

Scottish Law Commission

(SCOT. LAW COM. No. 42)

FAMILY LAW REPORT ON LIABILITY FOR ADULTERY AND ENTICEMENT OF A SPOUSE

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by the Lord Advocate
under section 3(2) of the Law Commissions Act 1965*

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The Scottish Law Commission was set up by section 2 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law of Scotland. The Commissioners are:

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To The Right Honourable Ronald King Murray, Q.C., M.P.,
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In accordance with the provisions of section 3(1)(b) of the Law Commissions Act 1965, we submitted on 14 May 1968 our Second Programme for the examination of several branches of the law of Scotland with a view to reform. Item No. 14 of that Programme, which was published on 19 July 1968, requires us to proceed with a preliminary examination of Family Law for the purpose, among other things, of making specific recommendations for changes in the law.

In pursuance of Item No. 14 we have examined the law relating to the liability of a paramour in damages for adultery and for the enticement of a spouse. We have the honour to submit our proposals for reform of these branches of the law.

3 June 1976

J. O. M. HUNTER
Chairman of the Scottish Law Commission

**LIABILITY FOR ADULTERY AND
ENTICEMENT OF A SPOUSE**

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LIABILITY FOR ADULTERY AND ENTICEMENT OF A SPOUSE

PART I: INTRODUCTORY

Purpose of Report

1. In this Report, we submit proposals for reform of the law of Scotland relating to the right of a husband whose wife has committed adultery to recover damages from the person with whom the adultery was committed (who is often conveniently called 'the paramour'); the associated liability of the paramour, under section 7 of the Conjugal Rights (Scotland) Amendment Act 1861, for the expenses of an action of divorce for adultery; and the separate question of the paramour's liability for enticement.

Consultation and acknowledgments

2. On 24 September 1974, we issued a consultative paper inviting the views of interested persons on these topics.¹ We are grateful to those bodies and individuals who responded to our invitation: their comments have helped us greatly in preparing this Report.² We are especially grateful to Mr. K. G. Macgregor, S.S.C., Deputy Secretary of the Law Society of Scotland, for giving us expert help on the legal aid implications of the subject.

The relevance of divorce reform

3. Since the comments on our consultative Memorandum were received, two Bills to reform the law of divorce in Scotland have passed through all their stages in the House of Lords.³ At present, the Divorce (Scotland) (No. 2) Bill,⁴ a Private Member's Bill having Government assistance, has been considered by the Second Scottish Standing Committee and is awaiting consideration by the House of Lords. The principles underlying these Bills closely affect the policy issues raised in this Report. Indeed, we note that the co-defender's liability was debated when the Second Scottish Standing Committee were considering the Divorce (Scotland) (No. 2) Bill⁵; in that debate, the need for reform was acknowledged.

4. If the Divorce (Scotland) (No. 2) Bill, or a Bill on similar lines, becomes law, divorce for adultery will no longer be competent. Instead, adultery will be treated as one of a number of fact-situations from which the breakdown of the marriage will be irrebuttably presumed. The underlying theory is that the adultery is a sign or symptom of the permanent breakdown of the marriage: the adultery

¹Memorandum No. 18 on *Liability of a paramour in damages for adultery and enticement of a spouse*, issued 24 September 1974.

²A list of the persons who submitted comments is annexed at Appendix A at page 18 below.

³Divorce (Scotland) Bill [H.L.] 1974-75 (Bill 217) presented by the Earl of Selkirk and ordered to be printed on 21 May 1975; and Divorce (Scotland) Bill [H.L.] 1975-76 (Bill 10) presented by the Earl of Selkirk and ordered to be printed on 25 November 1975.

⁴(1975-76.) [Bill 23] presented by Mr. Iain MacCormick, M.P., and ordered to be printed on 17 December 1975.

⁵Parl. Deb, H.C., O.R., Second Scottish Standing Committee, 7 April 1976, cols. 223 to 232.

may be either the cause or the result of the breakdown and which came first, the adultery or the breakdown, is immaterial. What matters is that the marriage has broken down: but marriage is a partnership and where one of the partners takes the decisive step of raising a divorce action to establish breakdown (relying, for example, on even one act of adultery⁶), he or she demonstrates his or her belief that the marriage is at an end. In this way, the new law of divorce recognises the complexity of the causes of the breakdown of many marriages. This new approach has implications for the patrimonial incidents and consequences of divorce. Thus, where a wife commits adultery after she has been deserted by her husband, it may be that the husband has been wholly or mainly responsible for the breakdown of the marriage. In such a case, both under the Divorce (Scotland) (No. 2) Bill and our recent tentative proposals for further reform of the law on financial provision on divorce,⁷ the wife would be able to apply to the court for an award of financial provision from her husband even though she is the defender in the action. If a wife's adultery should not invariably preclude her from obtaining financial provision on divorce, then by parity of reasoning a paramour's participation in an adulterous act should not necessarily entail liability on his part to pay damages to the husband or the expenses of the action of divorce.

Scope of Report

5. In this Report, we do not consider the possible delictual liability under Scots law for the enticement of a child. We deliberately excluded that topic from Memorandum No. 18 because the enticement of a child raises different issues from the enticement of a spouse and is more appropriately considered in a different context, such as the custody of children. Awards against paramours of the expenses of divorce actions are closely associated with awards of expenses as between the spouses involved in such actions. We refer to awards between spouses only incidentally, and we deal with the relationship between such awards and the law of aliment in our Memorandum on Aliment and Financial Provision.⁸

PART II: PARAMOUR'S DELICTUAL LIABILITY FOR ADULTERY

Aspects of the existing law

6. Under the existing law of Scotland, a man has a right to claim damages from his wife's paramour for adultery. Following a development which we briefly described in our Memorandum,¹ the common law of Scotland now concedes such a right to a husband, but, for historical reasons, a wife is not given a corres-

⁶The fact of litigation is also important: see our Report, *Divorce: The Grounds Considered* (1967) Cmnd. 3256, para. 6: 'Marriage being, as a minimum, a partnership, it is enough that one partner maintains irretrievable breakdown for the breakdown to be a fact . . . It is hardly possible to explain the motives of a sane pursuer who petitions the court to dissolve a marriage which in his view is still viable'.

⁷Memorandum No. 22 on *Aliment and Financial Provision* (2 volumes), issued on 31 March 1976, para. 3.97. and Proposition 86.

