated:

"In a seduction action brought by an adult woman, the declaration must allege facts to show that she was not in pari delicto with the alleged seducing defendant, as by alleging force, duress, or overpowering control of the defendant over her by reason of a fiduciary, family, employee or other relationship which put the plaintiff at a physical or mental or relationship disadvantage."

⁶¹ Blackman v. Iles (1950) 71 A. 2d 633 (Sup. Ct. N.J.) (head-note no. 3), Fletcher v. Ketcham, 141 N.W. 916. Cf. State v. Reeves 10 S.W. 841 at 845 (Sup. Ct. Mo.) per Sherwood J. and Oberlin v. Upson (1911) 95 N.E. 511 (Sup. Ct. Ohio).

⁶² Weisund v. Schneller (1906) 108 N.W. 483 (Sup. Ct. Minn.).

In a number of States the position has been altered by the enactment of statutory provisions which either expressly or impliedly confer on women⁶³ the right to sue in respect of their own seduction.

It is no defence to an action for seduction taken by a parent that the girl was a consenting party. Where the plaintiff marries (and later divorces) the defendant subsequent to her seduction by him her action may be barred on the basis that the marriage extinguished all ante-nuptial rights of action between the spouses, the position being unaffected by the divorce decree; but where the marriage is annulled the plaintiff will be entitled to sue. (Cp. the law in Turkey, supra p. 38).

The consent or connivance of a parent in the seduction of his daughter is a bar to his action, but carelessness or indifference on his part which affords an unusual opportunity for sexual relations will not by itself bar his action.

Damages are regarded as the peculiar province of the jury, and it is their judgment, and not that of the Court, which is to determine the amount of the damages. Only under "extraordinary circumstances" will an award be disturbed, as where the award is so great as to raise the suspicion of partiality, passion, prejudice or corruption on the part of the jury. Exemplary damages may be awarded in appropriate cases.

⁶³ The legislation has been interpreted as extending the right of action to widows and divorced women: Wiley v. Fleck (1920) 178 N.W. 410 (Sup. Ct Iowa); Phillips v. Ashworth (1929) 124 So. 519 (Sup. Ct Ala.) - noted in (1930) 30 Columbia Law Review 266.

During the Nineteen Thirties, a number of States abolished the action for seduction in an attack on "heart balm" which also extended to actions for alienation of affections, criminal conversation and breach of promise. The agitation for abolition concentrated upon the breach of promise action and there does not appear to have been a great deal of criticism of the action for seduction prior to its abolition in these States. The legislation has been criticised by a number of commentators as having been too drastic a solution to risks of blackmail and abuse that may well have been exaggerated.⁶⁴

In certain States seduction may constitute a criminal offence. In a number of States, an essential element of the crime is a promise of marriage by the defendant. Most States prescribe that the seduced woman must have been of previously chaste character and in many States the statute expressly requires that the woman be unmarried. Marriage by the defendant to the seduced woman or a subsequent bona fide offer to marry her affords a defence to the crime of seduction in several States. This defence has been criticised by a number of commentators.

⁶⁴ See e.g. F. Harper and F. James The Law of Torts, vol. 1 629; Feinsinger "Current Legislation Affecting Breach of Promise to Marry, Alienation of Affections and Related Actions" (1934) 10 Wisc. Law Review 417 at 430; "Legislative Abolition of Certain Actions Designed to Protect the Family Relation" (1936) 30 Ill. L. Rev. 764 at 781-783; Rinker, 47 Mich. L. Rev. 383 at 391.

Enticement and Harbours

A parent who has a right to the custody, control and services of a minor child may maintain an action for damages against anyone who unlawfully entices away or harbours the child. Formerly, it was necessary to establish some loss of services, actual or constructive, but this is not now generally required.

The enticement or harbours must have been wilful and must have involved some positive act on the part of the defendant in the knowledge that the child had a parent whose rights were being infringed. It is not, however, necessary to show that the defendant used force or that his or her motive was a sexual one.

Historically, it has been considered that the action should be taken by the father alone, unless the parents were divorced or the father was dead, and the mother had custody of the child.

