IX WO WOTHERSPOON, R. Enticement: the marketable vice - a case note on Shelbourne v. Watt.

ROBERT WOTHERSPOON

ENTICEMENT: THE MARKETABLE VICE - A CASENOTE ON SHELBOURNE v WATT

Submitted for the LL.B. (Honours) Degree at the Victoria University of Wellington.

27 AUGUST 1980

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I INTRODUCTION

The case of Shelbourne v Watt[1] recently focused judicial attention on the long recognised but seldom utilized tort of enticement of a spouse. There are indications that New Zealand in 1980 is finding this remedy increasingly useful in our restructured family law field. This case-note will attempt to outline the history of the tort both in England and in New Zealand as developed by the common law and legislation. It will also attempt to analyse the particular effect which Shelbourne's case has had and may have in this hitherto rarely litigated area of law. It is also the writer's intention that this paper provoke consideration on a broader level of the function that the tort should play (if any), in the current scheme of New Zealand family law. To this end some analysis of the Matrimonial Property Act 1976 and the Family Proceedings Bill (No. 2) 1979 will be of undoubted benefit. It is submitted that the tort of enticement has lost to a significant degree its raison d'étre in New Zealand law due to both changes in conceptions of the marriage relationship and a changed emphasis in the law of domestic relations. Both of these factors will be considered in detail. The practical difficulties in retaining the action in New Zealand will also be considered as will the problem that Shelbourne's case raises regarding the function of the law of tort in the area of marital offences.

II THE HISTORY OF THE ACTION

(i) England

Enticement is a cause of action which has existed for many centuries. It derived from the old action on the

case of per quod consortium amisit[2]. The action was founded (or at least justified) on the principle that the violation of a legal right committed knowingly is a cause of action[3]. In essence enticement allowed a husband to recover damages from a third person who enticed, induced, incited, persuaded or procured that person's spouse to leave him. Enticement required that this absence was of a continuing not a temporary nature[4].

The action was first established in the case of Winsmore v Greenbank[5]. In that case Lord Chief Justice Willis, while recognizing the novelty of the action held that when a third party without lawful justification persuaded another man's wife to leave her husband then the husband could recover damages by way of an action for enticement. At this time marriage was seen more strongly as a life union and no divorce was available except by Act of Parliament. The action was a recognition by the common law of a husband's proprietory interest in the person of his wife. The law's attitude to enticement and the marital relationship is summed up very well in McCardie J's judgment in Place v Searle:[6]

> "Broadly speaking it was the view of lawyers and of the law in the middle of the eighteenth century that the property of a woman became her husband's on marriage; that her body belonged to him, that he could

> restrain her liberty at his pleasure and that he could administer physical correction at his discretion, subject of course to the rule of moderation. She was his creature and his possession. She was debarred from suffrage. She was excluded from the professions."

The common law in this way reflected closely the social values of a country governed by the dominant male. The position of the wife in the household was that of a valuable and superior type of servant. The damages were recovered for loss of service and loss of consortium[7]. Adultery, though closely linked with enticement in practical terms, was unnecessary for recovery.

A notable feature of the action for enticement is its rare appearance in the law reports. The English experience shows that it did not seem to fill a very pressing need. From 1745 to 1904 there were only two reported cases. The next appeared in 1923[8] and there have been only a few since then.

The tort of enticement required some form of positive inducement, incitement or persuasion before there could be liability. The case of Smith v Kaye[9] established that reasonable advice given to the wife which encouraged her to leave her husband, if the advice had been requested by her and given in good faith, would not attract liability. The case of Place v Searle[10] followed in 1932. At first instance McCardie J. ruled that it was

necessary to show that the wife's will was overborne by the stronger will of the defendant. This was rejected on appeal by Scrutton L.J. who said: "The test must be whether something has been done which but for the interference of the defendant would not have been done".

