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Paul D. Schoonover

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COMMENT

PIRACY ON THE MATRIMONIAL SEAS — THE LAW AND THE MARITAL INTERLOPER

by Paul D. Schoonover

Primitive man married by physically capturing the female and domesticating her to his own use. Apparently due primarily to a scarcity of women, coupled with the advent of semi-organized society, wife-stealing became a common phenomenon. Gradually, such practices were replaced with a form of contract, or wife-purchase. After much evolution the institution of marriage has become somewhat less carnal and mercenary and has, in fact, approached divine status. In any event, man, in contemptuous rejection of his past, has undertaken to punish those of his contemporaries who are given to primeval regressions and interfere with another’s marital bliss.

This Comment will explore two remedies provided by most American jurisdictions that purport to deter those who would disrupt the sanctity of the marital relation — viz., the torts of criminal conversation and alienation of affections. Particular emphasis will be placed upon the present status of these actions in Texas and upon the propriety of continuing to recognize them in the future.

I. THE ORIGIN AND DEVELOPMENT OF THE ACTIONS

Criminal Conversation. Among the Teutonic tribes adultery was punished severely. Tacitus reported: “[T]he punishment is instant, and inflicted by the husband. He cuts off the hair of the guilty wife, and having assembled her relations, expels her naked from his house, pursuing her with stripes through the village.” Some husbands were less kind and were allowed to kill both the lover and the spouse if they were caught in the act. Later, the penalty was lessened to include merely the emasculation of the adulterer plus a monetary penalty payable to the husband. Among the Anglo-Saxons the penalty was levied for the purpose of providing the husband with a new wife. The rise of Christianity superimposed moral reasons for discouraging adultery upon the common-law rationale, which was to insure the maintenance of pure blood lines for inheritance purposes. The Christian morality also dictated the demise of the custom whereby the husband obtained a new wife in the bargain, and in its place—the damages now being “unliquidated” — the action for criminal conversation developed.

By Blackstone’s time the action was firmly entrenched.

Adultery, or criminal conversation with a man’s wife, though it is, as a public

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1. G. HOWARD, A HISTORY OF MATRIMONIAL INSTITUTIONS 156 (1904).
2. Id. at 157.
3. Id. at 179.
4. “Marriages are made in Heaven.” A. TENNYSON, AYLMER’S FIELD line 188.
5. The tort was so named since the ecclesiastical courts punished the act of adultery, or intercourse (conversation), and it was thus a spiritual crime. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 856 n.83 (5th ed. 1964) [hereinafter cited as PROSSER].
6. The great majority of this historical material is derived from Lippman, The Breakdown of Consortium, 30 COLUM. L. REV. 851 (1930).
crime, left by our laws to the coercion of the spiritual courts; yet, considered as a civil injury (and surely there can be no greater), the law gives a satisfaction to the husband for it by action of trespass *vi et armis* against the adulterer, wherein the damages recovered are usually very large and exemplary.

The same fiction that provided a master with an action in trespass for the loss of his servant's services also afforded the husband a similar action for the loss of consortium—a bundle of wifely duties including sexual intercourse. Thus, for pleading purposes both the wife and servant were chattels, interference with which constituted a direct interference with the husband-master's property rights.

**Alienation of Affections.** Though the same proprietary interest of the husband in the wife (consortium) is vindicated by the action for alienation of affections, its derivation is distinct from that of criminal conversation. The action for the alienation of a wife's affections evolved from the Blackstonian action for abduction: "[A]bduction, or taking her away, this may either be by fraud or persuasion, or open violence: though the law in both cases supposes force and constraint . . . and therefore gives a remedy by writ of *ravishment*, or action of *trespass vi et armis, de uxore rapta et abducta*." This action is the direct ancestor of *Restatement* section 68410 and the English action for enticement or harboring.11 Apparently the American action, which requires no physical separation of the spouses,12 is the descendant of the action for malicious interference

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8 2 W. BLACKSTONE, COMMENTARIES *139* [hereinafter cited as BLACKSTONE]. Blackstone had this additional comment:

> But these [damages] are properly increased and diminished by circumstances; as the rank and fortune of the plaintiff and defendant; the relation or connexion between them; the seduction or otherwise of the wife, founded on her previous behaviour and character; and the husband’s obligation by settlement or otherwise to provide for those children, which he cannot but suspect to be spurious. In this case, and upon indictments for polygamy, a marriage *in fact* must be proved; though generally, in other cases, reputation and cohabitation are sufficient evidence of marriage.

Id.

9 "In its broadest meaning it [consortium] includes all incidents of the family relationship. As between husband and wife the term denotes the husband’s right to his wife’s services, society, companionship, assistance and sexual relations . . . ." H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 261 (1968) [hereinafter cited as CLARK].

10 BLACKSTONE *139* (emphasis in original). The old law was so strict . . . that if one’s wife missed her way upon the road, it was not lawful for another man to take her into his house, unless she was benighted and in danger of being lost or drowned; but a stranger might carry her behind him on horseback to market to a justice of the peace for a warrant against her husband, or to the spiritual court to sue for a divorce.

Id. "This does not leave much scope for the energies of a knight-errant whose quest is the relief of distressed wives." J. JOLOWICZ & T. LEWIS, WINFIELD ON TORT 522 (8th ed. 1967).

11 RENSTATEMENT (SECOND) OF TORTS § 684(2) (Tent. Draft No. 14, 1969): "One who, without a privilege to do so and for the purpose of disrupting the marriage relation, causes a wife to separate from her husband or not to return after she has separated from him, is liable to the husband for the harm thereby caused to any of his legally protected marital interests."


13 See, e.g., Ott v. Sasseman, 239 F.2d 182 (5th Cir. 1956). But see White v. Thompson, 324 Mass. 140, 85 N.E.2d 246, 247 (1949), for the Massachusetts version: "The law does not attempt to control or limit human affections. It is only where, by alienating the affections of one spouse, the result is adultery or the ceasing of the spouses to live together, that the law recognizes that a tort has been committed."
with the marriage relationship which was recognized in New York in 1867.\footnote{Hoard v. Peck, 56 Barb. 202 (N.Y. Sup. Ct. 1867). In Hoard the defendant-druggist had sold plaintiff's wife large amounts of opium, knowing the effects thereof. The court held that the resultant inability of the wife to perform her consortium duties was due to the defendant's intentional acts and that he was liable just as if he had been a lover, enticer, or harborer.}

**The Effect of Married Women’s Statutes.** Blackstone made no mention of a wife’s right to recover for criminal conversation or alienation of affections, because no such right existed. The fiction of marital unity as reflected in the wife’s general disability to sue at common law denied her the vindication of a conjugal interest in her husband which, according to one theory, the common law recognized—but declined to protect.\footnote{See Brown, *The Action for Alienation of Affections*, 82 U. Pa. L. Rev. 472, 476 (1934); Bennett v. Bennett, 116 N.Y. 584, 23 N.E. 17 (1889). The argument is based upon the fact that the ecclesiastical courts allowed the wife to sue for restitution of conjugal rights, which rights were evidently similar to “consortium.” However, apparently the only element recoverable was support. See Dalrymple v. Dalrymple, 161 Eng. Rep. 665 (Consistory Ct. 1811).} The opposing argument viewed the wife’s disability as more than a procedural fiction—as an indication of the inferiority of women generally in that day.\footnote{See Lippman, *supra* note 6, at 664, in which the “right without a remedy” theory of Bennett v. Bennett, 116 N.Y. 584, 23 N.E. 17 (1889), was characterized as “not only incredible (because her [the wife’s] very incapacity to sue was due to her inferiority), but the Court fails to cite any case at common law from which this could be inferred.”}