The action may also be taken by a person who is in loco parentis to the child.

The defences to the action are restricted. It is no defence to assert that the parent has consented to parting with his child when that consent was obtained by fraud. Also, it is no defence in an action by the child's father that the defendant acted in aid of the mother,⁶⁵ or that "he only obeyed the orders of another person who illegally

⁶⁵ Corpus Juris Secundum vol. 67, 854.

assumed to direct the removal of the child from the father's custody".⁶⁶ Moreover, it seems that it is not a defence that the parent's treatment of the child contributed in any degree to produce the wrong in question.⁶⁷ Indeed, the parent's moral character may not be considered either as a defence or in mitigation of damages.⁶⁸ A parent is entitled to recover damages for all the "proximate consequences"⁶⁹ of the defendant's wrongful act. He may recover for any loss of services suffered by him, for the injury to his feeling and for the loss of the child's affection. Whether punitive damages may be awarded is uncertain.

⁶⁶ Id.

⁶⁷ Id. See, however, American Jurisprudence vol. 59, 208:

"The right of a father to recover damages for the abduction or enticing away of his child may be.... forfeited by a neglect of his duty to maintain, protect, and educate the child" (citing Wodell v. Coggeshall, 2 Met (Mass.) 89).

⁶⁸ Magnuson v. O'Dea (1913) 135 (Sup. Ct Wash.) at 642 (per Gose J.):

"[The parent's] moral character was not in issue on the question of damages arising from the abduction of her minor child. Every parent, whatever his or her moral life may be, is entitled to the custody and control of the minor children, unless and until that custody has been taken away by a court of competent jurisdiction, or unless the child is over 16 years of age and voluntarily consents to a transfer of his or her custody to another.

The case of Dobson v. Cothran [13 S.E. 679] supports the contention.... that evidence tending to establish the immorality of the parent is admissible, not as a defense to the action, but in mitigation of the damages. We are not convinced of the soundness of this rule. It seems to us to inject a false issue into a case where the parent seeks redress for the abduction of his child. It necessarily assumes that the parental love of an immoral parent may be less than that of a moral one. This may or may not be true, and its truth or falsity is purely speculative."

⁶⁹ Corpus Juris Secundum vol. 67, 854.

CHAPTER 7 THE LAW IN AUSTRALIA AND NEW ZEALAND

(a) Australia

Seduction

The common law action for seduction exists in Australia, supplemented in certain States (as in Canada) by legislation.

Common Law

The position is similar to that in this country. The action is based on loss of services, and only where the parent has in fact been deprived of the girl's services, or of the right to them, may he recover. Damages are not limited to mere compensation based on monetary loss.⁷⁰

Legislation

Legislation exists in a number of States which alters the common law position. Thus, in Tasmania,⁷¹ Victoria⁷²

⁷⁰ In dealing with the relevant criteria Dwyer J. in Brankstone v. Cooper (1941) 43 W.A.L.R. 51 at 54 (W.A. Sup. Ct) stated:

"Damages... are not to be limited to mere compensation based on monetary loss; that is, they are not restricted to the actual expenditure incurred, or some calculable assessment of the value of the services which may have been expected of the daughter during the period of incapacity; but it should be emphasised that any damage sustained by the daughter, whether in person, reputation, or prospect, should not be taken into consideration."

⁷¹ Evidence Act 1910 section 118 (cited in J. Fleming The Law of Torts (5th ed. 1977) at 640 (fn. 4)).

⁷² Wrongs Act 1958 section 14.

and Western Australia,⁷³ legislation permits an action to be taken by a parent or person in loco parentis to the seduced girl without alleging evidence of loss of services or of the existence of a master-servant relationship between them. In Murray v. Kerr,⁷⁴ a narrow interpretation of the Victorian legislative provision to this effect⁷⁵ was given by Chief Justice Irving, who considered that it was nonetheless still necessary for the parent to prove, in addition to the fact of seduction, physical incapacity arising from the seduction of the girl for ordinary domestic and other services. The judge (in a passage worthy of note having regard to the evidence of his disagreement with the social desirability of the complete abolition of the service requirement) stated at pp. 411-412:

".... It is boldly contended that the section in effect creates a new cause of action of vastly greater scope and more general application than the ordinary action for seduction - that, in an action of seduction brought by a parent, in which damages are alleged, no further element is necessary than the mere fact of the seduction. If that view is correct, the father of a daughter of any age living for any length of time independently of the father on her own resources, and engaged anywhere in supporting herself, even a married daughter, under certain circumstances, having no domestic relations arising out of the position of daughter and father, would be entitled to bring an action claiming damages without proof of more than the fact of seduction."

