Lascivious Wassailes on the Tort of seduction

Immediately prior to the editorial deadline, I was perusing the most recent edition of the *LIJ* with the most honourable intentions of writing an article concerning the consumption of alcohol as a young lawyer (being fully qualified for the task) when I found to my horror that a Ms Tesoriero had beaten me to the punch. The silver lining to this thievery of thunder is that my exercise in the art of procrastination has once again paid off and consequentially I now bring to your attention that seduction is an actionable tort.

"This tort is only actionable for the seduction of a female."

Now, before we all get carried away with litigious inclinations against perpetrators of heartbreak, it's worth mentioning that this tort is only actionable for the seduction of a female.[1] And if this isn't enough to get your EO hackles raised, the tort is only actionable by the female's father, or one standing in the father's place. *Halsbury's Laws of Australia* outlines the tort as follows:

> *At common law, a man, other than her husband, who has sexual intercourse with a woman will be liable to her father, or one standing in the father's place for any consequential loss of her ability to provide household services to the father (at [415-1970]).*

Archaic? Yes, well, not completely surprising when you consider that the action arose by analogy to two other actions developed in medieval England – *actio per quod servitium amisit* (action for loss of services), which recognises a master's proprietary or quasi-proprietary interest in his servants, and the action of consortium, which recognises a husband's quasi-proprietary interest in his wife and her services.[2]

There may be an argument that this tort has fallen into desuetude given the lack of post-WWII reported judgments. However, although passé, the tort has not been formally abolished in Victoria – unlike in the more progressive common law jurisdictions of South Australia, New Zealand and even England. Surely this cannot be a mere case of oversight, particularly since, when the *Wrongs Act* 1958 (Vic) was amended in 2000, the tort copped a mention in the Bill's second reading in the Legislative Council. It's a little surprising that we find the need to maintain a cause of action whereby a plaintiff can bring a suit against a man for the seduction of the plaintiff's daughter based on a master–servant relationship.

A quick run down of the elements of the tort further questions its utility in today's society. I must confess that the phrase "her ability to provide household services to the father" generated some perceptions of iniquity, however a glance through some late 1960s torts books reveals that this element of the tort had been reduced to a mere legal fiction since the early nineteenth

century. The performance of trivial domestic duties such as the "occasional making of tea" (*Carr v Clarke*)[3] or "milking of cows" (*Bennett v Allcott*)[4] was found to be sufficient evidence of service. We lucky Victorians don't even have to prove the loss of such services since they are statutorily presumed (section 14 of the *Wrongs Act*), as is the relationship of master and servant between a parent and the woman/girl seduced.

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Considering the master–servant relationship is presumed in favour of the plaintiff, proof of service is easily satisfied. As "loss of service" is also presumed by statute, the plaintiff only really needs to prove the act of carnal intercourse and causation. Sexual intercourse is a necessary requirement because, as Street points out in *The Law of Torts*:[5] "No action lies against a defendant who has merely alienated the affections of the female."

Pregnancy and childbirth are the usual cause for the loss of services, but are not essential. Any illness that is "directly traceable to the physical act of copulation"[6] which gives rise to some disability for service will suffice, as demonstrated in *Manvell v Tomson*,[7] where the plaintiff collected for the loss of service resulting from the daughter's mental agitation following her seduction and subsequent desertion. Where pregnancy is the cause for the loss of service, the defendant may defeat the action by denying paternity and may even call evidence

of the female's misconduct with a view to attributing the paternity of the child to someone else. In fact, the business end of the tort seems to focus on the daughter's knack for chastity or lack thereof.

This is particularly evident in the assessment of damages. Naturally, the plaintiff may recover reasonable expenses incurred in respect of the loss of service (i.e. medical expenses, etc). But damages are not limited to these out of pocket expenses and the plaintiff may seek substantial compensation for insult to his pride and honour (*Beetham v James*).[8] Such damages may be increased where the defendant has exacerbated the wrong either by his high position or as an honourable suitor (i.e. advances made under the guise of matrimony). Conversely, damages may be mitigated by proving the female's levity of character, bad reputation, improper conduct and conversation or unchastity (*Verry v Watkins*).[9] Obviously, the blow to the father's pride and sense of honour is not significant if his daughter is a tart.

Despite the fact that the seduced female's character seems central to the determination of damages, any consideration for the female's pain and suffering is completely out of the question when calculating damages. In *Brankstone v Cooper*[10] Dwyer J emphasised that although the damages are not limited to mere compensation based on monetary loss, any damage sustained by the daughter, whether in person, reputation or prospect should not be taken into consideration (at 54).

The tort is roundly criticised for its obvious anomalies, primarily that the action is in form and law based on the loss of services but in substance is based on the family's disgrace. Further, the action itself leaves the daughter without redress. Canada remedied this by introducing section 5 of the *Seduction Act* (Alberta) 1922, which entitled the seduced female to bring the action herself. Commenting on this legislative endeavour Lord Thankerton remarked that "Seduction may well have been thought to be a wrong to the woman from whatever angle it was considered, though there are no doubt cogent reasons for great caution in giving her a remedy for what may be said to be no more than a voluntary loss of chastity".[11]

Although a relic of the chauvinistic law of yore, the action is still available in many states of Australia. And this leads me to question "Why?" What's more, it excites a certain enthusiasm to bring the action, but, alas, I have no daughter. Perhaps someone will find a use for it. Perhaps we'll catch up with the rest of the world and abolish it.

Thanks for tuning in.

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1. Street's *The Law of Torts* (4th edn, 1968, London, Butterworths, 392) outlines the differences between the tort of seduction and that of enticement, noting that presumably for a cause of action in seduction the seduced child must be female. Street notes the lack of gender equality in this tort by poignantly commenting in a footnote: "If a male child contracts venereal disease (thereby putting his parents to expense) through being seduced by a woman, the parent does not seem to have a cause of action in seduction."
2. (Balkin & Davis, *Law of Torts*, 2nd edn, 1996, Sydney, Butterworths, 704.
3. (1818) 2 Chit. 260.
4. (1787) 2 TR 166.
5. Note 1 above, 393.
6. *Brownlee v MacMillan* [1940] AC 802.
7. (1862) 2 C&P 303.
8. [1937] 1 KB 527 at 533.
9. (1836) 7 C&P 308.
10. (1941) 43 WALR 51.
11. Note 6 above.