M I S C E L L A N E O U S A C T I O N S

REPORT OF THE TORTS AND GENERAL
LAW REFORM COMMITTEE OF NEW ZEALAND

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REPORT OF THE TORTS AND GENERAL LAW REFORM COMMITTEE ON MISCELLANEOUS ACTIONS

The Committee was asked by the Law Revision Commission to investigate and report on the desirability of retaining or abolishing a number of miscellaneous, mainly common law, actions, namely,

(a) the action for breach of promise;
(b) the action for enticement of a spouse;
(c) the action against a co-respondent for damages for adultery;
(d) the action for loss of consortium;
(e) the action for seduction;
(f) the action for enticement of a child;
(g) the action for harbouring a wife or infant child;
(h) the employer's actions for enticement or harbouring of an employee; and
(i) the employer's action for loss of services.

This report deals with all but the actions for loss of consortium and for loss of services, which will be dealt with separately.

After some preliminary discussion, the Committee sought the views of the New Zealand Law Society on its tentative thinking on the actions and it also asked the National Council of Churches and the Chief Marriage Guidance Adviser of the Department of Justice for their opinions on the action for breach of promise. The Committee was informed by the Secretary of the New Zealand Law Society that a majority of the District Societies favoured the retention of each of the actions in question, mainly on the ground that it was undesirable to abolish an action which might be useful in some cases. A more specific reason in respect of the action for damages for adultery, and the answers received from the National Council of Churches and the Chief Marriage Guidance Adviser, are mentioned in their context.

The Committee is grateful to these organisations for considering the questions referred to them and giving their opinions.

The Eleventh Report of the English Law Reform Committee, which is concerned with most of the actions discussed here, has been studied and is referred to where necessary in the course of the report.

The Action for Breach of Promise

The action for breach of promise is open to either party to a proposed marriage in the event of the other person breaking the agreement between them, but it is not customary for men to

exercise their rights. The aggrieved person's remedy lies in an action for damages only (specific performance being rightly regarded as inappropriate), but the damages are not confined to compensation for loss, financial or otherwise. They may also be exemplary or punitive in character. (Inglis, Family Law (1960), 43).

Breach of promise actions are only infrequently commenced in New Zealand and still more infrequently do they proceed to trial.* No precise information is available regarding the number of threatened actions which are settled before any proceedings are actually instituted, but inquiries suggest that the number is small.

The reply from the National Council of Churches to the Committee's request for comments indicated that opinion among the various representatives was divided. The Chief Marriage Guidance Adviser of the Department of Justice expressed the view that the existence of a right to claim damages for breach of promise was at best unnecessary and at worst capable of producing much unhappiness, in so far as it encouraged the celebration of a quite unsuitable marriage. He made the point that the retention of the action was wholly inconsistent with the development of marriage guidance facilities and the emphasis placed by workers in the movement on not only the right but the duty in some circumstances of an engaged person to break the engagement right up to the wedding day if need be. He suggested that the fact that young people today could contemplate a married life of about fifty years made it important to maintain complete freedom of choice before marriage.

The Committee is in agreement with this general viewpoint. It considers that the proposition that an engagement to marry is a binding legal contract which, like other legal contracts, should give rise to a claim for general damages in the event of a breach is not in accord with present-day thinking and is calculated to do more harm than good. It feels too that the interests of the community, which are so badly served by broken homes, require acceptance of the view that it is far better for an engagement to be broken than for a marriage to take place which one of the parties no longer wants. The present law is

* The information before the Committee was that only five such actions had been heard in the four main centres in the ten years prior to September 1966, and there were about twenty-five other actions which were commenced but which were settled or otherwise did not proceed to trial.

incompatible with that view. It creates a danger that the man will prefer to go ahead with the marriage and run the risk of unhappiness and possibly eventually a divorce rather than face Court proceedings and not inconsiderable financial loss.