With the advent of married women’s acts, servant analogies gave way to a conception of consortium less concerned with services than with conjugal society, comfort, and affection. The new definition of consortium was dubbed the "sentimental version."\footnote{Acuff v. Schmidt, 248 Iowa 272, 78 N.W.2d 480, 482 (1956); Lippman, *supra* note 6, at 662: “Consortium, however, has taken on a new meaning. It is a term that embraces love, affection, and company, and seems to exclude the material services of the wife which had originally been its basis.”} Some courts, however, were unwilling to embrace this development and to extend the right of action to the wife, developing imaginative rationales for refusing to do so.\footnote{See Doe v. Roe, 82 Me. 503, 20 A. 83 (1890); Hodge v. Wetzler, 69 N.J.L. 490, 55 A. 49 (Sup. Ct. 1903); Duffies v. Duffies, 76 Wis. 374, 45 N.W. 522 (1890).} One opinion,\footnote{Duffies v. Duffies, 76 Wis. 374, 45 N.W. 522 (1890).} which Prosser has deemed “immortal,”\footnote{PROSSER 903.} expounded "at some length upon the purer and nobler nature of wives and their tendency to stay at home and behave themselves, and the temptations, enticements and allurements of the world to which the husband by contrast was exposed, arriving at the conclusion that it was only what she had reason to expect when she married the man."\footnote{Id.}

With respect to criminal conversation some courts attempted to show that the common law refused to allow a wife such a right of action for substantive, policy reasons—not just on procedural grounds.\footnote{One such court said: [S]uch an action has grounds on which to rest that cannot be invoked in support of a similar action in favor of the wife. A wife's infidelity may impose upon her husband the support of another man's child, and, what is still worse, it may throw suspicion upon the legitimacy of his own children. A husband's infidelity can inflict no such consequences upon his wife. If she remains virtuous, no suspicion can attach to the legitimacy of her children . . . . Doe v. Roe, 82 Me. 503, 20 A. 83, 84 (1890). See also cases cited in note 17 supra.} However, the opposite view
prevailed, and a majority of jurisdictions allow the wife to sue both for criminal conversation and alienation of affections.83

For some reason—possibly the westerner's tendency toward self-help84—there are only two Texas cases involving criminal conversation in the reports.85
Neither case involved a plaintiff-wife and, therefore, the courts have not concerned themselves with theories for or against the allowance of such a suit. However, the wife has been allowed to sue for alienation of affections.86

II. THE BASES OF RELIEF

A. Criminal Conversation

Of the two Texas cases involving criminal conversation only Swearingen v. Bray87 actually dealt with the action, since the court in Lisle v. Lynch88 seemed to treat the adultery as an element within the alienation of affections claim and not as a separate cause of action. And since Swearingen is chiefly memorable for its moral castigation of the defendant,89 cases from other jurisdictions will

83 PROSSER 903-04. In Oppenheim v. Kridel, 236 N.Y. 156, 140 N.E. 227, 229 (1923), the rationale for allowing the wife to sue for criminal conversation was stated thusly: If he had feelings and honor which were hurt by such improper conduct, who will say to-day that she has not the same, perhaps even a keener, sense of the wrong done to her and to the home? If he considered it a defilement of the marriage bed, why should not she view it in the same light? The statement that he had a property interest in her body and a right to the personal enjoyment of his wife are archaic, unless used in a refined sense worthy of the times, and which gave to the wife the same interest in her husband.

84 In Swearingen v. Bray, 157 S.W. 953 (Tex. Civ. App.-Amarillo 1913), the court indicated that such a tendency may have accounted for the scarcity of Texas cases: The appellant [defendant] did not testify, although he was living and present at the trial, and the record shows that he was still living when his superseded bond was executed and filed. The fact shows that appellee had rather missed, judgment correct; Swearingen v. Bray, 157 S.W. 953 (Tex. Civ. App.-Amarillo 1913).


88 318 S.W.2d 763 (Tex. Civ. App.—Fort Worth 1958), error ref. n.r.e.

89 E.g.: Appellee's home, with its contentment and happiness, has been destroyed, his wife defiled and made an outcast, his children disgraced and scattered over the world, and all that any husband and father holds dear and sacred is thrown at his feet reeking with filth and slime, by the shameless perfidy and lechery of appellant, whose pleadings and silence at the trial may be taken as a confession of his guilt.
be called upon to outline the law of criminal conversation in Texas as applied in the trial courts.

The Elements of the Cause of Action. A plaintiff must prove two elements in order to recover for criminal conversation: (1) a valid marriage between plaintiff and spouse; and (2) sexual intercourse between the defendant and plaintiff's spouse. Thus, no further loss to the husband is required—the invasion of his exclusive right to the sexual relations of his wife is sufficient. Although Blackstone stated that an informal marriage was insufficient to support the action, there is more recent authority to the contrary. It is not necessary that the defendant be aware of the marital status of the plaintiff's spouse. Accordingly it is not a defense that the plaintiff's spouse represented an unattached status to the defendant, since one who has sexual relations with a person to whom he is not married does so at his peril.

The plaintiff need not prove that the defendant was the originator of the illicit relationship, nor that he was the pursuer or the seducer. However, one authority has cited a Texas case, Norris v. Stoneham, as being contrary to this principle. Norris was an alienation of affections case involving a problem of causation. The defendant claimed that plaintiff's husband was the aggressor in their relationship and that, therefore, plaintiff had failed in her case. The court applied the common-law rule applicable to actions for criminal conversation and held that it was no defense to the alienation action that the defendant's spouse was the aggressor. The court, however, commented that "[s]ome of the reasons given for applying such a rule in such actions [criminal conversation] may not exist in actions brought by the wife . . . ." This dicta is scant authority

We will not set out the disgusting details of the facts here, but to summarize they show that appellant invaded the appellee's home, induced his wife to drink with him, made her little girls bearers of his secret letters to her, furnished her expense money to leave home, and followed her or went with her to other towns, and, in short, that he dethroned the chastity of a wife, profaned the sacredness of motherhood, destroyed the virtue of a home, and defiled the holiness of a marriage bed. He now brings his case here assigning four errors committed by the trial court against him.

157 S.W. at 953-54.


38 See note 8 supra.


40 RESTATEMENT OF TORTS § 685, comment d at 477 (1938); Antonelli v. Xenakis, 363 Pa. 375, 69 A.2d 102 (1949). The rule is to the contrary with respect to actions for alienation of affections. See note 81 infra.

41 Tinker v. Colwell, 193 U.S. 473 (1904); Pierce v. Crisp, 260 Ky. 519, 86 S.W.2d 293 (1935); Powell v. Strickland, 163 N.C. 393, 79 S.E. 872 (1913); see Seiber v. Pettit, 200 Pa. 38, 49 A. 763, 765 (1901), wherein the court made the following assessment of the defense, at least when proffered by a male defendant: "It is but the old cowardly excuse set up by the first man. The woman gave me of the tree, and I did eat.' It did not save from the penalty the first defendant, and cannot, under the law, save this one."

42 CLARK 268 n.6.


44 Id. at 366.
when read with *Swearingen* wherein an instruction in line with the general rule was held not to be error.\(^9\) It, therefore, must be concluded that, at best, the Texas law is not clear on this point, except in that, when the husband is plaintiff, he need not prove that the defendant actively seduced his wife.