⁷³ Evidence Act 1906 section 49.

⁷⁴ [1918] V.L.R. 409.

⁷⁵ Then section 13 of the Wrongs Act 1915 - now section 14 of the Wrongs Act 1958.

He said he could not conceive it possible that the Legislature intended by the language of the section "to extend this peculiarly narrow cause of action into one of immense and unreasonable scope".

In South Australia the action for seduction was abolished by legislation in 1972.

Enticement and Harboring

It would appear that a parent has a right of action based on principles similar to those in Ireland.

(b) New Zealand

Until 1975, a parent could sue for the loss of his child's services, whether resulting from seduction, enticement, harbouring or negligence by the defendant. Since then, only an action based on negligence may be taken.

Previously the common law position had been altered by legislation (similar to that enacted in certain Canadian Provinces and Australian States) which provided as follows:

"In an action to recover damages for seduction brought by a parent of the woman seduced, or by a person standing to her in the place of her parent, it is not necessary to allege or prove that she

was in the service of the plaintiff, or that he sustained any loss of service by reason of the seduction."⁷⁶

The requirement as to corroboration has been held to be satisfied by evidence such as would afford corroboration in an action for breach of promise,⁷⁷ the Court of Appeal in Colquhoun v. Cross⁷⁸ holding that

"any evidence which renders it probable that the story told by the woman as to her seduction by the defendant is true ought to be treated as corroboration...."

Whilst there was no decision as to whether a parent was entitled to recover for loss of services arising from the seduction of a son, the view has been expressed by a learned

⁷⁶ Evidence Act 1908 section 22(1). Section 22(12) of the Act is as follows:

"The plaintiff in such action shall not recover a verdict unless the evidence of the woman seduced is corroborated by some other material evidence of such seduction".

The abolition of the service requirement stretches back to legislation of 1885 (Evidence Further Amendment Act 1885 section 8). It would appear that that provision was interpreted a good deal less strictly then and with none of the qualifications to its generality imposed by the Australian courts. See Stunnell v. Olsey (1896) 15 N.Z.L.R. 64 (Sup. Ct); Clapp v. De La Perrelle (1899) 17 N.Z.L.R. 413 (Sup. Ct).

⁷⁷ Evidence Act 1908 section 21.

⁷⁸ [1918] N.Z.L.R. 401 (C.A.).

authority in 1968, that, "1/n principle there seems no reason why he should not be".⁷⁹ Exemplary damages could be awarded as well as damages for the disgrace brought on the family.

The Torts and General Law Reform Committee of New Zealand considered the subject of seduction, enticement and harbouring of children in its Report entitled Miscellaneous Actions, presented to the Minister for Justice in February, 1968. The Committee's views are set out hereunder.

(a) Seduction

Having dealt briefly with the main features of the existing law, the Report continues (at p. 12):

"As far as we are aware, no-one has brought such an action in New Zealand in recent years. As regards female servants (using 'servants' in the colloquial sense) the action is quite obsolete. As regards daughters we think it serves no useful purpose and we agree in this respect with the English Law Reform Committee which recommended its abolition.... The action should be abolished completely, and the legislation framed widely enough to include the seduction of male children - doubtfully covered by the common law."

⁷⁹ B. Inglis, Family Law (2nd ed. 1968) 224-226, points out, however, that since section 22 of the Evidence Act 1908 applied only to the seduction of women, it would not appear that corroboration would be necessary in the case of a son, but that loss of service would have to be established. It is worthy of note that section 4 of the Domestic Actions Act 1975 appears to close the door to further speculation since throughout it refers to "child" rather than "daughter".