The enticement complained of therefore must have been a substantial cause in the spouse leaving the plaintiff. The law could have been summarized thus:[11]

> "Enticement consists ..... is deliberately inducing a wife to leave her husband with knowledge of her marital status and intent to interfere with the spouses mutual duty to give consortium to one another. The interloper may have employed persuasion, inducement or enticement but it is by no means necessary that his was the stronger or over-bearing personality. More advice however is not actionable."

Enticement has traditionally occurred between a spouse and a lover or suitor. Yet in Gottlieb v Gleiser[12] the question was whether a mother-in-law was liable at the suit of the husband for enticing his wife. Denning L.J. (as he then was) after denouncing enticement as an anamalous tort refused to extend it to this novel situation. This was done notwithstanding the case of Smith v Kaye[13] which involved a brother and brother-in-law who were both found liable for suit for enticement. The case of Philp v Squire[14] also involved enticement by a relation of the spouse. It may also be that a spiritual adviser or a sect leader who induced a spouse

to have the matrimonial home was liable[15]. It is submitted that Denning L.J's approach in refusing to extend the enticement action demonstrates the disapproval which the common law had for the enticement action. The action therefore was only available to a lover unless coming within the specific facts of the anomalous cases mentioned above.

Originally the action lay only at the suit of a husband. A wife was unable to avail herself of this remedy due to procedural difficulties, particularly the need for joining the husband as plaintiff. This was extremely unlikely as a husband would be naturally reluctant to sue his own mistress. Furthermore any damages received would become the husband's property in any event. The right to bring an enticement action was extended to a wife by the case of Gray v Gee[16]. This view was rejected in the Australian decision of Wright v Czedich[17] (Isaacs J. dissenting) on the basis that a wife's right to the consortium of her husband was of a different nature from her husband's right. Her right, it was held, was not capable of financial calculation as it only consisted of a husband's comfort and attention. The wife's consortium however excluded the conduct of the household and the education of children, being of material value and therefore capable of a monetary estimate. This case, thankfully, stands as the only dissentary voice in the wilderness.

Clearly social mores change over time. What is seen as acceptable in the social context of one generation may be repugnant to a later one. What is noticeable upon reading the English enticement cases since Gray v Gee[18] is an almost universal criticism of the action as being anomalous and anachronistic[19]. This widespread judicial hostility doubtless played some part in encouraging the Law Commission to study the merits of the action.

In 1963 the Law Reform Committee recommended the general abolition of the actions for enticement and harbouring[20]. However no legislative action was taken to implement this report. In 1967 the Law Commission released a Working Paper[21] which tentatively called for the abolition of the enticement action. No such hesitancy was apparent a year later in Working Paper No. 19 on Loss of Services[22] in which the total abolition of the action for enticement was proposed. The English Law Commission in its Report on Financial Provision in Matrimonial Proceedings[23] recommended that the action be abolished. This recommendation found legislative expression in the Law Reform (Miscellaneous Provisions) Act 1970[24]. No such clear resolution has yet occurred in New Zealand.

(ii) New Zealand

Actions for enticement in New Zealand have been very rare. The Tort and General Law Reform Committee[25] in 1968 evaluated the

action's usefulness and recommended its retention. It suggested that the action for damages for adultery be abolished but that it was just to retain the action for enticement where a third party had been instrumental in causing one spouse to leave the other.

It is submitted that the Report[26] gives few positive reasons why the tort should have been retained. It seems more concerned with dispelling a multitude of criticisms of the action than giving any compelling justifications. The Committee's recommendations may be summarized thus:

1. That the action be freed from its historical connection with the loss of service of the wife. (That Parliament should enact a section similar to section 22 of the Evidence Act 1908[27]).

2. That the action be available to a wife.

3. That a legislative provision should allow the settlement of damages for the benefit of the children of the marriage affected.