⁸Memorandum No. 22 (*supra*), para. 2.110. and Proposition 23.

¹Memorandum No. 18, pages 4 to 10.

ponding right to claim damages from her husband's paramour.² The husband's right may be enforced by calling the paramour as a co-defender in an action of divorce, and since 1861 divorce actions have provided the usual forum for such claims.³ Alternatively, the husband may raise an independent action of damages against the paramour, whether before or after an action of divorce, but independent actions are now extremely rare.

7. The basis of the paramour's liability is (or was) to some extent a matter of controversy. A leading 19th century authority has surmised:

'Perhaps the law is based on a variety of different reasons. The injury to the husband in the dishonour of his bed, the alienation of his wife's affections, the destruction of his domestic comfort and the suspicion cast upon the legitimacy of her offspring, are wrongs for which redress should be given. It is a trite observation, that such a loss does not admit of any pecuniary estimate or compensation; but if damages be not an adequate retribution, they constitute the only one which the law can award; and the impossibility of giving full redress is a bad reason for giving none and for depriving morality of one of its safeguards'.⁴

Whatever the reasons for the development of the husband's right to claim damages and solatium for adultery from his wife's paramour, previous official reports⁵ and the experience in other jurisdictions⁶ demonstrate that the case for abolition is not clear-cut. Even in the social conditions of today, there is still a case for the retention of a right of damages for adultery although, as we explained in our Memorandum No. 18, considerable changes in the present rules relating to that right would be required.

8. In our Memorandum No. 18, therefore, we did not advance provisional proposals but showed in detail how, if the right to claim damages for adultery were to be retained, the law might be modernised and we invited views on the arguments set out in that Memorandum, and on any other relevant arguments, to enable us to resolve the question whether the paramour's liability should be retained or abolished. The great weight of the comments which were received was in favour of abolition and this accords with our own conclusions reached on a balance of the competing arguments. These arguments can be briefly summarised.

²At the time when the common law rules were fixed, a married woman could hardly have claimed damages from her husband's paramour during the marriage because until the Married Women's Property (Scotland) Act 1881, the damages would have passed automatically to the husband who would then have profited from his own wrong. As we explain at para. 28 below, such a right is generally useless in relation to the expenses of process in a divorce action since the wife is not normally liable for these in any event, and consequently there is no patrimonial loss.

³After the Conjugal Rights (Scotland) Amendment Act 1861, s. 7 (see para. 20 at page 7 below) had made it competent for the husband to claim expenses from the paramour in a divorce action, the Court of Session accepted the competence of a conclusion against the co-defender for solatium and for damages for patrimonial loss other than the expenses of the divorce action.

⁴Fraser, *Husband and Wife* (2nd ed.; 1878) vol. 2., p. 1203.

⁵See the *Report of the Royal Commission on Marriage and Divorce, 1951-55* (1956) Cmd. 9678, para. 436-437, 448-452, 463-464, and Recommendations 43 and 44 (Scottish).

⁶In Appendix B at page 18 below, we set out a brief comparative survey of the law in certain other jurisdictions.

Arguments for and against abolition of the paramour's delictual liability

9. The *first* argument for retaining the husband's right to damages for adultery is that the paramour should compensate him for his wounded private feelings, and for his public disgrace, arising from the act of adultery. Under Scots law, it seems clear that the basis of the husband's right to claim damages for adultery is not any harm inflicted on the wife but the invasion of the husband's rights,⁷ although there is some doubt about the precise nature of the rights invaded. The husband need not have lost his wife: the adultery may have been condoned and there may be no divorce action since the marriage may not have broken down. Yet these facts do not affect the husband's right to solatium, although they may affect the amount of solatium which the court will award.⁸ It has been said that it is offensive to the modern mind that a husband should claim 'damages for mere adultery, since it purports to compensate him for being cuckolded without even having lost his wife'.⁹ Whether we regard the basis of the paramour's liability as a species of affront or insult or wrong against the husband's feelings or honour (on the analogy of the Roman Law *actio injuriarum*), or whether we regard it as the infringement of the husband's exclusive right to the possession of his wife's body (on the analogy of the Common Law action of criminal conversation),¹⁰ the liability appears difficult to defend. On the one hand, the notion of compensating a husband for the wrong to his pride or honour seems open to the objection that an action of damages would simply add to his own humiliation and the family's disgrace. On the other hand, the notion of a possessory or quasi-proprietary right is seen by many as degrading the wife to the status of a piece of property.

10. While there are no statistics of actions of damages for adultery, we understand that claims for damages (other than expenses) against a co-defender in divorce actions are very rare indeed, and actions raised independently of divorce proceedings are now unknown. This may partly be due to judicial discouragement of such claims; but there would, we think, be a widespread feeling that a husband's humiliation would often be increased rather than diminished by an action against the paramour. Certainly for reasons such as these the majority of those whom we consulted were strongly in favour of abolishing the husband's right to damages for adultery *per se*.

11. *Second*, the minority who wished to retain the right to damages for adultery (with one exception) did not expressly base their argument on the need to compensate husbands for wounded feelings or disgrace. Those who gave their reasons based their conclusions largely on the necessity or desirability of protecting the integrity and the stability of family relations, and accordingly they argued that the possibility of a damages action by the husband (or by a wife) against the

⁷Clive and Wilson, *Husband and Wife* (1974) p. 276.

⁸*Idem*.

⁹Fleming, *The Law of Torts* (4th ed.; 1971) p. 572, commenting on the Common Law action of criminal conversation: see Appendix B.

¹⁰Authorities on *inter alia* the Common Law action of criminal conversation and the Civil Law *actio injuriarum* both influenced the development of the Scottish delict in its formative period: see for example *Steedman v. Coupar* (1743) Mor. 7337; *Kilkerran*, 484; *Elchies*, tit. Adultery, No. 1; also *sub. nom. Stedman v. Stedman* (1743) Mor. 13909 (where the pursuer's authorities related to *injuria* and English authority); also *Maxwell v. Montgomery* (1787) Mor. 13919; *Paterson v. Bone* (1803) Mor. 13920.

paramour has (or would have) a deterrent effect. This argument, however, did not weigh heavily with the majority of the persons consulted, and we do not find it convincing. The existence of the right has not prevented an increase in the number of divorce decrees for adultery.¹¹ Further, there are many reasons why adultery occurs. Sometimes the persons concerned may drift into a situation where they determine to have sexual intercourse without long premeditation; sometimes the adultery will be deliberately planned and the adulterous spouse and the paramour hope that the other spouse will not find out; sometimes the adultery may be an incident of a stable illicit union which the wife, being unable to obtain a divorce, has formed with the paramour in order to live in a 'family household' with him. In many of these cases, the legal implications will be either unknown or discounted.