(b) Enticement of a Child

After a summary of the relevant law and following a reference to the English Law Reform Committee's comment that wardship provided a more satisfactory remedy for parents, the Committee stated (at p. 13):

"A New Zealand parent can rely on the inherent jurisdiction of the Court⁸⁰... and obtain an order against a person who has threatened to entice, or has enticed, the child. This is a speedy and a flexible procedure, though not widely used. Alternatively, he may launch habeas corpus proceedings (though, where the child has reached years of discretion, available only if he is detained against his will). In our view these practical remedies are sufficient and the action in tort may safely be abolished without substitution of anything in its place. There seems no social justification for the award of monetary compensation to the parent."

(c) Harbouring of a Child

On this subject the Committee suggested that the action for harbouring of a child should also be abolished, applications for the exercise of the Court's inherent jurisdiction and habeas corpus proceedings providing all that, in the Committee's view, was required. (p. 13).

Provisions giving effect to the Committee's recommendations on seduction, enticement and harbouring were enacted in the Domestic Actions Act 1975 (which also abolished the action for breach of promise of marriage). Section 4 of the Act provides as follows:

⁸⁰ Judicature Act 1908 section 17.

- "(1) No person shall be liable in tort -
- (a) To a parent for
 - (i) Inducing a child of that parent to leave or remain apart from that parent; or
 - (ii) Seducing the child of that parent; or
 - (iii) Harboursing the child of that parent; or
 - (b) To any other person for -
 - (i) Seducing the servant of that other person; or
 - (ii) Harboursing the wife of that other person.
- (2) In this section the expression 'parent', in relation to any other child, includes a guardian or person standing in the place of a parent of that child.
- (3) This section shall have effect in relation to events occurring before as well as after the commencement of this Act but shall not affect any action commenced before the commencement of this Act."

Two aspects of this provision may be noted.

Firstly, unlike the English provision, it deprives an "ordinary" master as well as a parent (as defined by the section) of the right of action.

Secondly, the section does not abolish the right of action of a master (other than a parent, as defined by the section) in respect of the enticement or harboursing of a child, although the Committee had recommended that the legislation should do so.

CHAPTER 8 POLICY ARGUMENTS REGARDING REFORM OF THE
LAW RELATING TO SEDUCTION.

The question arises as to whether the action for seduction should be retained in its present form. Set out below are arguments in favour of retaining and in favour of abolishing the action, together with a discussion of changes that might be made in the law on the assumption that the action is to be retained.

Arguments in favour of retaining the action as at present constituted

The first argument in favour of retaining the action is that it deters men from seeking to encourage women to behave immorally, risking pregnancy and the birth of children out of lawful wedlock.

This argument has some force but it should not be overstressed. The existence of the action would appear to have little more than a marginal effect on sexual conduct generally, although it is quite possible that in individual cases it may have a deterrent effect. The high number of births out of lawful wedlock in countries where the action for seduction is available indicates that it has no significant deterrent effect on behaviour.⁸¹

⁸¹ In this country the number of births out of wedlock rose from the lowest ever recorded figure of 2.9 per 1,000 unmarried women in 1959 to 7.9 per 1,000 in 1974. The number of births out of lawful wedlock in 1974 was 2,309, which was 3.4% of all births registered. Since then the number and percentage have risen each year: 2,514 and 3.7% in 1975, 2,578 and 3.8% in 1976, and 2,837 and 4.1% in 1977.

The second argument in favour of the retention of the action is that it serves a valuable function in compensating a family for the distress and dishonour that it may experience as a result of the defendant's conduct. If a person behaves in a manner that offends against the standards of the community, leading to the distress and dishonour just mentioned, there is much to be said for allowing those injured by his behaviour to be recompensed for the damage (including mental distress) that they suffer.

Arguments in favour of abolishing the action

The first argument in favour of abolishing the action is that the notion of a person recovering damages on the basis of a proprietary interest in another is now outdated.