4. That the publication of court proceedings be restricted.

5. That divorce proceedings and an enticement action be brought separately. The Committee felt that the compulsory joinder of these would tend to delay and complicate proceedings. By its recommendation divorce proceedings based on adultery would most likely be brought and disposed of before the enticement action is brought[28].

6. That just cause or reasonable grounds of belief (that the wife was not married) should be defences to the action.

These recommendations in part were incorporated in the Domestic Actions Act 1975. The Act gave no exhaustive definition of what enticement consists of and so the common law as outlined is still relevant in determining whether enticement has occurred[29].

Section 3(2) of the Act freed the action from its historical connection with loss of services by stating that it is not necessary to prove that the plaintiff's spouse was at any time in the service of the plaintiff or that the plaintiff has suffered loss of services by reason of the defendant's inducement. Section 3(5) allowed wives to bring enticement actions. There appears to be no implementation of the recommendations regarding: the settlement of damages for the children's benefit; the restriction on publication of proceedings; that divorce

and enticement proceedings be brought separately or that just cause or reasonable belief are defences to the action.

The first New Zealand case on enticement reported was Spencer v Relph[30]. In that case the appellant and his wife had been married for thirty-two years and had twelve children when the appellant's wife went to live with the respondent. She was persuaded to return to the appellant but soon left to reside again with the respondent. Wild C.J. at first instance held that the wife had not been enticed. In the Court of Appeal the relevant authorities were exhaustively canvassed by North P. and the finding of Wild C.J. was affirmed.

In the final analysis such a finding rests on questions of the credibility of the parties. The Court of Appeal was not prepared to substitute a positive finding for the negative finding of the Chief Justice. Clearly the Court was not prepared to extend the scope of the enticement action beyond the particular applications approved in earlier English decisions.

It is submitted that proof of enticement is difficult in a society whose standards of acceptable conduct are more permissive than the standards applied a century ago.

At this stage damages for the action would normally be compensatory in character. It is suggested that the size of damages in some earlier English cases[31] suggests that punitive damages may have been included in this assessment. Since 1964 however and the case of Rookes v Barnard[32] it is clear that punitive damages would not be awarded. Aggravated damages may have been awarded to protect the personality interests of the plaintiff.

In summary, Inglis,[33] it is submitted, has stated five aspects which described the nature of the action for enticement at this stage:

1. Some affirmative action on the defendant's part[34].

2. The tortious conduct must be directed at the marital relationship.

3. The action is unlikely to succeed if the wife is separated from or in desertion from her husband at the time of the alleged enticement[35].

4. Questions of privilege may arise[36].

5. The will of the wife need not be overborne by the stronger will of the defendant.

The decision of Spencer v Relph[37] does little but restate the principal elements necessary for enticement as expounded in the earlier English authorities.

In 1975 the Domestic Actions Act was passed. The case which followed this in 1978 was Shelbourne v Watt.

III SHELBOURNE v WATT

(i) The Facts

The respondant (Mr Watt) and his wife, (Mrs Watt) had been married for five years and had one child. Though there was some marital unhappiness Chilwell J. described the marriage as "outwardly happy and inwardly worthwhile and more than bearable". He added that the wife had no good reason for leaving her husband. The defendant, (Dr Shelbourne) and Mrs Watt met in July 1976. Mrs Watt became increasingly attracted to the appellant and concerned for her own marriage. The relationship developed and in August 1976 Mrs Watt told her husband that she was in love with Dr Shelbourne. After some discussions Dr Shelbourne and Mrs Watt agreed not to see each other. However on October 4 Mrs Watt telephoned Dr Shelbourne and as a result Mrs Watt decided ultimately to live with him. After Mr and Mrs Watt had discussed the situation with both sets of parents it was agreed that Dr Shelbourne would not see Mrs Watt for six months in order that

WO WOTHERSPOON, R. Enticement: the marketable vice - a case note on Shelbourne v. Watt.

the Watts could sort things out. On October 8 Mrs Watt returned to her husband. At the suggestion of a marriage guidance counsellor Mrs Watt was allowed to visit Dr Shelbourne again. According to Dr Shelbourne's evidence by this time he had told Mrs Watt that he eventually wished to marry her but wanted to take up a de facto relationship as marriage was impossible for a few years.