12. Moreover, the logic of the deterrence and protection arguments is that the Scottish courts should be empowered to grant an interdict at the instance of the husband against future acts of adultery between the wife and her paramour. If adultery is truly a wrong by the paramour against the husband, then the denial of an interdict would be anomalous, especially against the background of a system such as Scots law, which traditionally avoids restrictive remedy-based rules. Yet, we do not think that, in the conditions of today, the courts would extend the law in this way.

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

14. The objections to these arguments for retention of the action of damages for adultery are, at the same time, arguments for its abolition. A *third* argument for abolition is that the social detriment arising from such actions outweighs, or (if the action were more often used) would outweigh, the social benefits accruing from the attempt to protect family relations by delictual claims. Those whom we consulted who favoured abolition agreed that the action would, if used, encourage malicious and vindictive claims and would set a premium on motives of revenge. Moreover, as the Faculty of Advocates pertinently observed in their comments on our Memorandum:

'While the removal of an existing common law right of an individual is a large step to take, the complications involved in reforming the remedy to bring it more in line with contemporary views would be many. On a balance

¹¹In 1974, of 7,173 divorce decrees granted, 2,679 were on the ground of the defender's adultery. In these adultery divorces, the wife was the defender in 1,554 cases and the husband was defender only in 1,125 cases: (Cmnd. 6199, Table 5). Adultery continues to be extensively relied on by petitioners under the reformed divorce law in England.

of convenience, therefore, it would seem more practicable to remove once and for all a right that has already for all practical purposes fallen into desuetude'.

Those interested will find in our Memorandum No. 18 a detailed examination of the complications referred to by the Faculty.

15. A *fourth* argument for abolition submitted to us was that retention of the remedy of damages for adultery is quite inconsistent with the social policy underlying the change from a fault-based law of divorce, which recognises adultery as a matrimonial offence, to a divorce law based on the principle of the breakdown of the marriage—a principle which recognises the complexity of the causes of the breakdown of many marriages.¹² We think that there is force in this argument.

16. *Fifth*, in some jurisdictions, the view has been expressed that the action of damages for adultery is open to a number of other objections. It sets a premium on mercenary motives. It is a safeguard against gold-digging actions in Scotland that damages are related to the amount of the patrimonial loss, and to the degree of the wounded feelings, which have been suffered. It is also said that the action together with other actions containing allegations of sexual misconduct (such as actions of damages for seduction, or enticement of a spouse, or alienation of affections) 'have afforded a fertile field for blackmail and extortion by means of manufactured suits in which the threat of publicity is used to force a settlement.'¹³ Relying on our experience and the evidence which we received, we do not think that these abuses exist in Scotland. In Scotland, the main problem is to find some acceptable justification for retaining a claim which is little used. If, however, the action of damages for adultery were to be modernised along the lines referred to briefly in paragraph 13 above and (in more detail) in our Memorandum No. 18, and if such actions were to be encouraged by the law, the possibility would arise that the abuses experienced in other jurisdictions would emerge in Scotland.

Our proposals

17. For all these reasons, we recommend that *statutory provision should be made abolishing the right of a husband to obtain from his wife's paramour damages for patrimonial loss arising from the adultery, (other than the expenses of a divorce action—see Recommendations 2 to 4 at para. 36 below) and solatium.*

(Recommendation 1) This proposal means that the husband could neither raise an independent action of damages for adultery,¹⁴ nor claim damages for adultery in a divorce action. We revert to the paramour's liability for the expenses of a divorce action at paragraph 19 below.

18. Three further points may be noted. First, in some jurisdictions in which a wife's adultery is treated as an invasion of the husband's rights, the husband can enforce these rights by obtaining a preventive remedy, such as an injunction,

¹²See paras. 3 and 4 above.

¹³Prosser, *Torts* (4th ed.; 1971) p. 887.

¹⁴Since independent actions of damages for adultery are one of the 'enumerated causes' for jury trial, an amendment to section 28 of the Court of Session Act 1825 (c.120) will be required.

prohibiting further acts of adultery.¹⁵ In Scotland, there is no reported precedent for the award of an interdict against future acts of adultery between the wife and the paramour, and we think that, on grounds of policy, especially respect for personal liberty, and in the absence of common law precedent, the courts would hold an action for such an interdict to be incompetent. Second, there is no reported decision in which a wife has recovered damages from her husband's paramour. Although it has been rightly suggested that in principle there would seem to be no reason why she should not do so,¹⁶ we do not think that the Scottish courts would now recognise the competence of such an action, at any rate if, as we propose, the husband's right to damages has been abolished. Third, in response to a suggestion, we have considered whether the opportunity should be taken to declare by statute that a spouse who has committed adultery cannot be made liable in damages to the aggrieved spouse. It was pointed out that liability for expenses may be shared between the defender and co-defender¹⁷ and that, in France, a breach of conjugal duties by one spouse gives the other a claim for damages.¹⁸ There is no reported decision on this point in Scots law, but the generally accepted view is that 'Adultery gives the injured spouse no right of action *ex delicto* against the erring spouse.'¹⁹ Accordingly, we do not think legislation is required to abolish or declare incompetent the remedies or rights of action mentioned in this paragraph.

PART III: PARAMOUR'S LIABILITY FOR EXPENSES OF DIVORCE

Aspects of the existing law

19. The question whether a paramour should be liable for the expenses of an action of divorce at the instance of the pursuer is of considerable practical importance since awards of expenses against co-defenders are far more common than awards of solatium or of damages for other forms of patrimonial loss arising from the adultery.