The reply to this argument is that the historical basis of a particular action does not greatly matter if the social policies that it serves are sound by the standards of today. This may be said in relation to the action for seduction, which may now be considered to serve solid social policies. It must be conceded that, unlike the action for criminal conversation and the actions for other family torts, the action for seduction has the proprietary (or quasi-proprietary) aspect as a basic element for entitlement to recover. Unless a service relationship, however tenuous, is established, the plaintiff's case will fail, although, of course, this need not necessarily be so if a new type of action is substituted. Even conceding the strength of the argument, it is not necessarily a justification for total

abolition of the action. Alteration of the action so as to remove the proprietary or quasi-proprietary element appears to meet the main criticisms levelled against the action.⁸²

The second argument in favour of abolishing the action is that the basic concept of seduction of a woman by a man is doubtful in the light of the more equal relationship that now exists between the sexes. Frequently the woman may have been the real seducer or may have actively connived at the seduction. Moreover, in many cases there may be no seduction in the true sense but instead a mutual decision to have sexual relations, without undue pressure by either party on the other.

However, there are clear cases of seduction in the true sense of the word, and it may be argued that, in these cases at least, the law ought to provide a remedy.

The third argument in favour of abolishing the action is that it may give rise to blackmail. This fear has been expressed in a number of countries and was a reason for abolition of the action in a number of jurisdictions in the United States. Similar reasons have been advanced in relation to breach of promise and criminal conversation actions. Experience has, however, shown that evidence supporting the fear of blackmail is of its nature difficult to come by. It is,

⁸² Legislatures in some Australian States and Canadian Provinces have taken this step.

indeed, quite possible that a father and daughter (or, perhaps, brother and sister) may in some cases have conspired to trap a person by an implied threat of an action, since the girl's consent will not relieve the defendant of liability and since parental (or fraternal) connivance, although providing in law a defence, might often in practice be difficult to establish. Nevertheless, there does not appear to be any evidence of significant abuse of the right of action in this country. Actions are rarely taken⁸³ and as far as is known there have not been any public allegations of blackmail.

The fourth argument in favour of abolishing the action is that it is not desirable to seek to compensate a family for the dishonour it suffers by the girl's "fall". It might be said that "respectability" in the community should not be reinforced by the law in this fashion. The notion of "good" families who eschew sexual conduct outside marriage strikes many people as hypocritical. Moreover, there is something paradoxical in the fact that, when this reputation for sexual propriety is exploded by the girl's indulging in sexual relations outside marriage, the very conduct which "lets the family down" is relied upon to obtain money in the guise of damages.

On the other hand, it may be argued that there is nothing wrong in a law that provides compensation for a family because of the dishonour brought upon it by the defendant's

⁸³ No action has been reported in recent years, in contrast to the period from 1840 to 1940, during which the law reports contained many cases.

conduct. The facts of life are that families in a community are judged by the moral conduct of their members. If the defendant has by his conduct brought about a loss of the family's reputation and honour, it is not unreasonable that he should have to pay for his conduct.

Conclusion

Having regard to the arguments for and against the retention of the action for seduction and bearing in mind the fact that the question involves value judgments extending beyond strictly legal considerations, it is the view of the Law Reform Commission and it is accordingly recommended that the action for seduction as at present constituted should be abolished. It is, however, recommended that the seduction of a child should give a right of action in the nature of a family action but that there should be no requirement of a service relationship between the seduced girl and the members of her family.

As has been mentioned, this step has been taken in a number of Canadian and Australian jurisdictions, and in New Zealand. It has inter alia the advantage of dealing with the widespread criticism that has been made of the present law on the ground of its proprietary or quasi-proprietary foundation.

The gravamen of the proposed action would be the distress and humiliation suffered by the family of the seduced girl and not any loss of services. The plaintiff would not come into court as a "master", but rather as the representative of an injured family. It is desirable to

rid the law as far as possible of fictions such as those at the basis of the present action.