Mrs Watt separated from her husband on November 1 and went to live with her parents, refusing to return to her husband. She continued to see Dr Shelbourne and in December 1976 decided to live with him. In January she moved into her own flat but in March began living permanently with Dr Shelbourne.

Divorce proceedings ensued at the initiative of Mrs Watt. Mr Watt came to accept this as inevitable, however his increased financial burden consisting of increased household expenses and the "carve-up" of the joint family home under the Matrimonial Property Act 1976[38] he treated with less resignation. Enticement proceedings were brought seeking $30,000 by way of compensation for these losses. The action was heard in the Supreme Court at Rotorua[39] by Chilwell J.

(ii) The Supreme Court Decision of Chilwell J.

From the time when the defendant met Mrs Watt and started seeing her regularly, Chilwell J. held the view that the acts of

the defendant amounted to enticement, "because he [Dr Shelbourne] never resisted her dicisions to keep away because he knew she could not in the end abide them." Childwell J. held that the defendant procured Mrs Watt's leaving her husband by remaining always available to console and refused to get out of the way. It was on this basis that Chilwell J. considered the tort of enticement to be proved.

He further held that present social standards of association between the sexes were only relevant to the assessment of damages and were irrelevant to the question of whether enticement had occurred. This appears to be a much less restricted view of the action than the Court of Appeal in Spencer v Relph[40]. The case of first instance, if it had not been taken to the Court of Appeal would undoubtedly have led to an increase in successful enticement actions being brought. It is submitted that Chilwell J's view is unfortunate in its application to the facts in not demanding the necessary positive evidence of persuasion or inducement. This defect, given the judicial criticism the action has received in modern times[41] was not desired. Dr Shelbourne, it is said, was "waiting in the wings for his cue, well knowing his lines". Yet this is what the law allows. Some positive conduct of inducement is

required, mere inaction or remaining available to Mrs Watt cannot be said to fulfill this requirement. The law has never imposed a duty to reject the initiatives of the wife.

As to damages, Chilwell J. restricted these to the heads of loss of consortium and loss of services and held that the Domestic Actions Act 1975 was endeavouring to use as a measure for damages the state of the marriage at the time when the enticement took place. He did not consider the other heads argued for i.e. compensatory damages for injury to the plaintiff's feelings, or costs incurred through the generation of the Matrimonial Property Act 1976. Judgment was entered for the plaintiff and damages fixed at $3,000. Dr Shelbourne appealed the decision and in 1979 the Court of Appeal delivered its judgment.

(iii) The Decision of the Court of Appeal

The Court of Appeal judgment in Shelbourne's[42] case differs markedly from the decision at first instance. For the appellate court to overturn the views of a judge who saw and heard the three parties involved shows a strong divergence in attitude. The leading judgment of Richardson J. shows the emphasis of the court. After establishing the existence of the action, the learned judge went on to consider the problem raised of when the conduct of the enticer can be said to cause one spouse to leave the other.

Richardson J. isolated four aspects of this concept. First the inducement must be of a positive character. The enticer must set out to influence the spouse to leave. Secondly, the enticer must perform this act with the deliberate intention of breaking up the marriage. Thirdly, a causal link must be shown between the defendant's conduct and the departure of the spouse from the home. Fourthly was the question of whether changing social attitudes can be said to affect the tort. Given that there are more relaxed codes of behaviour between men and women today and a greater freedom to form relationships outside the home of a social or business nature, does this make the ingredients of the tort as described above more difficult to establish? Richardson J. felt that the social mores clearly have an effect on ascertaining whether the ingredients of tort are present i.e. persuasive conduct, whether the defendant intended to break up the marriage and causation will all be interpreted in the light of current social mores. Once these factors were established however, "any assumptions as to social attitudes to the tort are irrelevant[43]".