It is no defense that the plaintiff and his spouse are still married or that plaintiff has forgiven his spouse or otherwise condoned the offense.\(^8\) Similarly, the fact that the spouses were separated at the time of the act will not excuse the defendant's wrongdoing.\(^1\) The concept of a permanent marriage status, dissolveable only by death or divorce has dictated that the law allow damages to be exacted from the hapless defendant who engaged in sexual relations with a plaintiff's wife even though a divorce proceeding had been instituted and the mandatory reconciliation conference had failed to re-unite the couple.\(^4\) It is sometimes said that love and affection between husband and wife will be presumed, especially when the marriage has produced children.\(^4\) A husband may sue even though he could never exercise his exclusive rights to his wife's sexual relations because of impotence.\(^4\)

**Defenses.** Other than an argument that *Norris v. Stoneham*\(^6\) recognizes as a defense that the plaintiff's husband was the aggressor in the illicit relationship,\(^6\) there is but one other line of defense. If it can be shown that the plaintiff acted in such a way with respect to his spouse's adultery as to constitute implied consent or connivance of the behavior, such consent or connivance is a complete defense to criminal conversation.\(^4\) In *Kohlhoss v. Mobley* the test for determining whether the plaintiff had consented or connived was said to be whether his conduct "when subjected to the test of reasonable human transactions [showed] an intention to connive, and here, as elsewhere, the presumption of the law is in favor of honesty and correctness of purpose, but the husband, like other persons, is chargeable with an intention to produce the necessary and legitimate consequences of his own deliberate action."\(^4\) The court elaborated up-

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\(^8\) *Id.*; *Sikes v. Tippins*, 85 Ga. 231, 11 S.E. 662 (1890).


> While the conduct of the parties may render the marriage relationship a hollow shell, the relation, once entered into, continues until death or dissolution in the manner prescribed by law. Even though the parties may be separated, as long as the contract is in existence, the state, for the good of society and the family, clings to the possibility of a return of the relationship to its proper state.

\(^4\) *See notes 85-86 infra.*

\(^4\) *Beden v. Turney*, 99 Cal. 649, 34 P. 442 (1893). "Consortium may, but need not, include coition which, indeed, may be entirely lacking due to injury or age at a time of life when each party to the union needs the other more than ever." *Albert v. McGrath*, 278 F.2d 16, 18 (D.C. Cir. 1960).


> While the conduct of the parties may render the marriage relationship a hollow shell, the relation, once entered into, continues until death or dissolution in the manner prescribed by law. Even though the parties may be separated, as long as the contract is in existence, the state, for the good of society and the family, clings to the possibility of a return of the relationship to its proper state.

\(^4\) *See notes 85-86 infra.*
on this test and said that the plaintiff could still gather evidence against his spouse by not stepping in to stop her from taking advantage of her own opportunities "but he must not make opportunities for her or smooth her path to the adulterous bed." This defense is available when the plaintiff and spouse had conspired against the defendant to obtain money damages. The defense is not easily waged and is not often successful, but other than proof that the plaintiff and spouse were not validly married at the time of the relations or that no adulterous relations actually occurred, it is the defendant's only hope.

B. Alienation of Affectons

The Elements of the Cause of Action. In Collier v. Perry it was said that "[t]he gist of the action is the intentional and purposeful alienation of the affections of one spouse from the other." A more vivid description was provided in Kahn v. Grothaus: "The thing forbidden and made actionable is the entry of a home by a wrongdoer and the consequent loss of consortium by the injured spouse; and it does not matter if this entry is by physical violence or subtle influence ... ."

Analytically, the elements are three: (1) intentional and purposeful enticement away of the affections of the spouse; (2) an actual loss of consortium; and (3) the defendant's actions must have been the controlling cause of plaintiff's loss.

Intent To Alienate. While the plaintiff is required to prove that the defendant intended to alienate the affections of his spouse, such proof may be supplied by inference. The familiar rule of tort law that one must be presumed to intend the test yet another way: "[C]onivance may be the passive permitting of the adultery or other misconduct, as well as the active procuring cause of the commission. If the mind consents, that is connivance."

The judge found connivance from facts indicating that the plaintiff took his wife to visit the defendant at night alone in defendant's house after he knew of her profession of love for the defendant and of sexual relations between them. See also Nadeau v. Dallaire, 132 Me. 178, 168 A. 778 (1933).


However, when the defendants are the plaintiff's "in-laws," the circumstantial evidence may be subject to more severe scrutiny than when adultery is alleged and the presumptions come into play. See Jackson v. Jackson, 35 S.W.2d 830 (Tex. Civ. App.—El Paso 1931), error dismissed.
the natural consequences of his actions applies. Thus, in *Norris v. Stoneham*,
where the defendant had been living with the plaintiff's spouse—knowing him
to be married—it was held that the jury could infer intent even though the de-
fendant was shown not to have been the aggressor in the illicit relationship.
The application of this rule has led to a presumption of intent to alienate
when adultery is admitted or proven.86

While it is often stated that inaction by the defendant will not render him
liable,87 it is evident from the decisions that inaction means just that. Any vari-
ance from absolute passivity will likely render the defendant liable.88 When
there is an "inherently wrongful and seductive act"89 by the defendant, such as
adultery, the defendant cannot be deemed to have been "passive"—even though
he was not the seducer.90

Lost of Consortium. Although the action may be somewhat misnamed,91 since
consortium includes a spouse's right to the society, comfort, and assistance as
well as the affection of the other spouse,92 Texas courts have on occasion indi-
cated that the action arises when there is a loss of "affection or consortium."93

资格。TEX. REV. CIV. STAT. ANN. art. 3715 (1926) (emphasis added) provides:
"The husband or wife of a party to a suit or proceeding, or who is interested in the issue
to be tried, shall not be incompetent to testify therein, except as to confidential com-
munications between such husband and wife." According to Lanham v. Lanham, 105 Tex.
1912, 145 S.W. 336, 338 (1912), confidential communications embrace all information coming
to a husband or wife in consequence or by reason of the existence of the marriage relation.
Confidential communications are excluded even after the relation has been dissolved by
death or otherwise. See State *ex rel.* Boswell v. Curtis, 334 S.W.2d 757 (Mo. App. 1960)
(income tax returns not privileged); Wallen v. Gorman, 112 Ohio App. 350, 176 N.E.2d
262 (1960) (when purpose of evidence is to show the state of feeling existing between
husband and wife prior to alienation—not privileged); Swearingen v. Vik, 51 Wash. 2d
843, 322 P.2d 876 (1958) (en banc) (privilege may be asserted by the communicating
spouse only).

59 McQuarters v. Ducote, 234 S.W.2d 433 (Tex. Civ. App.—San Antonio 1950), error
ref. n.r.e.; Smith v. Smith, 225 S.W.2d 1001 (Tex. Civ. App.—Amarillo 1949); Collier
v. Perry, 149 S.W.2d 292 (Tex. Civ. App.—El Paso 1941), error dismissed, judgment
correct. See also Kiger v. Meehan, 253 Iowa 746, 113 N.W.2d 743 (1962); Pearsall v.
Colgan, 76 S.D. 241, 76 N.W.2d 620 (1956); Kuhn v. Cooper, 141 W. Va. 33, 87 S.E.2d
531 (1955). The adultery issue may go to the jury upon the uncorroborated testimony of
60 McQuarters v. Ducote, 234 S.W.2d 433 (Tex. Civ. App.—San Antonio 1950), error
ref. n.r.e.; Smith v. Ducote, 225 S.W.2d 1001 (Tex. Civ. App.—Amarillo 1949); RESTATE-
MENT OF TORTS § 683, comment e (1938). See also Lewis v. Bauer, 198 N.E.2d 781
(Ohio Ct. App. 1964).
61 Except possibly when no inherently wrongful acts are involved. See notes 57, 59 supra,
and accompanying text. See also Dube v. Rochette, 262 A.2d 288 (N.H. 1970).
62 McQuarters v. Ducote, 234 S.W.2d 433, 435 (Tex. Civ. App.—San Antonio 1950),
error ref. n.r.e.
63 But to be liable the defendant must be aware that the plaintiff's spouse was married.
RESTATEMENT OF TORTS § 683, comment g (1938). See Come v. Blessing, 381 S.W.2d
780 (Mo. 1964). The Restatement rule does not apply, however, when there has been
adultery. Madison v. Neuburger, 130 Misc. 650, 224 N.Y.S. 461 (Sup. Ct. 1927); An-
64 CLARK 263.
65 Smith v. Smith, 225 S.W.2d 1001, 1006 (Tex. Civ. App.—Amarillo 1949); Norris
66 McQuarters v. Ducote, 234 S.W.2d 433, 435 (Tex. Civ. App.—San Antonio 1950),
error ref. n.r.e. Some courts have gone to great lengths to save the plaintiff from "slips of
the tongue" on the issue of loss of consortium. E.g., Edgren v. Reissner, 239 Ore. 212, 396
P.2d 364 (1964), held that plaintiff's testimony to the effect that she was not deprived of
the affections and consortium of her husband prior to their divorce was not a fatal judicial
admission, since the jury might or might not believe her. But, it should be noted, in Edgren
Thus, Texas courts have adopted the “sentimental version”\(^{64}\) of consortium, and, like a majority of courts,\(^{65}\) have held that all the elements of consortium need not be lost for a cause of action to accrue.\(^{66}\) In the well-known case of *Ex parte Warfield*\(^{67}\) an injunction was granted to prevent a “partial” alienation of affections. Later cases have stated that the action lies where the plaintiff has suffered any “substantial impairment” of consortium rights.\(^{68}\) The importance of the Texas emphasis upon the affection element becomes clear when it is seen that proof of adultery, already shown to be sufficient from which to presume intent,\(^{69}\) also gives rise to a *conclusive* presumption of the loss of consortium.\(^{70}\) Thus, upon proof of criminal conversation, plaintiff has satisfied two of the three elements of his cause of action. The third element may not be so proven.