No argument could be maintained today that a woman's future chance of marriage might be destroyed by the mere fact of a broken engagement; and further, as Dr Inglis has pointed out in the work already cited, the action provides an excellent opportunity for the prospective "gold-digger".

Finally it should be noted that there is an anomaly in the fact that a breach of a pre-marriage contract entitles the injured party to claim damages from the other but that the breach of the marriage contract itself, with its infinitely more serious possible consequences, does not.

The Committee therefore takes the view that the action for breach of promise should be abolished. There is however one related question which arose in the course of the Committee's deliberations and which we think requires specific consideration in the context - namely, the need for a procedure enabling settlement of disputes arising out of property transactions entered into in anticipation of a marriage which does not take place. We considered these disputes under three headings.

In the first group we would place all disputes concerning the ownership or disposition of property, whether purchased by one or both the parties to the marriage, or given to either or both of them by a third person. The settlement of these disputes does not necessarily involve consideration of the issue of fault, so that the existence of a right to have them dealt with by a Court would not be inconsistent with the lack of any general action for breach of promise. We think it unquestionable that such a right should be provided if the action is abolished and we suggest that this should be in the form of a provision enabling the appropriate Court, on the application of any person affected, to consider any question arising out of the termination of an agreement to marry, and relating to the ownership or disposition of property, and to make such orders as may be necessary for the purpose of restoring the parties to the contract, and third persons, as nearly as possible to the position they would have been in had there been no such agreement, or such orders as appear just in respect of gifts where no claim is made by the donor.

The second group includes those disputes which concern any money spent by any person from which he has benefited, whether in the form of land, goods or services. We do not think there is

need for any provision regarding money spent by any person in the purchase of property about which there is no dispute as to ownership, e.g. a house property bought by one party, or household items in the purchaser's possession, or the woman's trousseau. In these cases the person concerned will still have the property; and although some loss may be incurred by reason of its no longer being needed at that particular time we do not think this would be sufficient to justify an action which could only be dealt with on the basis of fault, and hence would be open to the objections we have found to the existing action.

We think too the same principle should apply in relation to money spent by one party or the other on any consumable item, e.g. a fare to New Zealand, from which that party was the one who benefited. The benefit has been received and we do not think any adjustment on a fault basis should be contemplated. In some such cases, it is true, the benefit would be almost non-existent - where for instance the person travelled to New Zealand by air, whith no stop-overs, and returned home immediately after arrival in New Zealand. These cases should we think be considered as belonging in the next category.

Under the third head we considered disputes concerning money spent or owing by any person on consumable items from which he himself does not benefit. Into this category would fall such matters as the payment by one party of the other's fare from some place overseas to New Zealand or the obligation of one party or of a parent to pay the cost of wedding invitations already issued, or catering arrangements cancelled at the last moment. In some of these cases, therefore, someone else will have benefited, in others the expenditure will constitute an irrecoverable loss.

In some cases, it would appear that an action for money had and received would lie now and we do not see any reason to disturb this situation, though we think this fact should be made clear by legislation. In cases where the action would not lie however it appears to us that the loss should be allowed to lie where it falls. We appreciate that under the present law a parent who is required to pay for invitations or for catering arrangements for a wedding which does not take place has in theory a chance to recover the cost indirectly if the circumstances are such as to give rise to a breach of promise action. In practice however we do not think the abolition of the action for breach of promise will affect parents in this situation. We reiterate that no right of action could be given without introducing the question of fault and we do not think this is appropriate in respect of the termination of an agreement to marry.

Our recommendation therefore is that the action for breach of promise should be abolished, but that legislation as outlined be enacted to ensure the availability of a means of settling disputes about property transactions where necessary.

The Action for Damages for Adultery -
The Spouse's Action for Enticement -

These two actions were discussed together because they are to a large extent affected by the same considerations.

The action for damages against an adulterer (which in New Zealand is available only on a petition for divorce or judicial separation - s.36, Matrimonial Proceedings Act 1963) is a descendant of the old common law action of criminal conversation, which was abolished in England in 1857 and in New Zealand in 1867. Prior to the coming into force of the Matrimonial Proceedings Act, however, the relevant legislation provided that a claim for damages was to be heard and tried on the same principles and subject to the same rules as governed actions for criminal conversation.