On the assumption that the service basis of the action is abolished, it is necessary to determine the persons who would be entitled to sue. The first question that arises in this regard is whether the seduced child should in certain circumstances herself have a right of action. This is the position in Scotland, a number of Continental European countries and in some jurisdictions in the United States, Canada and Australia. One can conceive of cases where a child might have a powerful moral claim, as, for example, where an experienced philanderer sets out to seduce a young and impressionable girl. Overall, it is considered that the child's right of action should be merged in the family action, thus allowing her to be awarded damages where the circumstances so warrant. To avoid a multiplicity of actions in respect of a single seduction the legislation should specify that only one action may be taken on behalf of all the members of the family, the Court to award damages to each of the members of the family unit residing together as it considers fit.

It is recommended that the members of a family unit should be defined as comprising the parents and the children (including legally adopted children and children to whom either parent is in loco parentis). This would be the same family unit as that suggested for the proposed new family action for damages for adultery and the enticement of a spouse.⁸⁴

⁸⁴ The Commission Working Paper No. 5 - 1978, pp. 56, 67, 72 and 73.

It is also recommended that the action for seduction should be limited to the case (1) where the seduced child was under the age of eighteen years at the time of the seduction and was not married at that time and at the time of the hearing and (2) where the seduction resulted in pregnancy.

Age limitations are, of course, important in the criminal context in respect of sexual behaviour, but, as already mentioned, the age of the seduced child has not been relevant to entitlement to sue for damages for seduction.

The argument in favour of an age limit is that above that age - normally the age of majority - the child may be presumed to be sufficiently mature to look after her own welfare. An argument against this is that, whilst this presumption may accord with the facts in most cases, there will be some where it does not, as where a man, by fraud or undue pressure, takes an unfair advantage of a woman over the age of majority. On balance, however, it is thought that the limit should be fixed at majority.

As regards the proposal to confine the right of action to the seduction of children who are not married, it should be noted that this is the position in a number of jurisdictions in Canada and it is also part of the law in Scotland. Clearly, there is a strong argument for making a change in our law. If the action is to be based on the damage done to family honour, the position must be considerably affected by the fact that the child is married. The dishonour, if any, will not fall primarily on her original family but rather on her spouse and children: her conduct will normally be that of adultery, in respect of which her husband should be able to sue her paramour. It should be noted that, where the seduced person is a

widow, her original family may, under the Commission's proposals, have a right of action in certain circumstances, as, for example, where a girl had married at a young age and had returned to her home a year later when her husband was killed in an accident. Here the girl has in effect renewed her relationship with her original family. It is, of course, true that a married person is generally no longer a minor, and will, by marriage, have reached majority, if the proposals in the Commission Working Paper No. 2 - 1977 are implemented.

The proposal to limit the right to sue to cases where the seduction has resulted in pregnancy may be supported on the ground that, if family dishonour is to be the basis of recovery, there should be some public awareness of the defendant's conduct before he should be liable. It is, of course, true that there are some cases where the seduction of a girl becomes widely known in a community without her becoming pregnant. Overall, however, it is thought that it would be better to insist that no action for seduction will lie unless there is pregnancy - a rule that has the merit of simplicity and ease of application. This is not to say that an action for enticement or harbouring might not lie in the particular circumstances. (See Chapter 9 infra.)

It is not proposed that any legislation resulting from the Commission's proposals should include specific provisions regarding damages. At present, as has been mentioned, damages are at large, and depend on such factors as the conduct of the defendant, the dishonour suffered by the girl's family and the relative positions of the parties, with exemplary damages being capable of being awarded in appropriate cases. Overall, it is considered that, the

deterrent effect of the action for seduction of a child should not be weakened and that, accordingly, it is better not to disturb the present law relating to damages (except in so far as concerns any change necessitated by the abolition of the requirement of a service relationship).

CHAPTER 9 POLICY ARGUMENTS REGARDING REFORM OF THE LAW
RELATING TO THE ENTICEMENT AND HARBOURING OF
A CHILD

A number of arguments for and against retention of the actions for enticement and harbouring are considered below, together with possible changes in the actions that might be desirable.

Arguments in favour of retention of the actions

The first argument is that the continuity of family relationships should not be disturbed by outsiders seeking to entice children away from their parents. For a family to function effectively and for parents to be able to discharge their duty of rearing and educating their children it is essential that the family must be secured from outside interference. A law that affords protection to the family in this regard should accordingly be retained.