**Defendant as the Controlling Cause.** Causation is perhaps the most important element in an alienation of affections case. The mere fact that the defendant has been guilty of wrongful conduct is not sufficient to make him liable.\(^{71}\) The defendant’s acts must have brought about the loss of affection or consortium.\(^{72}\)

In *Rhodes v. Meloy* it was held that the defendant’s conduct need not be the sole cause, but that “the rule that defendant must be the controlling cause of the alienation is a sound one.”\(^{73}\) In *Lisle v. Lynch* “active” was added to the “controlling cause” standard to indicate that something more than passivity is required and that one is not liable simply because the plaintiff’s spouse centers affections upon him.\(^{74}\) The Texas rule—and the majority rule—is, at least on the plaintiff’s spouse admitted that he was trying to deceive the plaintiff into thinking their marriage was in good order. As an exception to the hearsay rule, statements of the plaintiff’s spouse may be testified to by witnesses or by the plaintiff himself to show the spouse’s state of mind and affections. *Farrier v. Farrier*, 46 Ill. App. 2d 471, 197 N.E.2d 163 (1964); *Castner v. Wright*, 256 Iowa 638, 127 N.W.2d 583 (1964); *Boden v. Rogers*, 249 S.W.2d 707 (Ky. 1952).

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\(^{64}\) See note 17 supra.

\(^{65}\)*CLARK 265.


\(^{67}\)40 Tex. Crim. 413, 50 S.W. 933 (1899).

\(^{68}\) See note 56 supra.

\(^{69}\) See note 56 supra.


\(^{72}\)RESTATEMENT OF TORTS § 683, comment i (1938). Hearsay testimony of declarations of the adulterous spouse are admissible to show the state of mind of such spouse, and although such evidence does not prove that the defendant actually exerted a wrongful influence over the spouse, once the evidence is admitted the jury obviously considers it when determining causation. See note 66 supra.

\(^{73}\)289 S.W.2d 159, 164 (Tex. Civ. App.—Eastland 1926), *error dismissed*. The rationale for such a rule of causation was explained in *McNelis v. Bruce*, 90 Ariz. 261, 367 P.2d 625, 629 (1961) (en banc): “There are many reasons why parties to a marriage may separate and ultimately secure a divorce, the least of which may be the meddlesome interference of a third person. Hence, we feel that the actions of a third person should be the dominating cause for the dissolution of the union and approve the controlling cause rule.”

\(^{74}\)318 S.W.2d 763 (Tex. Civ. App.—Fort Worth 1958), *error ref. n.r.e.*

\(^{75}\)RESTATEMENT OF TORTS § 683, comment e (1938). The court in *Farrier v. Farrier*, 46 Ill. App. 2d 471, 197 N.E.2d 163, 165 (1964), put the issue metaphorically: “Nautically speaking, we must determine whether they just drifted away, whether [plaintiff’s spouse] voluntarily floated them away or whether the defendant pirated them away.”
its face, less stringent than that of some other jurisdictions which require only that the defendant's conduct be a *contributing* cause.6 While these standards do not allow prediction of the outcome in any particular fact situation, in *Lisle* the test was clarified somewhat by equating it to the famous "but for" test of *Place v. Searle*: "The test [of liability] must be whether something has been done which, but for the interference of the defendant would not have been done."7 Of course, the "but for" test, though more readily recognized, is in actuality no more of a talisman than "active and controlling cause." As Clark puts it: "Since any definitive assessment of cause in such cases would require a full exploration of the marital history and the parties' deepest motives, the courts must be content with a rough and ready judgment as to whether the defendant was sufficiently instrumental in bringing about the marital break-up to justify holding him responsible."8

**Defenses.**

(1) *Qualified Privilege of Parents and Near Relatives.* When parents or near relatives are defendants they may plead their relationship to the plaintiff's spouse as an excuse for their interference with the marital relation.79 Prosser defines "privilege" as a "modern term applied to those considerations which avoid liability where it might otherwise follow."80 In the North Carolina case of *Bishop v. Glazener* the legal effect of the family relationship was expressed:

> When a suit for alienation of affections is brought by one spouse against the parent of the other, the parent occupies a markedly different situation from a stranger or unrelated third person in these matters. The law recognizes, respects and protects not only the marital relation, but likewise the natural affection between parent and child. The parent does not in the eyes of the law become a stranger by reason of the child's marriage.81

This parental privilege is not, however, absolute. It is qualified with the proviso that conduct which would be illegal interference by a stranger must be conditioned by a proper motive when done by a parent.82 There is, therefore, a requirement of good faith, or conversely, malice must not be the parents' moti-

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77 [1932] 2 K.B. 497, 521.

78 *CLARK* 266. This "rough and ready" approach was exemplified in Knight v. Willey, 120 Vt. 256, 138 A.2d 596, 599 (1958): "Just and reasonable triers of the fact might well decide that the attentions paid to Mrs. Knight by the defendant *had progressed sufficiently far beyond the limits of propriety . . . ." (Emphasis added.)


80 *PROSSER* 98.

81 245 N.C. 592, 96 S.E.2d 870, 873 (1957).

82 *PROSSER* 901.
The burden is on the plaintiff to prove that the defendant’s actions were actuated by malice.

(2) That There Were No Affections To Alienate. This defense goes to the second element of the cause of action; i.e., the loss of affection or consortium. It is generally presumed that there is affection between husband and wife; therefore, this is generally considered to be an affirmative defense. While some jurisdictions treat the lack of affection between spouses only as a factor in mitigation of the damages, in effect conclusively presuming affection for purposes of liability, there is Texas authority recognizing the absence of affection as a complete defense. There is, however, apparently a difference—though necessarily a fine one—between a complete lack of affection between spouses and an unhappy marriage relationship. The latter goes only to mitigate the damages.

The rationale of those cases holding that lack of affection affects only the quantum of damages is that even though the spouses are already alienated, there is always a chance of reconciliation, and if the defendant’s conduct has ended that chance, the action still should lie.