20. The husband's right to claim from his wife's paramour the expenses of a divorce action in the action itself stems from section 7 of the Conjugal Rights (Scotland) Amendment Act 1861 which provides that:

'In every action of divorce for adultery at the instance of the husband it shall be competent to cite . . . as a co-defender along with the wife, the person with whom she is alleged to have committed adultery; and it shall be lawful for the court in such action to decern¹ against the person with whom the wife is proved to have committed adultery for the payment of the whole

¹⁵Since 1899, injunctions have been granted by courts in some states of the USA prohibiting for example association with the plaintiff's wife and other conduct tending to alienate her affections: see Prosser *Torts* (4th ed; 1971) pp. 880-881. It appears that interdicts are competent in South Africa: McKerron, *Law of Delict* (7th ed; 1971) p. 167.

¹⁶See Walker, *Delict* (1966) pp. 718-719; Clive and Wilson, *Husband and Wife* (1974) p. 277.

¹⁷*Froebel v. Froebel* (1884) 22 S.L.R. 22.

¹⁸Civ' 9 Nov. 1966, D.66 80 n. J. Mazeaud.

¹⁹Walker, *Delict* (1966) p. 718.

¹The word 'decern' means to pronounce a decree.

or any part of the expenses of process, provided he has been cited as aforesaid: . . .'.²

The section did not give the husband-pursuer a new substantive right to claim expenses; he could already claim the expenses of a divorce action before the 1861 Act as an element in the separate action of damages for adultery. The section was construed by the courts as if it had merely the procedural effect of enabling the aggrieved husband to make his claim for the expenses of the divorce process in the divorce action itself.³ This procedural facility saved him the trouble, risk and expense of raising a second action. In disposing of the husband's claim for expenses against the co-defender, the Court of Session applied the same principles as it had formerly applied in separate actions of damages for adultery.⁴ The basis of liability was characterised as delictual:

' . . . that the adultery of the co-defender has caused damage to the pursuer, whose loss includes the expenses for the action of divorce caused by the co-defender's adultery'.⁵

The basis of the claim is therefore quite different from the basis of an ordinary claim for expenses: the co-defender may be liable even where he has not by his conduct in the course of the action increased or affected in any way the expenses incurred by the pursuer.⁶ Indeed, expenses may be awarded against the co-defender even where he does not enter appearance and lodge defences.⁷ In this respect, the claim resembles a petitory conclusion⁸ in which the court can, and indeed must, grant decree in absence where the action is undefended.

21. The husband's claim under section 7 of the 1861 Act, however, has anomalous features which make the analogy of petitory actions incomplete. Thus the section gives the court a discretionary power to award 'the whole *or any part* of the expenses of process'. While this discretion is appropriate to ordinary awards of expenses, it is somewhat anomalous when applied to expenses which are essentially a species of damages for patrimonial loss. Perhaps for this reason, there are no reported cases stating the principles upon which, in terms of section 7, part only of the expenses of process are awarded. In practice, where the adultery is proved and the action not dismissed by reason of the conduct of either spouse under the special power conferred by the proviso to section 7, the whole expenses are awarded.

²The remainder of the section provides that the co-defender is a competent witness and gives the court a discretionary power to dismiss the action against the co-defender, 'if in their opinion such a course is conducive to the justice of the case'.

³*Fraser v. Fraser and Hibbert* (1870) 8 M. 400; *Fraser, op. cit.*, p. 1147; *Thomson v. Thomson and Anor.* 1907, 14 S.L.T. 643 *per* Lord Salvesen at p. 646; *Murray v. Murray and Tattersall* 1944 S.L.T. 46 *per* Lord Keith at p. 47.

⁴In *Heggie v. Heggie* 1917, 2 S.L.T. 246, Lord Anderson at p. 247 spoke of the defender being 'penalised either in damages or expenses—the latter being really a form of damages'. This view has been assumed to be correct in subsequent cases: e.g. *Sleigh v. Sleigh and Allison* 1951 S.L.T. (Notes) 57 *per* Lord Guthrie at p. 58; *Forrester v. Forrester and Exton* 1963 S.C. 662 *per* Lord Johnston at p. 663. In conformity with this view, the expenses are required by section 7 to be paid on an agent and client basis. Equally some of the factors regarded by the court as relevant to exclude or reduce liability for expenses are those relevant to exclude or reduce liability for damages: see our Memorandum No. 18, pp. 10, 14–15, and 24–25.

⁵*Sleigh v. Sleigh and Allison* 1951 S.L.T. (Notes) 57 *per* Lord Guthrie at p. 58.

⁶*Fairgrieve v. Chalmers* 1912 S.C. 745; *A v. B. and C.* 1922 S.L.T. 392; *Hutchison v. Hutchison and Anor.* 1962 S.L.T. (Notes) 11.

⁷*Kirk v. Kirk* (1875) 3 R. 128; *Sleigh v. Sleigh and Allison* 1951 S.L.T. (Notes) 57.

⁸A petitory conclusion is a request to the court for a decree in an action for debt or damages.

22. Equally anomalous is the court's practice, where the co-defender is receiving legal aid, of treating the co-defender's liability as if it were a liability for expenses which the court may modify under section 2(6)(e) of the Legal Aid (Scotland) Act 1967. That enactment provides that the liability of an assisted person, by virtue of an award of expenses against him with respect to the proceedings, shall not exceed the amount which in the opinion of the court making the award is a reasonable one for him to pay, having regard to all the circumstances including the means, and conduct in connection with the dispute, of all parties.

23. It hardly seems likely that Parliament intended that section 2(6)(e) of the 1967 Act should apply to expenses which are essentially a species of damages. The consequences are not easy to justify. First, if an aggrieved husband sues his wife's paramour in a separate action of damages for the expenses he had incurred in his previous divorce action founded on the paramour's adultery, the paramour could only receive legal aid for his liability for expenses in the damages action. He would not receive payments from the legal aid fund to meet his liability for the expenses of the previous divorce action. Yet, under present practice, the courts will assess his maximum liability as co-defender in a divorce action. It seems inappropriate that legal aid legislation should be used to afford a co-defender a higher protection in a divorce action than he would receive in a separate action for damages. Second, the practice may cause serious injustice to a pursuer who is not an assisted person in a case where the co-defender is. Third, where both the pursuer and co-defender are assisted persons, the state will pay the greater part of the successful pursuer's award of damages for adultery. Yet, it is not the function of the legal aid fund to relieve people of liability for their delicts.