The second argument, which is a development of the first, is that the existence of the actions for enticement and harbouring serves to deter persons who might otherwise intrude upon family relationships.

The third argument is that abolition of the actions for enticement and harbouring could place children in the position of having to make a decision of fundamental importance (namely, whether to leave or remain away from home) at an age when they have neither the experience nor the maturity to make such decisions.

The fourth argument - and perhaps the most fundamental one - is that the Family is in Article 41 of the Constitution given a special status and authority.

Arguments in favour of abolition of the actions

The first argument is that these actions are based on the alleged proprietary interest of a parent in his child.

The reply to this argument, which is equally applicable to a number of other torts in the area of domestic relations, is that the historical origin of an action is not a valid objection to it if the action achieves a desirable objective judged by the standards of today.

The second argument is that the concept of obtaining damages for enticement or harbouring is not socially acceptable; the welfare of the child and the protection of the family against outside interference may be better achieved by other means, such as wardship, guardianship and custody proceedings and applications for habeas corpus.

The third argument is that the actions restrict the freedom of young persons unduly. Whilst the Court will defer to a large extent to the wishes of the child in custody and wardship proceedings, it is not clear that this is so in an enticement or harbouring action.

The fourth argument is that the actions may involve some dangers to religious liberty. A reading of Lough v. Ward⁸⁵ suggests that the defendant's religious society was considered unconventional and intellectually

⁸⁵ [1945] 2 All E.R. 338.

"second rate" and that this did not assist the defendant's position. Whilst in the law of charities the Courts may, in certain contexts, be required to adopt a neutral position regarding the value or merit of any particular religion, the Courts in enticement and harbouring actions may have to consider differing religious beliefs. As against this, however, it may be argued that the parents' rights in regard to the religious upbringing of their children must be a major consideration.

The fifth argument in favour of abolition is that the actions may be taken by parents who do not come to the Court "with clean hands". The parents may have maltreated the child over the years and their motives for taking an action may be questionable. It is true that the amount of damages awarded, if any, may reflect these aspects, but some people might argue that a right of action should not be available in such cases.

Overall, it is considered that the arguments in favour of the abolition of the actions for the enticement and harbouring of children have little merit and the Commission recommends that the actions should be retained.

On the assumption that the actions are to be retained it remains to consider what changes are desirable in the existing law.

The first change would be to specify an age limit for the child, who should not be married. The Commission has already recommended⁸⁶ that the age of majority should be reduced to eighteen years or the age of marriage (if under

⁸⁶ Working Paper No. 2 - 1977, The Law relating to the Age of Majority, the age for Marriage and some Connected Subjects, paras 2.38, 2.45.

eighteen years). It appears to the Commission that the proposed age limit for enticement and harbouring actions should be eighteen years and that the child should not be married. The proposed new age limit is also that recommended for seduction actions - supra p. 64.

The second change would be to provide that the Court, in actions for enticement or harbouring of a child, should be required to have regard to the welfare of the child as "the paramount consideration". This would appear to have two principal advantages:

Firstly, it would be in the interests of the child. Under the present law, it would be possible, though not always probable, that the parents' claim might succeed regardless of the child's welfare. Such a possibility may be argued not to be in harmony with contemporary attitudes to child welfare or indeed with the child's own rights under the Constitution.

Secondly, it would place actions for enticement and harbouring on the same basis as proceedings under the Guardianship of Infants Act 1964.

Accordingly, the Commission recommends that in enticement and harbouring actions the law should be amended so as to require the Court to have regard to the welfare of the child as "the paramount consideration" in assessing damages or granting discretionary relief.

The third change would be to remove from the actions for enticement and harbouring the requirement of establishing a service relationship between the plaintiff and the child in question. The interest protected by the actions for enticement and harbouring is clearly in essence that

of family solidarity and continuity of family relationships rather than one concerning the loss of the child's services. Accordingly, and for the reasons mentioned in relation to the action for seduction, the Law Reform Commission recommends that the requirement of a service relationship in actions for enticement and harbouring should be abolished.