The history and basis of that action were discussed in some detail by McCardie J. in Butterworth v. Butterworth [1920] P.126. At p.133, the position was summarised as follows :-

> "It seems to me, therefore, that the common law found its technical basis for the action for criminal conversation in the strict view it took as tothe power of a husband over the person and the property of a wife. As stated at p.126 of the report of the Royal Commission on Divorce (1912): 'It seems to have been founded on notions of property'. But I conceive it well to suggest that beneath this technical and somewhat sordid basis there lay perhaps a cogent moral foundation. The law has ever regarded the sanctity of married life as a matter of grave moment. It may be, therefore, that one of the original objects of the action was to maintain the purity of married life, and to defend the honour of husband, wife and children. The risk of damage might well have been deemed a check to the wanton inclinations of an intending adulterer."

The damages are compensatory and not punitive (Butterworth v. Butterworth (already cited); Tranter v. Tranter and Lamb [1925] N.Z.L.R. 593).

Formerly in New Zealand only the husband had the right to claim damages for adultery, but the Matrimonial Proceedings Act 1963 removed this anomaly. At that time, although the question of abolishing the action was raised, it was not extensively discussed.

In both England and Australia there is statutory provision for the award of damages for adultery, but in the former case only the husband has the right to claim, despite the recommendation of the latest Royal Commission on Marriage and Divorce (the Morton

Commission) in its report, (Cmd. 9678 (1956) paragraph 434), that the wife should be given the same right as the husband. The English Law Reform Committee has not considered the question of abolishing the action.

To decide whether or not it is appropriate at the present time, it is necessary first of all to consider what is its modern purpose. The notion that a husband has any sort of property right in his wife is abhorrent today and was clearly abandoned as a basis for the action with the extension to the wife of the right to make a claim.

It is a matter of opinion whether deterrence is a proper reason for the existence of a liability for damages but assuming that it is the present-day deterrent value of the right of action in respect of adultery is questionable. Damages are awarded in only about 2% of the cases where a decree nisi is granted on the ground of adultery.

The Committee was informed that two of the District Law Societies had suggested that, where the adultery had broken up a marriage, provision for damages against the adulterer was appropriate in the interests of the children of the marriage, for whose benefit the whole or part of the amount may be settled (s.37 (2) of the Matrimonial Proceedings Act 1963). It is true that a divorce may entail considerable financial loss for the person who is given custody of the children - for the husband in providing a housekeeper to undertake the care of them and for the wife in having to manage on a smaller amount of money for the support of herself and her family. From statistics obtained from the four main centres for a period of about eight or nine years to date, it also appears to be true that in the majority of cases where damages are given there are dependent children to justify the claim on this ground.

This argument does not dispose of the matter, however, First, it has to be noted that the amounts awarded in the cases for which particulars were obtained were usually fairly low - seldom more than $1,000 and more often $100 or less. Whether this suggests some other basis for the awards than compensation for financial loss or merely a realistic assessment of the co-respondent's resources, it is clear that the right of action does not in fact do much to protect the interests of the children.

Moreover, even if it did, the question arises whether it is always just that the responsibility for the break-up of the marriage, and of any resulting financial loss, should be placed solely on the co-respondent. Human relationships are very complex

and we suggest that where the adultery of one party leads to a divorce it is likely in many cases to be a symptom of failure of the marriage, rather than a cause.

Then, too, one cannot ignore the respondent's part in the matter - it may be he or she who must take the major share of the blame as between respondent and co-respondent. Further, where the respondent does not actually leave home the door is not completely shut on a resumption of the marriage.

It appears to us that the number of cases where damages against the co-respondent could be considered just and appropriate in the light of his responsibility for the final break-up would be very small: and it appears further that it is precisely in those cases where they are just, namely where the co-respondent has been the cause of the respondent's leaving home, that the action for enticement provides an appropriate remedy. We therefore turn to a consideration of that action.