85 Squire v. Hill, 100 Colo. 226, 66 P.2d 822 (1937); Weyer v. Vollbrecht, 208 Iowa 914, 224 N.W. 568 (1929); Trainor v. Deters, 22 Ohio App. 2d 135, 259 N.E.2d 131 (1969); Buckley v. Francis, 78 Utah 606, 6 P.2d 188 (1931); Beach v. Brown, 20 Wash. 266, 55 P. 46 (1898). Contra, Curry v. Kline, 187 Kan. 105, 353 P.2d 508 (1960), wherein in the court said that the action was so often abused that it was necessary to require the plaintiff to prove that he himself was not at fault in the loss of the spouse's affections nor that she voluntarily bestowed her love upon the defendant. See also Quagliano v. Johnson, 100 Ill. App. 2d 444, 241 N.E.2d 137 (1968); Pedersen v. Jirsa, 267 Minn. 48, 125 N.W.2d 38 (1963); Litchfield v. Cox, 266 N.C. 622, 146 S.E.2d 641 (1966); Warner v. Torrance, 2 N.C. App. 384, 163 S.E.2d 90 (1968).

86 Hedman v. Siegriest, 127 Vt. 291, 248 A.2d 685 (1968); Knight v. Willey, 120 Vt. 256, 338 A.2d 596 (1958). "[E]ven if there is no affection between a husband and his wife, another person has no right to cut off all chance of its springing up in the future." 248 A.2d at 688. A somewhat weaker presumption was enunciated in Kiger v. Meehan, 253 Iowa 746, 113 N.W.2d 743 (1962), wherein it was held that the plaintiff's testimony that there was in fact love and affection between the spouses prior to the piracy of the defendant plus the presumption was enough to go to the jury with the issue. Contra, Bassett v. Bassett, 20 Ill. App. 543, 550 (1886):

Marriage, of itself, cannot be considered as conclusive proof of that mutual regard and love which should be entertained by husband and wife, and where one of them seeks to recover damages for the loss of love and affection, we know of no case that goes so far as to deprive the defendant of the right of showing the real feelings of the other to the plaintiff.


88 Id. at 162.

89 The law indulges in the hope that notwithstanding that affection may be dead or appears so, there is lurking in the hearts of the parties some atom left which may spring up into returning affection and result in a reconciliation. It is against the policy of the law to
(3) That Plaintiff Was the "Active and Controlling Cause," Not the Defendant. This defense, of course, goes to the third element of the action; i.e., the element of causation. It recognizes an alienation of the affections of plaintiff's spouse, but argues that the plaintiff is at fault, not the defendant. This defense is often raised when there has been a previous divorce in which the plaintiff or his spouse was adjudged somehow to be at fault. Despite frequent arguments to the contrary, the prior divorce proceedings are not res judicata on the issue of fault in an action for alienation of affections. In support of this defense the practitioner must of necessity introduce redundant evidence and testimony tending to show the pathology of the marriage break-up. The decision to emphasize this defense may be strategically crucial, since the jury may be unable to sift through the great amount of evidence—with the result that they may lose sight of a stronger, but more brief defense.

(4) That Plaintiff's Spouse Originated the Alleged Illicit Relationship and Was the Aggressor Therein. This has been recognized as a complete defense in some jurisdictions, but it is doubtful that it would be so acknowledged in Texas. In Norris v. Stoneham the defense was expressly denied where the defendant argued that the plaintiff's husband actively seduced her. The court discussed authorities dealing with criminal conversation and concluded that, at least when adulterous conduct has been admitted or proven, other proof as to the intent of the defendant is not necessary to plaintiff's case. It could be argued that this defense goes to the causation element rather than the intent element, and that Norris could be distinguished on that basis. Of course, it is likely that courts will receive evidence as to who seduced whom on the general causation issue, even though they do not recognize it as an independent defense.

(5) That Plaintiff's Acts Subsequent to Defendant's Alleged Wrongdoing Constituted Connivance or Implied Consent Thereto. While condonation always goes to the damages only, implied consent or connivance is a complete defense to alienation of affections.

(6) Statute of Limitations. The general rule is that actions for alienation of affections are governed by the statute of limitations pertaining to actions for injuries to the person. This is the rule in Texas, and the statute specifies that

allow this possibility to be interfered with by an outsider." Jenness v. Simpson, 84 Vt. 127, 141, 78 A. 886, 893 (1911).

Pilot v. Necastro, 50 Del. 165, 125 A.2d 857 (1956); Boden v. Rogers, 249 S.W.2d 707 (Ky. 1952); Edgren v. Reissner, 239 Ore. 212, 396 P.2d 564 (1964); Vogel v. Sylvester, 148 Conn. 666, 174 A.2d 122 (1961) (this case indicates, however, that some statements in divorce proceedings may constitute admissions in alienation of affections or criminal conversation actions, and that they may at least be used for impeachment purposes); Carbon v. Pelton, 9 Utah 2d 224, 342 P.2d 94 (1959); Schneider v. Mistele, 39 Wis. 2d 137, 158 N.W.2d 383 (1968).


See notes 47-50 supra, and accompanying text.

Hosford v. Hosford, 58 Ga. App. 188, 198 S.E. 289 (1938); Rheudasil v. Clower, 197 Tenn. 27, 270 S.W.2d 345 (1954); Fischer v. Mahlke, 18 Wis. 2d 429, 118 N.W.2d 935 (1963).

the action must be brought within two years from which time the cause of action accrued. The obvious problem is determining just when the cause of action did accrue. The usual statement made by courts is that the statute begins to run from the time that there is a loss of consortium. While the actual process of alienation is gradual, it is, nevertheless, settled that alienation of affections is not a continuing wrong—but one which occurs at some certain point in time. Accordingly, most courts have held that the cause accrues when the plaintiff loses the affection of the spouse, rather than the time of the defendant's wrongful acts.

Two Texas cases, Turner v. Turner and Whitley v. Whitley, indicate that either a physical or legal separation creates a presumption of loss of consortium for the purposes of the statute of limitations. Some courts have held that the husband and wife need not have physically separated to start the running of the statute.

As a general rule the statute of limitations attaches when there is injury, even though at the time the plaintiff may not be fully advised of the extent of the damages suffered, and further substantial damages occur subsequently. It seems not far-fetched to argue that once a spouse has either personally witnessed an act of adultery by the other spouse or otherwise obtained evidence of such an act, his cause of action for alienation of affections as well as for criminal conversation has accrued. Of particular interest is a comment of a Georgia court: "[B]ut if the act causing such subsequent damage is of itself unlawful in the sense that it constitutes a legal injury to the plaintiff, and is thus a completed wrong, the cause of action accrues and the statute begins to run from the time the act is committed, however slight the actual damage then may be." It is well to recall that in Smith v. Smith it was held: "Where adultery is admitted or proved, as was done in the instant case, there is authority to the effect that loss of consortium is conclusively presumed." From Smith and other similar holdings it appears that Texas courts adhere to the view of the Tennes-
see Supreme Court in *Rheudasil v. Clower*.

In *Rheudasil* an action for alienation of affections was barred by the one-year statute of limitations for personal injuries. The court said:

'Criminal conversation' means adulterous relations between the defendant and the spouse of the plaintiff. Alienation of affections can be brought about without adulterous conduct. But the contrary does not reasonably seem to be true. That is, a spouse guilty of adulterous conduct with a third party has necessarily lost some of his or her affection for the innocent spouse.

This reasoning, coupled with the Texas authority that only a "substantial impairment" of consortium rights is necessary to give rise to a cause of action, supports the argument that a spouse who has evidence of the other spouse's philandering had better use it within two years or else forfeit his right of action. The argument that such a holding would discourage reconciliation of the spouses ignores the fact that the mere presence of a cause of action may do more to destroy chances of reconciliation.