Our consultations

24. In our Memorandum No. 18, we took the view, which was shared by those whom we consulted, that a paramour who intervenes of his own accord in the divorce action should continue, as under the present law and practice, to be liable for the expenses resulting from his intervention. His liability, if any, should continue to be determined on the ordinary principles governing liability in civil litigation, one of the main guiding principles being that expenses follow success.

25. In Memorandum No. 18, we did, however, invite views on the question whether it is right in principle to hold a co-defender liable in the expenses of an action of divorce. Our consultations revealed a general agreement with our provisional view, expressed in the Memorandum, that the present law and practice is unsatisfactory. Not surprisingly, opinion was divided on the appropriate solution. The differences centred on three problems:

- (a) Should the paramour be liable for the expenses of a divorce action only if he intervenes in the process to contradict the allegation of adultery? Or should the pursuer continue (as under the present law) to have a right to call him as a party to the action by citing him as a co-defender?
- (b) Should the court be empowered to modify or reduce the expenses awarded against the paramour, for example according to the degree to which his adultery, or his adulterous association, with the defender contributed to the breakdown of the marriage?

- (c) Should the paramour be liable not only to reimburse the husband for his own expenses incurred in raising and prosecuting the action, but also to meet the husband's liability under the necessities rule for his wife's expenses as defender?

One possible solution: liability based on responsibility for marriage breakdown

26. The argument for retention appears to be based on the view that, by his act of adultery, the co-defender was at least partially responsible for the action of divorce. Even an undefended action can be expensive and it is right (so the argument runs) that the person who is at least partially responsible for the divorce should be liable to compensate the pursuer for this expenditure which, but for the adultery, he would not have had to incur. Moreover, the case for retaining the husband's right to expenses is stronger in two respects than his rights to damages for other forms of patrimonial loss and to solatium. First, given that the claim is raised in the divorce action, it is less open to the objection that the husband is obtaining damages when he has not even lost his wife.⁹ Second, there is less difficulty in assessing the quantum of damages than in claims for damages for other forms of patrimonial loss or for solatium, since the expenses of process are easily quantifiable.

27. Those who favoured retention generally argued that the main defects in the existing law would be remedied if the court were to retain its discretionary power to reduce or modify an award of expenses against the paramour and that, in exercising its discretion, the court should have regard to the degree to which the paramour's adultery, or adulterous association, was responsible for the breakdown of the marriage. On this approach it follows that the pursuer must also retain the right to cite the paramour as co-defender. As the Law Society of Scotland observed, if the co-defender can only be liable for the pursuer's expenses if he intervenes, then there would be nothing to prevent the defender lodging defences and calling the co-defender as a witness, thereby circumventing the pursuer's claim for expenses against the co-defender. In these circumstances, the only fair solution, from the pursuer's standpoint, would be to find the co-defender liable in expenses whether he intervenes or not.

28. Those who favoured retention also had to meet the objection that the present law concedes a claim for expenses to a husband against his wife's paramour but does not concede a claim to a wife against the woman with whom her husband has committed adultery. But the extension to the wife of a claim for expenses would be pointless if the husband is liable for his wife's expenses, win or lose.¹⁰ It was submitted to us that the husband's liability for his wife's expenses is anachronistic and should be removed. Those who commented on this point leaned to the view that the principles applicable to the co-defender's or paramour's liability and the liability of the spouses for expenses should be assimilated to those applicable in ordinary civil litigation. We revert to this question at paragraph 40 below.

⁹See para. 9 at page 4 above.

¹⁰This rule has been eroded by recent cases: see *Wilson v. Wilson* 1969 S.L.T. 100; *Nelson v. Nelson* 1969 S.L.T. 323; *Dawson v. Dawson* 1975 S.L.T. (Notes) 37; and *Campbell v. Campbell* 1975 S.L.T. (Notes) 47. Contrast *Tait v. Tait* 1955 S.C. 364: and see also our Memorandum No. 22 on *Aliment and Financial Provision* (1976), para. 2.110.

29. After careful consideration, we have concluded that the compromise solution whereby the court has a duty to have regard to the degree of responsibility for the breakdown would not cure the existing law of its defects. In paragraphs 30 to 36 below we argue that the husband's right to cite the co-defender should be abolished. The argument in paragraphs 30, 32 and 34 apply with equal force to the compromise solution which we have just described. In particular, it would encourage judicial inquests into dead marriages which are objectionable for the reasons given at paragraph 34. For these reasons we reject it.

Our preferred solution: abolition of paramour's liability as co-defender for expenses

30. In our view, the arguments for retention, with or without modifications, of the husband's claim for expenses against a co-defender are outweighed by the arguments for its complete abolition. The main arguments for abolition seem to be these: *first*, as the Faculty of Advocates observed in their comments on our Memorandum:

'it is often wrong to assume that the paramour is the real cause of or even contributor to the divorce. He may have come to the wife's 'rescue' long after the breakdown of the marriage, and this becomes a 'ground' for the divorce, rather than a cause of it, if such a distinction can be made. Similarly, the wife might have had a string of lovers, the co-defender being only the latest in the line—a clear case of inequity if he has to bear the expenses of the divorce.'

Thus, there is no necessary connection between the co-defender's responsibility for the breakdown and his liability for the whole expenses. Often the court will hold the husband-pursuer liable in the wife-defender's expenses (on the basis of the rule mentioned in paragraph 28) and the co-defender liable to the pursuer in both his (the pursuer's) and the wife's expenses. In addition, the co-defender has to pay his own expenses. This seems unjust if the co-defender is not wholly or mainly responsible for the breakdown. It might be thought that the court's power under section 7 of the 1861 Act, to modify his liability provides a safeguard. But this is not so. The inequity which can frequently occur is exemplified in *Morrison v. Morrison and Another*,¹¹ a case in which the spouses lived together for only about three months; the wife left the matrimonial home but the co-defender was not responsible for her departure; the pursuer acquiesced in the separation and had no interest in his wife's society; and the husband delayed in raising a divorce action for over two years after learning of the wife's adultery, during which period the wife formed a stable union with the co-defender by whom she had two illegitimate children. The Lord Ordinary refused the pursuer's motion for expenses, but the First Division held that:

'... where adultery is established against a co-defender, and where he is proved to have known that the defender was a married woman, there is a strong basis in practice for awarding expenses against him in the absence of special circumstances justifying some other course.'¹²

The fact that the co-defender was not responsible for the breakdown of the marriage was held not to be a special circumstance relieving him of liability. This

¹¹1970 S.L.T. 116.