In commenting on the tort in this way, it is submitted, the successful pursuance of this cause of action has become more difficult to establish in comparison to Chilwell J's more flexible interpretation at first instance. This is particularly

evident when the principles above are applied to the facts of the case. It was held that the relationship between Dr Shelbourne and Mrs Watt developed over an extended period of time. The attitudes of both were discussed at great length and as equals. The various periods of the affair were then considered with a view to ascertaining whether the four aspects outlined above were satisfied. At first it is clear that in view of the doctor's willingness to agree not to see Mrs Watt for six months it would be unreasonable to conclude that at that stage Dr Shelbourne was trying to induce her to leave her husband. It was at Mrs Watt's initiative that they both began seeing each other for the second time. This falls short of the encouragement which is necessary to establish the tort. Dr Shelbourne's availability to console or his willingness to receive Mrs Watt was held not sufficient. The judge felt that on the face of it the conduct of Dr Shelbourne does not convey the impression of a man seeking to impose his views on a woman and to lure her away from her husband.

Chilwell J. commented that Shelbourne was waiting in the wings - well knowing his lines,[44] yet the Court of Appeal considered this conduct was not tortious in that it lacked conduct of an active character amounting to deliberate persuasion.

(iv) The View of Cook J.

Cooke J. chose to apply the law as it was stated in Spencer v Relph[45]. He rejected the argument that the defendant's action need be only a dominant cause of the spouse leaving and held the conduct alleged must be a substantial cause. This must of course be ascertained with reference to current social conditions. In evaluating Chilwell J's findings of first instance, he comments:[46]

> "The language chosen: waiting, biding time, remaining available to console, knowing that in the end she could not abide her decisions to keep away, refusing to get out of the way, suggest that the judge felt constrained to find something less than would satisfy the settled test and what he labels inducement may have been in truth no more than willing co-operation."

It is in applying these views to the facts that the effect of this judgment is appreciated. Cooke J. suggests that Mrs Watt's marriage was under strain but would have lasted if Dr Shelbourne had not appeared. Cooke J. considered that Dr Shelbourne's availability to Mrs Watt was allowed by the law. For enticement to be established more positive conduct on the defendant's part is required. An inference of a subtle encouragement of Mrs Watt is the most that is suggested at first instance. Chilwell J. linked this factor with a suggestion that it was Dr Shelbourne's duty to discourage the younger woman. Cooke J. held that the law does not impose this duty on the defendant and hence the appeal was allowed.

Richmond P. briefly stated his concurrence with the previous judgments.

(v) The Effect of the Decision

Chilwell J's judgment is clearly more advantageous to the plaintiff in an enticement action. It imposes a duty to dissuade the "enticed" spouse. This goes beyond the tort of enticement as it has been described above, which requires conduct of a positive nature, causative in the marital break-up. This tort imposes no duty to dissuade but merely not to induce, persuade or incite. Clearly Chilwell J's views were not adopted by the Court of Appeal when the old rules were laid down and clarified with undoubted stringency severely limiting in comparison with Chilwell J's judgment the occasions when a plaintiff will succeed in this action. Positive words or inferences of enticement, substantially causative in the martial break-down must now be shown. In addition, the elements of the tort must be established with regard to the current levels of permissiveness and changing levels of association between the sexes. In applying these principles to the facts in Shelbourne[47] it is evident that both judges were reluctant to find evidence of enticement. Clear words or inferences of persuasion were required. This restated strict view seems to owe more to the precise enforcement of the rules than to any change in the rules themselves.