**Injunctive Relief.**

*The attempt to dragon the body when the need is to convince the soul will end only in revolt.*

Although equity has traditionally protected only property rights, in Texas it is settled that equitable relief is available to protect purely personal rights. As early as 1899 the statute giving district courts the power to issue injunctions was interpreted to permit such relief, in spite of the historical limita-

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108 197 Tenn. 38, 270 S.W.2d 345 (1954).
109 Id. at 346 (emphasis added).
110 See note 68 supra, and accompanying text.
111 The Tennessee courts have reached this conclusion by reasoning that in a cause of action which alleges alienation of affections and is based upon an act or acts of criminal conversation the alienation of affections count is only incidental to the charge of criminal conversation and in aggravation of the damages. *Scates v. Nailling*, 196 Tenn. 508, 268 S.W.2d 561 (1954); *Broido v. Hall*, 188 Tenn. 236, 218 S.W.2d 737 (1949). If a plaintiff wishes to extend the period of the running of the statute of limitations, he must base his alienation of affections count upon some wrongful act other than adultery. *Nabors v. Keaton*, 216 Tenn. 637, 393 S.W.2d 382 (1965) (the plaintiff alleged sexual perversion in support of the alienation of affections count). It should be noted that in Tennessee the actions for criminal conversation and alienation of affections are governed by different statutes of limitations. TENN. CODE ANN. § 28-304 (1955) (criminal conversation— one year); *Id.* § 28-305 (alienation of affections—three years). The confusion resulting from this situation should not affect the conclusion that once a plaintiff learns of some actionable relationship between his spouse and the defendant, be it adultery or perversion, the cause of action has accrued and the limitations period, be it one, two, or three years, should begin to run. *But see Daniels v. Morris*, 199 Va. 205, 98 S.E.2d 694, 697 (1957), wherein the court said: "[A]lienation of affections is not conclusively presumed to result from acts of criminal conversation, but whether or not it does result is a question of fact to be determined by the jury."

113 Gee v. Pritchard, 36 Eng. Rep. 670 (Ch. 1818). In *Hanson v. Valdivia*, 187 N.W.2d 151 (Wis. 1971), the fiction that consortium was a property right was avoided, and it was held that the action for alienation of affections did not survive the death of the plaintiff such that his estate might maintain the action.

115 TEX. REV. CIV. STAT. ANN. art. 4642 (1952):

Judges of the district and county courts shall, in term time or vacation, hear and determine applications for and may grant writs of injunction returnable to said courts in the following cases:
tion. That decision, *Ex parte Warfield*, upheld the contempt conviction of a potential alienator of affections. Warfield had been enjoined from "visiting or associating with plaintiff's said wife, or going to or near her at a certain house, No. 129 Marion Street, or any other house or place, in the city of Dallas, . . . where his said wife might be . . . ." He was further prohibited from "writing or speaking to her, or in any manner, either directly or indirectly, communicating with her, by word, letter, writing, sign, or symbol . . . ." Warfield challenged the injunction as being beyond the jurisdiction of a court of equity and as violative of the first amendment. The court of criminal appeals answered the first argument by noting that courts of equity progress as civilization progresses and "are continually finding new subjects for the interposition of equitable relief by . . . injunction." As for the first amendment argument, the court indicated that Warfield's first amendment rights were not boundless, and could be circumscribed when plaintiff's marital rights became jeopardized.

Twenty-four years later, in *Witte v. Bauderer*, an irate husband successfully enjoined the defendant "from associating with [plaintiff's] wife, except in a business way as employer and employee." Although the court of civil appeals cited no cases or other authority, it seemed to have no doubts about the propriety of the relief. In *Smith v. Womack*, a suit for injunction brought by a plaintiff-wife, the court was more concerned about the right of a wife to bring such a suit than the wisdom or validity of equitable relief. However, the court did take note of *Snedaker v. King*, the leading authority for the proposition that equity should not delve so far into the love lives of the parties. But, having *Warfield* as precedent, the court declined to follow *Snedaker*.

While the jurisdiction of Texas courts to grant injunctive relief in alienation of affections actions has been established, the propriety of granting such relief in a particular situation is subject to a number of qualifications—or equitable defenses. In the court's discretion an injunction may be denied

1. Where the applicant is entitled to the relief demanded and such relief or any part thereof requires the restraint of some act prejudicial to him.
2. Where a party does some act respecting the subject of pending litigation or threatens or is about to do some act or is procuring or suffering the same to be done in violation of the rights of the applicant when said act would tend to render judgment ineffectual.
3. Where the applicant shows himself entitled thereto under the principles of equity, and the provisions of the statutes of this State relating to the granting of injunctions.

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116 *Ex parte Warfield*, 40 Tex. Crim. 413, 50 S.W. 933 (1899).
117 Id.
118 Id. at 933.
119 Id.
120 Id. at 935.
121 Id. at 938.
122 Id.
125 111 Ohio St. 225, 145 N.E. 15 (1924).
because of: (1) laches, 128 (2) the existence of an adequate remedy at law, 127 (3) impracticality of enforcement, 129 or (4) the likelihood that plaintiff would not be benefited by its issuance. 130 Another important consideration is that frequent issuance of injunctions in these cases might invite public ridicule and disrespect of the courts. 130 At least two authorities are in disagreement as to whether equitable intervention in alienation of affections cases is wise. 131 Nevertheless, in extreme instances equitable relief should be available, and the Texas approach, in which equitable jurisdiction is not questioned, is preferable to the inflexibility of other jurisdictions. 132

C. Damages

Although the causes of action for criminal conversation and alienation of affections are separate and distinct wrongs, both result in the same injury—i.e., loss of consortium. 133 Compensation for loss of consortium is broader in these actions than in negligence actions, and the plaintiff may recover for mental anguish, humiliation, disgrace, loss of social position, as well as loss of support or other direct pecuniary loss. 134 Apparently certain indirect in-

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128 See, e.g., Hall v. Smith, 80 Misc. 85, 140 N.Y.S. 796 (Sup. Ct. 1913), in which the plaintiff had waited seven years after apparent complete alienation to seek the injunction.

127 Hadley v. Hadley, 323 Mich. 55, 36 N.W.2d 144 (1949) (divorce held to be an adequate remedy). In Smith v. Womack, 271 S.W. 209, 212 (Tex. Civ. App.—Fort Worth 1925), the court pointed out that only rarely will damages be an adequate remedy: "Such a doctrine would be tantamount to a holding that one who had a home, with carefully tilled crops on it, ready for harvest, would have the right to sue in damages an enemy who was seeking to destroy a dam or dyke, and thereby let the floods inundate such farm and crops and utterly destroy them, but would not have the capacity or right to prevent such acts by an injunction."

129 Professor Simpson has criticized the issuance of injunctions in alienation of affections cases as necessitating the unseemly attachment of "a probation officer permanently to the defendant or inviting repeated contempt proceedings by spying or imaginative plaintiffs .... " Simpson, Fifty Years of American Equity, 50 HARv. L. REV. 171, 221 (1936). But Professor Moreland sees no insurmountable difficulties in allowing plaintiffs to detect violations in these situations. Moreland, supra note 125, at 217.

130 See, e.g., Knighton v. Knighton, 252 Ala. 520, 41 So. 2d 172 (1949) (injunction denied since the parties had separated by mutual consent and reconciliation chances were nil); Hall v. Smith, 80 Misc. 85, 140 N.Y.S. 796 (Sup. Ct. 1913) (injunction denied because the plaintiff's husband had ceased living with her—the court finding no affections left to alienate). Of course, an injunction cannot force an alienated or partially alienated spouse to perform marital duties; it can only remove, or attempt to remove, the temptor. See Moreland, supra note 125, at 217-18.