¹²*Ibid* per L.P. Clyde at p. 117.

criticism could be partially met by requiring the court to have regard to the degree of the paramour's responsibility for the breakdown, but this would lead to judicial post mortems on dead marriages which are undesirable for the reasons given at paragraph 34.

31. *Second*, while it is sometimes said that the co-defender by his adultery places the husband under the necessity of raising a divorce action, clearly such an argument goes too far. A spouse is not *forced* to raise a divorce action by the other spouse's adultery. There will be many cases where the action is raised because the pursuer wishes to be free of the marriage, often so that he or she can remarry. It is arguable that the pursuer should pay for his expenses or, at least, that he should not be allowed to complicate matters by trying to recover from a third party. This argument would become even stronger under a reformed divorce law since, in many situations, one party to a marriage could avoid such expense by awaiting proceedings at the instance of the other party.

32. *Third*, the two preceding arguments in paragraphs 30 and 31 above will gain added force if the principle of breakdown is introduced as the sole ground of divorce in place of the matrimonial offence. As we noted in paragraph 4 above, the proposed new law of divorce acknowledges the complexity of the causes of breakdown: the paramour's adultery is recognised as a symptom of a breakdown which may well have other causes. We have also noted that this has implications for the patrimonial consequences of divorce, and this includes the paramour's liability for expenses as well as his liability for other forms of patrimonial loss and for solatium.

33. *Fourth*, even against the background of a fault-based and unreformed divorce law, the paramour's liability for expenses has been criticised. The Faculty of Advocates, in their representations to us, argued that it:

'seems illogical that a paramour should have to pay the expenses of an action which is caused in law by the defender's adultery, i.e. the defender's wilful offence against the marriage. (Again, if the adultery were against the wife's will, then it is submitted that divorce proceedings against her should not be competent since she had no *mens rea* to commit the matrimonial offence). The offence lies in the wife's associating with another man who is not a party to the marriage. The paramour is, in effect, merely the means whereby she committed the offence.'

34. *Fifth*, another argument stems from the inequity, already noted in paragraph 30 above, of unloading liability for the expenses of divorce on one co-defender when other people, including the spouses, other paramours and even relatives or associates, may be equally or more responsible for the breakdown. The unjust anomalies in the present law were well described by Dr. Clive in his comments on our Memorandum:

'Why should only the pursuer be able to bring in the co-defender? If a wife with separate estate is the defender in a divorce action and her view is that she was seduced by her paramour, from whom she has become estranged, why should she not be able to bring him in as a co-defender so that he can bear his share of the expenses? To deny her this right is to limit the application of the principle that he who causes the expense should pay for it. To

allow her this right is to increase the risk of complications and expense in divorce actions. The argument may be carried further. Should one co-defender not be allowed to bring in other paramours so that all may bear their proper share?

The answer to these questions must clearly be negative. To allow both of the spouses and (if there is more than one paramour) all the paramours to allocate responsibility for the breakdown would often conflict with one of the main objects of the new divorce law—which is to prevent unnecessary judicial post mortems on dead marriages so that those marriages can be buried with the maximum decency and dignity and the minimum bitterness and hostility.

35. *Sixth*, we have already noted at paragraphs 22 and 23 above the injustices and anomalies which can occur if the paramour's liability for the expenses of divorce proceedings is treated for legal aid purposes as a liability for expenses in the ordinary way rather than as a delictual liability. These defects would disappear if the paramour could not be cited to appear and was liable on the ordinary principles of expenses.

Our proposals

36. To sum up, the present law is an unsatisfactory mixture of principles appropriate to delictual claims and rules of practice or guidelines appropriate to judicial awards of expenses. To restore clarity to this confused branch of the law and to remove its anomalies and injustices, we recommend that *it should no longer be competent for a husband to cite his wife's alleged paramour as a co-defender in an action of divorce*. (Recommendation 2). We further recommend that *the liability of the paramour to pay the expenses of a divorce action should no longer be treated as an element in a delictual claim for damages, but, where in any action of divorce, separation or aliment, the paramour of a spouse enters the process as party-minuter, he or she should be held liable for expenses only on the normal principles governing awards of expenses in civil litigation* (Recommendation 3). In other words, expenses would normally follow success and the paramour would only be liable for expenses arising from his or her intervention in the action. From these two proposals it follows that *section 7 of the Conjugal Rights (Scotland) Amendment Act 1861 should be repealed*. (Recommendation 4). Indeed, that section (unless it were amended) would appear to be deprived of all content by the proposed change in the law of divorce,¹³ since the section refers to an 'action of divorce for adultery',¹⁴—wording which does not seem apt to cover divorce for breakdown of the marriage.

Connected problems

37. Two problems connected with the abolition of the paramour's liability merit further attention.

38. *Alleged paramour's right of intervention*: The first relates to the right of a person who is alleged to have committed adultery to intervene in a process in order to contradict the allegation. In the Court of Session, a third party who is alleged to have committed adultery founded on by a pursuer or by a defender

¹³See paras. 3 and 4 above.

¹⁴See para. 20 above.

in their respective pleadings may apply to the court to be sisted as a party to the action.¹⁵ The application is made by lodging a minute craving leave to be sisted and, if the application is successful, the applicant enters the process as party-minuter. The Rules of Court also give the judge a power (not a duty) to order intimation of the action to a person with whom a party to the action is alleged to have committed the adultery founded on in the action or defences.¹⁶ These rules apply not only in divorce actions but (in contrast to section 7 of the 1861 Act) to actions of separation and adherence, and also to actions of aliment.¹⁷ Under Rule 174 of the Sheriff Court Rules, where adultery is stated as a ground of action or defence in any action in the sheriff's ordinary court, the sheriff cannot allow proof unless intimation is made to the alleged paramour or his or her address is unknown.¹⁸ There is no similar provision, however, requiring intimation where adultery is alleged in an action of interim aliment between spouses in the sheriff's small debt court or under the new summary cause rules.

39. We think that these safeguards are necessary partly to allow an alleged paramour to clear his or her name and partly because findings of adultery are admissible, and raise a rebuttable presumption of the facts to which they relate, in subsequent civil proceedings,¹⁹ e.g. an action of affiliation and aliment. We recommend therefore that *the existing procedural safeguards entitling an alleged paramour to receive intimation of an allegation of adultery, and to enter the process to contradict the allegation, should be preserved. Consideration should be given by the competent authorities to the extension of these safeguards to actions of interim aliment between spouses under the new summary cause procedure.* (Recommendation 5).