The action for enticement is a common-law action, historically connected with loss of services. "In the absence of lawful justification, it is a tort actionable at the suit of a husband to induce his wife to leave him or to remain away from him against his will." (Salmond on Torts, 14th ed. 511).

At the present time the action is probably available only against a lover, not for example against a mother-in-law (cf. Fleming, Law of Torts (3rd ed., 1965) 617 and Gottlieb v. Gleiser [1958] 1 Q.B. 267). There are conflicting authorities on the question whether a wife enjoys the benefit of this action as well as a husband, though probably she does (Darling J. in Gray v. Gee (1923) 39 T.L.R. 429 and dicta of Lord Goddard C.J. in Best v. Samuel Fox [1952] A.C. 716, at 729-730).

Since Rookes v. Barnard [1964] A.C. 1129 (followed in Bowles v. Truth (N.Z.) Ltd [1965] N.Z.L.R. 768) it seems that exemplary damages would not ordinarily be awarded in an enticement action* though it seems obvious from the size of some of the

* Cf. however Uren v. John Fairfax and Sons Pty Ltd (1966) 40 A.L.J.R. 124 where the High Court of Australia refused to follow Rookes v. Barnard and held, replying on earlier Australian authorities, that exemplary damages might be awarded if it appeared that in the commission of the wrong complained of the defendant exhibited a contumelious disregard of the plaintiff's rights. Cf. also Australian Consolidated Press Ltd v. Uren [1967] 3 All E.R. 523 (P.C.)

earlier awards in England (e.g. £3,500 in 1936) that they have included a large element representing damages of that nature.

The English Law Reform Committee in paragraph 23 of its Report recommended the complete abolition of the action. It stated: "The only importance of the action of enticement at the present day is in the field of husband and wife, where we think that an adequate remedy is available in divorce proceedings".

It seems to us that, of the two, it would be preferable to retain the action for enticement. For one thing, adultery may have taken place but the other party to the marriage may be unable to prove it, or the marriage relationship may have been effectively disrupted by enticement without adultery. Also, in New Zealand (though not in England, where a husband may claim damages for adultery in the divorce court without petitioning for any other relief) the injured party may for some reason be unwilling to commence divorce or separation proceedings. It has to be noted however that a remedy in an action for enticement will not be lightly granted. The plaintiff must show that the initiative in causing his wife to leave him was taken by the other man and the enticement must result in a continuing loss of consortium by the plaintiff; it is not enough to show that the wife committed adultery, or went to stay temporarily with another man, if she has not given up cohabitation with her husband.

The Committee considered other arguments which have been advanced in support of the abolition of the action (see e.g. Glanville Williams, Some Reforms in the Law of Tort, (1961) 24 Mod. L.R. 101, at 107-110). It is said that claims of this type are distasteful and we agree, but we do not think this justifies refusing a remedy where there has been a wrong.

It is also said that the assessment of damages is more than usually difficult in this class of proceeding, and there is some force in this, but not sufficient to our mind to justify abolishing the action. Inquiries suggest that claims made in this country tend to be for say $2,000 or $3,000 and that more usually claims are settled out of court. We would accept however, that damages should be strictly limited to compensation in accordance with the prevalent tendency in defamation and other tort actions to discourage exemplary damages, though in the view of the majority aggravated damages might still be proper in some cases. One member of the Committee would prefer to go further and restrict possible damages to compensation for actual or potential financial loss - though clearly this would need to be assessable in very general terms.

Another argument is that claims for damages for enticement may be potent instruments of blackmail. To quote McCardie J. in Place v. Searle (The Times, March 24, 1932): "unless carefully watched and checked by the courts, they may easily develop into recognized methods of wrongful pressure and improper extortion". But this could with equal merit be said of some of the ancillary remedies available to a spouse under the Matrimonial Proceedings Act 1953. Provided that damages are awarded on a strictly compensatory basis we do not think that enticement actions can be differentiated in this respect from other actions in tort. Moreover, a restriction on publication of reports, as in the case of divorce proceedings, would tend to reduce the danger.