132 See CLARK 267; PROSSER 880-81.


134 Thus, in Sebastian v. Kluttz, 6 N.C. App. 201, 170 S.E.2d 104 (1969), it was held that only one issue of compensatory damages and one issue of punitive damages should be submitted to the jury.

juries are also compensable. For instance, in a Massachusetts case the plaintiff argued that he was so shocked by his wife's infidelity that he no longer trusted women and suffered from impotency. The court disallowed recovery, but only because the plaintiff offered no expert testimony.

In *McQuarters v. Ducote* it was held that loss of consortium is presumed when adultery has been proved. Compensation is for the complete and continuing loss to the plaintiff, and, therefore, damages are assessed to the date of the trial and include future suffering and disability. Thus, the fact that the plaintiff and his spouse are divorced does not necessarily preclude recovery of any damages for loss or impairment of consortium occurring after divorce. Also, if the divorce may be properly viewed as a proximate result of the defendant's acts, the divorce may enhance the damages.

Punitive damages are allowed upon a showing that the defendant was actuated by malice. The test is whether the tort has been committed "in such a manner or under such circumstances that a person of ordinary reason or prudence would then have been conscious of it as an invasion of the plaintiff's rights." Malice may, however, be inferred from the defendant's act if it shows a flagrant disregard for the plaintiff's rights. When punitive damages are sought, evidence of the defendant's wealth is admissible. But if the judge should later refuse to submit the punitive damage issue, the defendant should ask that the jury be instructed to disregard such evidence.

Because damage awards are usually highly speculative in these cases, they are rarely held to be excessive. The general rule is that the damages are not excessive unless they "strike mankind, at first blush, as being, beyond all measure, unreasonable and outrageous, and such as manifestly show the jury to have been actuated by passion, partiality, prejudice or corruption." Even

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185 In *Eubank v. Hayden*, 202 Va. 634, 119 S.E.2d 328 (1961), the plaintiff successfully argued that the loss of money from his savings account was the proximate result of the alienation of his wife's affections.
187 *234 S.W.2d 433 (Tex. Civ. App.—San Antonio 1950), error ref. n.r.e.*
190 *Jenness v. Simpson*, 84 Vt. 127, 78 A. 886 (1911) (allowing deduction from husband's damages for support he was no longer obligated to provide). *Contra*, Lankford v. Tombari, 35 Wash. 2d 412, 213 P.2d 627 (1950).
193 *Smith v. Smith*, 225 S.W.2d 1001 (Tex. Civ. App.—Amarillo 1949). Several cases have held that when adultery is proved, malice is presumed. *Tice v. Mandel*, 76 N.W.2d 124 (N.D. 1956); Smithmiser v. Dutter, 157 Ohio St. 454, 105 N.E.2d 868 (1952); Paulson v. Scott, 260 Wis. 141, 50 N.W.2d 376 (1951). If the plaintiff and his spouse were formally separated at the time of the defendant's wrongful acts, a good argument could be made that there was no disregard of the plaintiff's rights, and, hence, no malice. *See McNelis v. Bruce*, 90 Ariz. 261, 367 P.2d 625 (1961) (en banc).
195 *See Hardy v. Raines*, 228 Ark. 648, 310 S.W.2d 494 (1958).
though judges may often be personally aghast at the size of an award, or personally unsympathetic toward these actions in general, such sentiment is not a valid basis for ordering remittitur. In addition, these damages are not dischargeable in bankruptcy.

Factors in Mitigation of Damages. Since, inter alia, the plaintiff is supposedly being compensated for his "hurt feelings," anything that tends to lessen his heartbreak will mitigate the damages for criminal conversation and alienation of affections. Thus, a showing of unhappy marital relations between plaintiff and spouse, or that they were legally separated or otherwise living apart before the defendant entered the picture, will reduce the plaintiff's damages. Also, a reduction of damages will be proper if the plaintiff can be shown to have erred himself, or to have mistreated his spouse. The plaintiff's acts subsequent to the commencement of the litigation may be considered by the jury in determining the sincerity of his agony. Any property settlement or separation agreement may mitigate or entirely eliminate loss of support as an element of recovery, but such agreements have no effect on the other elements of consortium.

Other factors have been allowed to mitigate the plaintiff's damages even though they have no effect upon the gravity of his injury. Instead, these considerations seem somehow to reduce the defendant's blameworthiness. If the defendant can show that the plaintiff's spouse initiated and was the seducer in the illicit affair, plaintiff's damages are lessened. Other circumstances considered in mitigation are illicit relations by the plaintiff's spouse with persons other than the defendant, and the spouse's general reputation for unchastity.

\[148\] See Stoll v. Plarr, 322 S.W.2d 712 (Ky. 1959).
\[150\] Comte v. Blessing, 381 S.W.2d 780 (Mo. 1964).
\[151\] Fennell v. Littlejohn, 240 S.C. 189, 125 S.E.2d 408 (1962).
\[152\] Phillips v. Thomas, 70 Wash. 533, 127 P. 97 (1912).
\[153\] Cross v. Grant, 62 N.H. 673 (1882); Lewis v. Roby, 79 Vt. 487, 65 A. 524 (1907); Kuhn v. Cooper, 141 W. Va. 35, 87 S.E.2d 531 (1955); Helminiak v. Przekurat, 184 Wis. 417, 198 N.W. 746 (1924). Kuhn points up the requirement that the plaintiff's error must bear on the transfer of his spouse's affections to the defendant. The defendant sought to prove that the plaintiff married her husband in violation of an earlier divorce decree, which restrained him from remarrying for a period of sixty days. The court held that the proof was improper for two reasons: (1) the events were too remote (sixteen years prior to suit), and (2) the events were not relevant to the issue of the transfer of affections from the plaintiff to the defendant.

\[154\] Quagliano v. Johnson, 100 Ill. App. 2d 444, 241 N.E.2d 187 (1968). In Quagliano the plaintiff's wife was allowed to relate acts of cruelty committed against her by the plaintiff apparently both in mitigation and to show a total lack of affection.


\[157\] Norris v. Stoneham, 46 S.W.2d 363 (Tex. Civ. App.—Eastland 1932); Scott v. O'Brien, 129 Ky. 1, 110 S.W. 260 (1908). See also Frierson v. McIntyre, 151 F. Supp. 5 (D. Va. 1957), wherein the court held that in the absence of any direct evidence of malice, punitive damages may not be awarded when the plaintiff's spouse is shown to be the originator and aggressor in the illicit relationship.

ty—despite the fact that the plaintiff may have been unaware of either. The fact that courts have allowed these elements to mitigate the damages indicates the punitive nature of the actions and the role of the courts in dispensing "moral justice."

III. SHOULD TEXAS CONTINUE TO RECOGNIZE THESE ACTIONS?

There are some remedies worse than the disease.61

This year the first appellate opinion in seven years to deal with alienation of affections actions was handed down by the Texas Supreme Court. In Kelsey-Seybold Clinic v. Maclay62 the plaintiff-husband sued a medical partnership and an individual doctor for the alienation of his wife's affections. The case was a summary judgment appeal. The partnership had summary judgment in the trial court, but the court of civil appeals reversed.63 The crucial issue was whether the partnership owed the plaintiff any duty to take precautions to prevent, by any use of its premises, the alienation of the affections of his wife. The court relied on the principle in Williams v. F. & W. Grand Five, Ten & Twenty-five Cent Stores,64 a Pennsylvania case, to charge the partnership with such a duty. In Williams the plaintiff was accused of stealing a toothbrush, and while being interrogated in the defendant's store, was assaulted by a guard from an independent detective agency. Irrespective of any vicarious liability theories, the jury was instructed that if they found that the defendant's store manager was present at the time of the assault and did nothing to stop it, the plaintiff could prevail. Thus, the theory of the Williams case is that one is primarily negligent when he stands by and permits a tort to occur when he has a duty to protect the victim.