40. *Awards of expenses as between spouses:* As we have already noted at paragraph 28, the problem of awards of expenses as between spouses is closely associated with awards of expenses against a co-defender. For the extension to a wife of a claim for expenses against the woman with whom her husband had committed adultery would be pointless if a husband is liable for his wife's expenses, win or lose. The Law Society of Scotland submitted in their representations that the husband's liability for his wife's expenses is anachronistic and should be abolished. The Faculty of Advocates considered that if:

'Scotland is . . . to make the concept of irretrievable breakdown the basis for divorce rather than the matrimonial offence, . . . the opportunity should be taken to dispense with claims for expenses against paramours at that time, and also to review completely the system of expenses as a whole in consistorial cases, and bring it more in line with the treatment of expenses in ordinary actions.'

The abolition of the co-defender's liability will remove one legislative barrier to the introduction of a new approach to expenses. The problem, however, is wider

¹⁵R.C. 161(a). The rule does not apply where the allegation relates to sodomy, bestiality or other crimes.

¹⁶R.C. 161(c). ¹⁷R.C. 154 (b).

¹⁸We understand that in practice the sheriff orders intimation to an alleged paramour in actions of interim aliment even though, since the amendment in 1963 of Rule 23 of the Sheriff Court Rules, proof is no longer required in such actions.

¹⁹Law Reform (Miscellaneous Provisions) (Scotland) Act 1968, s.11.

than consistorial cases. As we have pointed out elsewhere,²⁰ the rule applies not only between husband and wife and not only in consistorial cases. In so far as the rule is founded on the view that the expenses of litigation are necessities for the provision of which an alimentary obligant is liable, it applies to all litigation involving an alimentary obligant and dependant. In our Memorandum No. 22, we therefore advance a tentative proposal for the abolition of the necessities rule²¹ and this would remove a further barrier to a new approach to expenses. Insofar as the necessities rule is part of the law of aliment, it may require legislation by Parliament to amend that rule. Moreover, the Court of Session, acting on the advice of the Rules Councils, has extensive powers as rule-making authority for that Court and the sheriff court to regulate expenses by act of sederunt. We venture to suggest therefore that *consideration should be given by the competent authorities to the question whether the court's discretionary power to award expenses in consistorial, alimentary and other litigation involving alimentary obligants and dependants should be exercisable on the normal principles obtaining in civil litigation.* (Recommendation 6).

PART IV: DAMAGES FOR ENTICEMENT

The existing law

41. In our Memorandum No. 18, we also examined the action of damages for enticement. We showed that there was considerable doubt on the question whether the action is competent under the law of Scotland. The ground of the action is not adultery, which need not be established, but simply the inducement of a spouse (whether husband or wife) to leave the other spouse.

42. While some textbook authorities in Scotland recognise the competency of an action of damages for enticement,¹ there are few reported cases in this field. The first is *Duncan v. Cumming*² where a husband sought to recover damages in an action styled an action *injuriarum* against his wife's father 'on account of his instigating and enticing and encouraging his daughter to desert and abandon the pursuer her husband and harbouring her in his house after she had deserted him'. The concluded view of the Court of Session does not, however, appear in the report of the case.

43. The second reported decision is *Adamson v. Gillibrand*³ where a husband brought an action of damages against his mother-in-law alleging that she had by illegal and improper acts and practices caused his wife to desert him and remain in desertion without good cause. The Lord Ordinary dismissed the action on the ground that the pursuer's averments were irrelevant. He took the opportunity, however, to set out a series of propositions which appear to have been derived mainly from the English authorities cited in the action. A subsequent case in the sheriff court, *McGeever v. McFarlane*,⁴ concerned the right of a wife to seek

²⁰See our Memorandum No. 22 on *Aliment and Financial Provision*, para. 2.110.

²¹Proposition 23 at para. 2.110.

¹Fraser, *Husband and Wife*, (2nd ed.; 1878) p. 1203; Walton, *Husband and Wife*, (3rd ed.; 1951) p. 282; Walker, *Delict* (1966) pp. 714-716; contrast the sceptical treatment in Clive and Wilson, *Husband and Wife* (1974) pp. 280-281.

²(1714) 5 Broun's Supplement 104.

³1923 S.L.T. 328

⁴(1951) 67 Sh. Ct. Rep. 48.

damages for the enticement of her husband. Relying on English authority, both the sheriff-substitute and the sheriff-principal accepted that a wife was entitled to damages from a woman who by artifices induced her husband to leave home and give up his wife.⁵ While both judges accepted the competency of the claim, they held that it was irrelevant in the circumstances.

44. The position, accordingly, is that there is no recorded instance of damages being in fact awarded for enticement and no wholly satisfactory authority for the existence of this right of action in Scotland.⁶ In England, the corresponding right of action was abolished by section 5 of the Law Reform (Miscellaneous Provisions) Act 1970. For some time before that Act, the English courts had shown a distinct tendency to narrow the scope of the action by saying that it involved 'the deliberate break-up of marriage',⁷ that it did not lie against parents-in-law,⁸ and that such actions were 'no more than legal fossils incapable of further growth beyond the point which binding precedent compels us to acknowledge that they had already reached'.⁹ They were declared by statute not to survive for the benefit of, or against, the estate of either party. Their abolition was recommended successively by the Lord Chancellor's Law Reform Committee¹⁰ and by the Law Commission for England and Wales.¹¹

Consultation and Proposals

45. In our Memorandum No. 18, we invited comments on the question whether actions of damages for enticement should be allowed in future in Scots law. We argued that such actions are an anachronism in the present social climate and fulfil no useful purpose. They are officially discouraged, as legal aid is not available.¹² They are anachronistic because they imply that one spouse has a species of proprietary right to the society of the other. They fulfil no useful purpose both because the remote chance that such an action may be raised is not a serious deterrent to a third party who wishes to persuade one spouse to leave the other and because success in the action is more likely to persuade the enticed spouse to remain apart than to rejoin the other. Such an action would be likely to increase the bitterness between those involved. They are objectionable on that account and also because there is a danger that they may be raised for reasons of mere spite. We therefore suggested provisionally in our Memorandum that the action should be declared incompetent.