Having considered both the action for damages for adultery and the spouse's action for enticement, therefore, the Committee is of the opinion, first, that there are strong arguments against the action for damages for adultery except in cases where the co-respondent has induced the wife or husband to leave home and has thereby caused the break-up of the marriage, second, that in those cases the action for enticement provides an adequate and more appropriate remedy and third, that there are no serious countervailing arguments against retention of the latter action.

We think that there are cases where people would rightly consider it highly unjust if the law did not provide some remedy to a husband or wife whose home was disrupted by another man or woman and we accordingly recommend the retention of the common law action for enticement of a spouse but the abolition of the action for damages for adultery.

We make the further recommendation however that the action for enticement should be freed from its historical connection with loss of services (a section similar to s.22 of the Evidence Act 1908, as to seduction, could be enacted) and also that it should be made clear by legislation that the action is available to a wife as well as to a husband. In addition we consider there should be provision enabling the settlement of the damages for the benefit of children and that on the analogy of divorce proceedings the publication of reports should be restricted.

Finally, we considered three other questions which arose, in the one case as a result of our recommendations and in the others out of the general discussion on the subject. The first of these was the effect of the doctrine of res judicata, the second the scope of one of the possible defences to an enticement action and the third the possibility of making a co-respondent in part liable for the maintenance of children of the marriage.

We consider that divorce proceedings and the action for

enticement should be independent of each other and brought separately. When a divorce petition is presented it is important that it be heard and disposed of and we feel that the compulsory joinder would tend to complicate proceedings and cause delay. The Committee cannot see any procedural difficulties in keeping the two proceedings separate other than the problem of the operation of the doctrine of res judicata, and to that we therefore gave attention. We proceeded on the basis that if the law is changed as we recommend divorce proceedings based on adultery will most likely be brought and disposed of before an action for enticement is brought.

The following situation could arise :

H petitions for divorce alleging W's adultery with E (Enticer). E will be co-respondent and thus a party to the divorce proceedings. E either takes no part in, or does not seriously defend, those proceedings. A decree nisi is granted. H subsequently sues E in an action for enticement. E will be estopped from asserting that he did not commit adultery with W, but this does not greatly matter, since a finding of adultery is neither a sufficient for a necessary ingredient of H's action against E for enticement.

In our opinion, the only relevance of adultery in such an action is that it may aggravate the damages. The Committee is unaware of any reported case which illustrates the circumstances in which aggravated damages may be awarded in an enticement action. Perhaps an example would be where E boasts widely of his adulterous association with W. Such cases must be rare. When one occurs, plaintiff H will have to prove much more than an act of adultery to obtain an award of damages for his humiliation.

The issue then comes to this: should there be no modification of the ordinary res judicata doctrine, with the result that E will be estopped by the finding of the Divorce Court that he committed adultery with W? Or should the doctrine be modified in some way by statutory provision?

In favour of not modifying the doctrine is that the issue will arise infrequently and that it is not really a hardship if E is estopped by the finding of adultery. In the divorce proceedings only one act of adultery need be proved. Cases where the Court finds it necessary to hold adultery proved on a number of different dates will be rare. If E is estopped, the real kernel of the claim for aggravated damages will still require proof by the plaintiff, either of repeated acts of adultery not adjudicated upon by the Judge in the divorce proceedings, or of other facts causing humiliation to H; and these will not have been relevant in divorce proceedings (where, ex hypothesi, there will be no power to award damages). Moreover, even if E could realist-

ically be said to be prejudiced by reason that he is no longer able to deny adultery with W on a particular occasion, this is arguably counterbalanced by the reasons which supply a rationale for the res judicata doctrine.