In Maclay the court held that the partnership itself could be liable for the alienation of the affections of the plaintiff's wife "if . . . the partnership received information from which it knew or should have known that there might be a need to take action,"65 and it then failed to "use reasonable means at its disposal to prevent any partner or employee from improperly using his position with the Clinic to work a tortious invasion of legally protected family interests."66 Although the decision is logically sound, as Justice Greenhill points out,67 it seems to be an unwise extension of a cause of action not favored in the law. The theory of Williams, no doubt spawned in an attempt to extend the reach of plaintiffs further into the deep pocket of vicarious liability (albeit under the name of primary negligence), comes into direct conflict with the requirement that the defendant in an alienation of affections action intend to

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161 S. PUBLILIUS, MAXIM 301.
162 466 S.W.2d 716 (Tex. 1971).
165 466 S.W.2d at 720.
166 Id.
167 Id. at 720-22 (Greenhill, J., dissenting).
alienate affections. Mere negligence has, until now, been insufficient to support the action.

Though *Maclay* will be important in other contexts for its acceptance of the *Williams* theory of negligence, it also serves as a startling reminder that "heart balm" is still very much a part of the tort law of Texas. Thirty-six years have passed since the Legislature considered the pros and cons of the actions for criminal conversation and alienation of affections. Perhaps the time has come for a reconsideration.

**Heart Balm—Pluses and Minuses.** On the plus side, the actions for criminal conversation and alienation of affections are obvious attempts to (1) maintain family solidarity by deterring wrongful interference, and (2) compensate, however inadequately, for injuries that may often be bona fide and severe. But the degree of success with which the actions achieve these goals may be questioned, especially in the light of the considerations on the minus side. First, the public scandal that can be engendered by the filing of one of these actions is an open invitation to extortion and blackmail. This problem was a major consideration in the 1930's campaign to abolish the actions. If this argument was persuasive then, there is no reason to think it is less of a problem today.

A second objection is that by allowing juries to award compensation for hurt feelings and thus provide "salve for the heart," damages are rendered highly speculative. It has been noted that courts will not readily grant new trials or order remittitur in such cases. Awards are likely to be high, and although one commentator has argued that these defendants are not worthy of too much sympathy, the problems of proof inherent in the third objection below seem to dictate that the uncertain and largely punitive nature of these damages not be ignored.

The final and most important objection to the maintenance of these actions is that the application of tort theory—with its simplistic concept of causation—just does not reflect the mechanics of the usual marriage break-up. Psychologists have candidly admitted that they cannot say why a particular marriage ends in divorce. They speculate on the causes of extramarital sexual activity, but the third party in the romantic triangle is not considered causally important. Although the law is properly concerned more with responsibility

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168 See note 51 supra.
170 See HOUSE JOURNAL 1929-30 (1935). The bill to abolish criminal conversation and alienation of affections failed by a vote of 64-56. Id. at 1930.
172 "[W]hen it comes to measuring perverted chastity in terms of 'heart balm,' society has not yet set up a standard as it has with peanuts and popcorn and other tangibles, by which it can be done." Rotwein v. Gersten, 160 Fla. 736, 36 So. 2d 419, 421 (1948) (en banc).
173 See notes 146-48 supra, and accompanying text.
174 Although happily these actions are rare in Texas, when they are brought, awards of $50,000 or more are probably not uncommon. See, e.g., Kuykendall v. McCann, No. 49,778-C (67th Dist. Ct., Dec. 30, 1966).
175 Brown, supra note 15, at 506.
176 W. GOODE, AFTER DIVORCE 113-14 (1956).
than with scientific causation, it is submitted that the less correlation existing between the two, the more likely it is that a jury finding on a causation issue will reflect moral responsibility, rather than legal responsibility. That is, a jury, virtually unbridled and unguided in its quest for the "controlling cause" of an alienation of affections, will be tempted to fix responsibility upon the defendant when his conduct has merely been "wrongful" or morally reprehensible. Although the cases have made much of the "controlling cause" requirement as a limitation, in actuality verdicts are almost never disturbed.

Since very few persons who are willing to publicly display the innermost privacies of their married life by bringing a suit for criminal conversation or alienation of affections could be motivated by anything other than a desire to "get a few more bucks" out of their divorce situation, the social utility of these actions must be doubted. In any event, the alternatives to status quo are worth looking into.

The Legislative Choices. The choices are essentially three: (1) do nothing, and retain the two actions as they have judically evolved; (2) engraft some statutory limitations on the actions; or (3) abolish the actions.

Nine states have abolished the cause of action for criminal conversation, and twelve states have abolished the action for alienation of affections. Although suits for criminal conversation, like those for alienation of affections, are subject to abusively high damages awards, the problems of proof with respect to causation in the former are not present in the latter. This fact, coupled with the rather lax enforcement of the adultery laws, may explain why a larger number of states continue to recognize criminal conversation. At any rate, abolition statutes are clearly constitutional in view of the state's traditional interest in and power to regulate the incidents of the marriage contract, and since that contract has been deemed not to be a "contract" within article one, section ten of the United States Constitution. If abolition is desired, the statute should clearly indicate whether equitable relief is to survive in the absence of civil

178 W. Goode, supra note 176, at 115.
179 See note 73 supra.
actions for damages. The Alabama statute has been interpreted so as not to preclude the granting of injunctive relief, although this interpretation has been criticized. Whatever the correct interpretation might be, it is clear that the legislative intent should appear in the statute to avoid misinterpretation by the courts.

Illinois has retained both actions, but limited the damages recoverable in both to actual damages. The statute explicitly disallows "punitive, exemplary, vindictive or aggravated" damages. By way of additional clarification of what is and is not compensable, Illinois further provided:

In determining the damages to be allowed in any action for alienation of affections [or criminal conversation], none of the following elements shall be considered: the wealth or position of defendant or the defendant's prospects of wealth or position; mental anguish suffered by plaintiff; any injury to plaintiff's feelings; shame, humiliation, sorrow or mortification suffered by plaintiff; defamation or injury to the good character of plaintiff or his or her spouse . . . or dishonor to plaintiff's family . . . .

Thus, it is apparent that Illinois was more concerned with the uncertainty and punitive nature of damages, than with the danger of extortion or blackmail. Nevertheless, by taking most of the profit out of the cause of action, "extorted" settlements are less likely since the defendant will be more willing to "stand and fight." Of course, the problem of causation is untouched by the Illinois approach. Still, the Illinois method indicates that statutory tampering with the elements of common-law actions may yield an advantageous compromise solution to what is, in the final analysis, a problem requiring a delicate balancing of interests.

IV. Conclusion

The causes of action for criminal conversation and alienation of affections, though originally vindicators of common-law property rights, are now cast as protectors of the family unit. Their performance in this role has been a subject of criticism, and must still be categorized as an issue on which reasonable men may differ. At a time when Texas is taking a second look at a number of time-honored concepts with regard to the family relationship in an effort to obtain an up-to-date family code, it would be unfortunate if these two causes of action were allowed to continue unimpaired by default. If the actions are to be retained, let the decision be a conscious one, the result of at least minimal scrutiny. The Illinois compromise approach offers an interesting method of minimizing the unsavory aspects of the actions, while at the same time keeping the force of the law behind the integrity of the family. At least some consideration should be given to a statutory overruling of the Maclay decision, which sets up a realistically undefinable duty on the part of certain persons to exercise control over the activities of consenting adults. But any reconsideration of the pro-

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180 Henley v. Rockett, 243 Ala. 172, 8 So. 2d 852 (1942).
183 Id. § 36.
184 Id. § 37.
priety of continuing to allow maintenance of these actions in any form should take cognizance of the inherent limitations of the law: "Under the attempt to perform the impossible there sets in a general disintegration. . . . The law . . . loses its sanctity and authority. A continuation of this condition opens the road to chaos."188

188 Coolidge, supra note 112, at 276.