46. With only one exception, all of those who submitted comments on our Memorandum, including the bodies representative of the legal profession, agreed with our provisional views that such actions should be abolished, if they exist. We therefore recommend that *the action of damages for enticement of a spouse should be declared by statute to be incompetent* (Recommendation 7).

⁵Cf. Walton, *Husband and Wife*, (3rd ed.; 1951) p. 282.

⁶The Court of Session Act 1825, section 28 (which enumerates certain causes as appropriate for jury trial) refers to actions of damages on account of seduction or adultery but does not refer to actions of damages for enticement.

⁷*Winchester v. Fleming* [1958] 1 Q.B. 259 per Devlin J. at p. 266.

⁸*Gottlieb v. Gleiser* [1958] 1 Q.B. 267.

⁹*Pritchard v. Pritchard and Sims* [1967] P. 195 per Diplock L. J. at p. 209.

¹⁰Eleventh Report, Cmnd. 2017.

¹¹*Report on Financial Provision in Matrimonial Proceedings*, Law Com. No. 25 (1969) para. 101 and App. II, paras. 132 and 133.

¹²Legal Aid (Scotland) Act 1967, Sch. 1, Pt. II.

PART V: SUMMARY OF RECOMMENDATIONS

	<i>Para.</i>	<i>Page</i>
1. Statutory provision should be made abolishing the right of a husband to obtain from his wife's paramour damages for patrimonial loss arising from the adultery (other than the expenses of a divorce action—see Recommendations 2 to 4 below), and solatium.	17	6
2. It should no longer be competent for a husband to cite his wife's alleged paramour as a co-defender in an action of divorce.	36	13
3. The liability of a paramour to pay the expenses of a divorce action should no longer be treated as an element in a delictual claim for damages, but, where in any action of divorce, separation or aliment, the paramour of a spouse enters the process as a party-minuter, he or she should be held liable for expenses only on the normal principles governing awards of expenses in civil litigation.	36	13
4. As a consequence of the two preceding proposals, section 7 of the Conjugal Rights (Scotland) Amendment Act 1861 (which relates to the citation of a co-defender and delictual claims against him for expenses) should be repealed.	36	13
5. The existing procedural safeguards entitling an alleged paramour to receive intimation of an allegation of adultery, and to enter the process to contradict the allegation, should be preserved. Consideration should be given by the competent authorities to the extension of these safeguards to actions of interim aliment between spouses under the new summary cause procedure.	39	14
6. Consideration should be given by the competent authorities to the question whether the court's discretionary power to award expenses in consistorial, alimentary and other litigation involving alimentary obligants and dependants, should be exercisable on the normal principles obtaining in civil litigation.	40	15
7. The action of damages for enticement of a spouse should be declared by statute to be incompetent.	46	16

APPENDIX A

LIST OF PERSONS WHO SUBMITTED COMMENTS ON MEMORANDUM No. 18

1. Association of Sheriffs Principal.
2. Dr. E. M. Clive, University of Edinburgh.
3. Lord Dunpark.
4. Edinburgh Marriage Guidance Council.
5. Faculty of Advocates.
6. Professor W. M. Gordon, University of Glasgow.
7. Law Society of Scotland.
8. Professor M. C. Meston, University of Aberdeen.
9. Scottish Law Agents' Society.
10. Sheriffs' Association.
11. Society of Writers to Her Majesty's Signet.
12. Professor D. M. Walker, University of Glasgow.

APPENDIX B

COMPARATIVE SURVEY OF OTHER LAWS

In *England and Wales*, at common law the husband of a woman who had committed adultery could obtain reparation in an action of criminal conversation. It was unnecessary to prove loss of consortium, and a wife had no corresponding right to claim damages for her husband's paramour. The action of criminal conversation was abolished by the Matrimonial Causes Act 1857, section 59, and in its place section 33 of the Act gave a husband (but not a wife) a statutory right to claim damages from the paramour in a petition for divorce or judicial separation on the same principles as had previously applied in the common law actions for criminal conversation. The new law was subsequently examined by the Gorell Report in 1912¹ and the Morton Report in 1956,² but the relevant recommendations for modernisation of the proceedings, including the extension of a corresponding right to the wife, were not implemented. Following a report by the Law Commission, however,³ damages for adultery, together with *inter alia* actions of damages for enticement, were abolished as from 1 January 1971 by sections 4 and 5 of the Law Reform (Miscellaneous Provisions) Act 1970. The court may, however, make an order awarding costs against the co-respondent in exercise of its general statutory powers to award costs.⁴

¹*Report of the Royal Commission on Divorce and Matrimonial Causes* (1912) Cd. 6478, paras. 393 to 395.

²*Report of the Royal Commission on Marriage and Divorce* (1956) Cmnd. 9678, paras. 429 to 435, 438 to 447, and Recommendations (46) to (50).

³*Report on Financial Provision in Matrimonial Proceedings* (1969) Law Com. No. 25.

⁴Rayden on Divorce (12th ed.; 1974) p. 1244 and p. 1255 *et seq.*

In *Australia*, the Commonwealth legislature got rid of one of the worst defects of the law on damages for adultery by extending a corresponding right to wives,⁵ thereby removing the element of sex discrimination. Subsequently the Family Law Act 1975⁶ abolished the action together with the action of damages for enticement of a spouse. In *New Zealand*, claims for damages by either spouse against the other spouse's paramour are competent in divorce or separation proceedings.⁷ In *Canada*, the Divorce Act of 1968, which enacted a Federal law of divorce applying throughout Canada, does not affect provincial laws governing matrimonial causes other than divorce and, accordingly, claims for damages for adultery and enticement continue to be available.⁸ In some provinces, the common law action of criminal conversation survived (e.g. Ontario) while other provinces enacted legislation on the model of the English 1857 Act (e.g. British Columbia).

In the *United States of America*, actions of damages for adultery and enticement and other actions of damages alleging sexual misconduct have been abolished in a number of states (at least 18) by what have been called 'anti-heart balm statutes'.

⁵Matrimonial Causes Act 1959, s. 44.

⁶(No. 53 of 1975) s. 120.

⁷Matrimonial Proceedings Act 1963, s. 36.

⁸*Anderson v. Anderson* (1970) 12 D.L.R. (3rd) 521.

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