The Committee recommends, however, that the doctrine should be slightly modified by a statutory provision to the effect that a finding of adultery in divorce proceedings is not to be admissible in evidence against the defendant in an enticement action unless the defendant appeared in and contested the divorce proceedings. The result of an acceptance of this recommendation would be, on the one hand, that where a divorce based on adultery was heard as an undefended action a subsequent action for enticement would be heard on entirely fresh evidence and the defendant would not be prejudiced in his defence or in respect to the quantum of damages. On the other hand, there would not be an increase in defended divorce proceedings which might perhaps occur if co-respondents were fearful that to fail to contest a divorce petition might prejudice their position. The Committee thinks it is clear that an increase in defended actions so caused would be undesirable. The Committee noted that the res judicata doctrine is theoretically capable of producing difficulties wherever an enticement action is brought by one of the parties to a divorce or contemplated divorce. However apart from adultery the problem exists under the present law and has not in any sense been created by our proposals. It is also questionable whether the present theoretical difficulties cause any problem in actual practice. For these reasons although for the sake of completeness we have considered the question in relation to all the grounds of divorce and are satisfied no provision requires to be made, we do not propose to set out our conclusions in detail in this report.

The next point discussed was the question whether it should be a defence to an enticement action that the enticer believed that the spouse enticed had just cause for leaving the other spouse. According to some very old case law this seems to constitute a defence. Lord Goddard has spoken of "humanity" as a defence: Best v. Samuel Fox & Co. Ltd [1952] A.C. 716, at 730 and Denning L.J. in Gottlieb v. Gleiser [1958] 1 Q.B. 267n. has suggested that lack of "malice", whatever that may mean, is a defence. In truth, the law is very uncertain. We think that the opportunity should be taken to clarify the law on this point, especially as one consequence of our main proposal is likely to be a modest increase in the number of enticement actions which are brought. We consider that it should be a defence if the enticed spouse had just cause for leaving the other spouse or if the enticer proves that he believed, on reasonable grounds, that the enticed

spouse had just cause. The requirement that he prove grounds for his belief which are objectively reasonable will prevent enticement actions being too easily successfully defended. The danger of collusion between spouse and enticer will remain. However, the Committee accepts the view that divorce should be available fairly readily where a marriage has in fact broken down but that damages for enticement should be a remedy not lightly granted. If, as a result of supposed collusion, some meritorious plaintiffs fail because the revised defence we have referred to succeeds, this will occur only in doubtful cases of enticement. Again, there is always the possibility of collusion in an ordinary undefended divorce but no one would agree that divorces should not be permitted by the law for that reason.

The last point considered was a suggestion that the burden of maintenance of the children of a marriage which terminates in a divorce founded on adultery might be shared between the respondent and the co-respondent. The Committee considers that only the father should bear a continuing financial responsibility for the maintenance of any child and that such a link with a co-respondent would be undesirable.

The Action for Seduction -

"It is a tort, actionable at the suit of a master, to seduce or, a fortiori, to rape his female servant, and thereby to deprive him of her services." (Salmond op. cit. 503). "Seduce" here is used as equivalent to having sexual intercourse. In English law loss of de facto service or of constructive service is sufficient to support the action, and hence a father generally has an action for the seduction of his daughter residing with him. In New Zealand it is not necessary to allege or prove that the daughter was in the plaintiff's service or that the plaintiff father (or mother or guardian) has sustained any loss of service by reason of the seduction (s.22 of the Evidence Act 1908). In both countries the real substance of the wrong is the wounding of the honour and feelings of the plaintiff.

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 (paragraph 22). 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.

The Action for Enticement of a Child -

"It is actionable to induce a child under age but capable

of service to leave his or her parent against the latter's will, or not to return home, having so left, unless there is some justification." (Salmond, op. cit., 503.) This tort remedies the violation of a parent's right to custody. The latest reported instance of this action is a case in 1945 in which a girl of sixteen was persuaded to join a religious community against her father's will (Lough v. Ward [1945] 2 All E.R. 338). Success in the action is dependent on proof of loss of services.