The fourth change, which follows from the third, would be to specify the nature of the action. As in the case of seduction, the Commission recommends that the actions for enticement and harbouring should be in the nature of family actions, that only one action may be taken and that the members of the family unit entitled to damages should be as defined in the case of actions for seduction. (See supra p. 63.)

The fifth change relates to the question of damages. It might be considered desirable for the legislation to specify the heads of damage for which compensation would be allowable in actions for enticement and harbouring, rather than to leave the matter at large. However, it is considered that the best approach would be to leave the existing law as it is (except in so far as concerns any change necessitated by the abolition of the requirement regarding a service relationship). As was stated in relation to the action for seduction, the deterrent effect of the actions for enticement and harbouring of a child should not be weakened. (See supra p. 66.)

The sixth change would be to give the enticed child a right of action, or, at all events, a right to share (at the discretion of the Court) in the damages awarded against the defendant. A strong argument could be made that, where the child is very young, he or she should obtain

damages for his or her separation, whether enforced on him or her or brought about by his or her agreement, where he or she is not mature enough to make a proper judgment. Indeed, under the present law, he or she might have a right of action for false imprisonment or for negligence, or possibly a right of action for damages for interference with his or her rights under the Constitution.⁸⁷

In the Commission's view, the better approach would be to merge the child's right of action in the family action, as has been recommended in the case of seduction. (See supra p. 63.)

⁸⁷ Cf. Meskeil v. C.I.E. [1973] I.R. 121 (Sup. Ct); R.F.V. Heuston, "Personal Rights under the Irish Constitution" (1976) 11 Ir. Jur. 205 at 222.

CHAPTER 10 SUMMARY OF RECOMMENDATIONS

Seduction

1. The present action for seduction of a child should be abolished. (Page 62)
2. There should be created a single family action for seduction on the lines set out hereunder. (Pages 62 sqg.)
 - (1) It should no longer be necessary for plaintiffs to prove a service relationship between themselves and the seduced child.
 - (2) The action should be available for the benefit of all 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), the Court to award damages to each of the members of the family unit residing together as it considers fit.
 - (3) The child's right of action should be merged in the family action, thus allowing her to be awarded damages where the circumstances so warrant.
 - (4) The action should be limited to the case (a) where the seduced child was under the age of 18 years at the time of the seduction and was not married at that time and at the time of the hearing and (b) where the seduction resulted in pregnancy.
 - (5) The deterrent effect of the action for seduction of a child should not be weakened and, accordingly, the present law relating to damages should be retained (except in so far as concerns any change

necessitated by the abolition of the requirement of a service relationship).

Enticement and Harboring

The actions for the enticement and harboring of a child should be retained and the following rules should apply. (Pages 69 sqg.)

- (1) The requirement of a service relationship should be abolished.
- (2) The actions should be in the nature of single family actions, as in the case of actions for seduction.
- (3) The child's right of action should be merged in the family action, as in the case of actions for seduction.
- (4) The actions should be limited to cases of children under the age of 18 years who are not married.
- (5) The deterrent effect of the existing actions should not be weakened and, accordingly, the present law regarding damages should be retained (except in so far as concerns any change necessitated by the abolition of the requirement of a service relationship).
- (6) The Court should be required to have regard to the welfare of the child as "the paramount consideration" in assessing damages or granting discretionary relief.

General

A simple rule regarding corroboration of the evidence of a child in seduction, enticement and harbouring actions should be incorporated in any new legislation regarding such actions. The rule should be the same as that on breach of promise contained in section 2 of the Evidence Further Amendment Act 1869. (Page 13)

ADDENDUM

This Paper does not include a general scheme of a Bill because, as has been indicated in the Commission Working Paper No. 5 - 1978 at page 71, it is considered that the drafting of the necessary legislation will be a relatively straightforward task once the principles upon which it is to be founded are settled following comments on Working Paper No. 5 - 1978, on the present Paper, and on a Paper to be published shortly that will deal with the law relating to loss of consortium and loss of services of a child.