The English Law Reform Committee recommended the abolition of this action, commenting (in paragraph 23 of its Report) that "a more satisfactory remedy is provided nowadays by wardship proceedings". A New Zealand parent can rely on the inherent jurisdiction of the Court (see s.17 of the Judicature Act 1908) 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.

Harbouring Wife or Infant Child -

In the last paragraph it was recommended that the action for enticement of a child away from its parents should be abolished, but harbouring of a child may be established without proof of enticement. We suggest that the action for harbouring a child should also be abolished: again applications for the exercise of the jurisdiction conferred by s.17 of the Judicature Act 1908 and habeas corpus proceedings together provide all that is required.

In respect of wives, we have recommended that the action for enticement should be retained and modified. We must consequently face the question whether the action for harbouring should also be retained.

Loss of consortium must be proved. There is a review of the history and policy of the action by Devlin J. in Winchester v. Fleming [1958] 1 Q.B. 267. His Lordship explained that "the reason why harbouring was considered objectionable was because it interfered with the economic process by which a wife, refused food and shelter elsewhere than in the matrimonial home, would eventually be forced to return to it. This is no longer an accepted method of effecting a matrimonial reconciliation." (at 265). "In a society that is organised on the basis that everyone is in the last resort to be housed and fed by the State, the bottom has dropped

out of the action for harbouring" (idem). He held that until the action was abolished or regulated by statute it should be kept strictly within the limits at present established by authority and that the wrong was not actionable at the suit of a wife.

In our view it is very doubtful whether a differentiation between husband and wife in terms of matrimonial remedies can be justified and we refer to the trend evidenced by the Matrimonial Proceedings Act 1963 to equate the rights of wife and husband.

We recommend that the action be abolished altogether.

The Employer's Actions for Enticement and Harbouring -

(a) Enticement

"In the absence of lawful justification it is a tort actionable at the suit of a master to induce his servant to leave his employment wrongfully or to induce him by illegal means, such as fraud or intimidation, to leave his employment even rightfully, or to conspire to do so". (Salmond, op. cit. 500.)

This action was the progenitor of a general action for intentionally procuring a breach of any contract and at the present time subsists alongside that general action. We agree with the view expressed in paragraph 23 of the English Law Reform Committee's Report that "a more satisfactory remedy is nowadays nearly always found in the general tort of procurement of breach of contract or, where there has been no such breach but the means used were illegal, in an action for conspiracy."

As far as we are aware, there is no record of an action for damages for enticement having been brought by an employer in New Zealand. We think that it may safely be abolished. In the case of, say, a highly skilled scientist who is enticed away by a rival manufacturer, the employer will still have an action for breach of contract against the scientist (if he thinks it at all worth while to pursue this remedy) and a remedy in tort against the rival manufacturer for inducing breach of contract. Whether that remedy is adequate in present day conditions is a quite distinct question which falls outside the scope of the present report, but which might well be reviewed separately.

(b) Harbouring

So far as harbouring is concerned, a person commits a wrongful act who knowingly continues to employ another's employee even though he did not procure him to leave his employer or know when he engaged him that he was the employee of another person. Damage must be proved. It is a defence to show that the employee

would not in any event have returned to the first employer (Jones Bros. (Hunstanton) Ltd v. Stevens [1955] 1 Q.B. 275). It is hard, as Salmond (op. cit., p.501 n.52) notes, to see how a plaintiff could ever rebut this, especially in a state of full employment. We agree with the English Report (paragraph 23) that "the action is to all intents and purposes extinct" and that the opportunity might well be taken to abolish it.

Costs on an Action for Habeas Corpus -

During discussions on habeas corpus it was suggested that persons who take such actions should not be limited to the recovery of party and party costs as is the case at present. As such an action may be taken by a person who has nothing to gain financially from its outcome and who may be put to considerable expense acting on unselfish motives, we recommend that the Court should be given a discretion to award solicitor and client costs on the action.

(Signed) J.C. White
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