Shelbourne's[48] case was recently followed in Howard v Aldridge[49]. A long married

couple with a grown-up family was involved. Mrs Howard had a history of psychological illness. Mr Howard, the plaintiff, after suffering an illness, found his wife in a compromising situation with Aldridge (the defendant), a man he had known for years in the district. Mrs Howard soon left to live with Mr Aldridge and the plaintiff sued for enticement. In a hearing before a jury, judgment was entered for the plaintiff and damages assessed at $5,000. On a motion for non-suit McMullers J. found for the defendant. In so doing he based the decision on the principles outlined in Shelbourne's[50] case. He clearly felt the same reluctance to hold the tort established without strong, positive evidence of inducement and the need for the tortious conduct to be a substantial cause in the marriage break-down. It is clear that the jury in this case felt sympathy for the plaintiff who had, in middle age, through no fault of his own, suffered a complete change of life-style. This was due to the equal division of matrimonial property under the Matrimonial Property Act 1976[51] and the necessity to sell his business due to increased expenses. This however, though deserving sympathy was considered beyond the power of the court to rectify.

A very recent enticement case appearing in New Zealand is Duke v Symonds[52]. This case involved a doctor allegedly enticing the wife of a storeman clerk. The High Court

applied the Court of Appeal judgment of Richardson J. in Shelbroune[53]. The issue to be resolved by the court was whether Dr Symonds used positive enticement or persuasion in order that Mrs Duke leave her husband. On the evidence it was apparent that Dr Symonds "made the moves" and there was little prospect that Mrs Duke would leave of her own accord[54]. On the facts of the case Dr Symonds had asked Mrs Symonds to live with him despite her initial reluctance and hesitation and this was positive evidence required to establish the tort. Damages were assessed by the jury at $26,000, an extraordinarily high amount and one which appears to be affected more by the financial standing of the defendant and the jury's moral disapproval of his conduct than actual loss of service and consortium. This case also made headlines in Truth[55] high-lighting the highly distasteful mud-slinging that occurs in these actions and serving as a further reminder of the humiliating process for all concerned which an action of this sort has become.

Another recent case of Hartridge v Harvie[56] involved the "classic" case of the plaintiff's best friend enticing his wife. The damages were assessed at $17,500. This case took place before the appeal in Watt v Shelbourne and is of limited usefulness for our purposes. The case is interesting for comments made on the question of superior financial means on the part of the defendant

WO WOTHERSPOON, R. Enticement: the marketable vice - a case note on Shelbourne v. Watt.

and its relevance to damages. It was held by Mahon J. that if the superior financial means of the defendant were used to induce the wife to leave the plaintiff then this may increase damages. The facts disclosed positive evidence of inducement and the judgment reflects the views of Spencer v Relph[57]. It appears the future of the action while differing to Shelbourne's[58] case is still very much alive. We turn now to the broader aspects raised by the decision of Shelbourne[59].

IV THE FUNCTION OF THE LAW OF TORT

Tort law exists primarily to compensate an injured person. This is achieved by compelling the tortfeasor to pay, usually in financial terms for the damage he has caused[60]. The punishment of the tortfeasor or his stigmatization for immoral conduct is outside the realm of this body of law. Thus it is important when evaluating the action for enticement not to confuse these aims. The plaintiff's actual and potential loss is what concerns the law. The Domestic Actions Act 1975 section 3(4) compensates the plaintiff in enticement only for loss of services and loss of consortium. The despicable conduct of the defendant is not relevant. The court concludes a financial judgment not specifically a moral one. It is submitted that the law of torts is inadequate to compensate the injury suffered in an enticement case (i.e. often emotional harm is paramount) nor is it desirable that it do so. The comments of Lord Denning are relevant in this regard[61].

> "If a husband is to keep the affection of his wife he must do it by the kindness and consideration which he himself shows to her. He must put his faith in her, trusting that she will be strong enough to thrust away the designs of would-be lovers. If she is weak and false to her trust the harm done cannot be righted by recourse to law; nor is money any compensation. The only thing for the husband to do is to set to work as best he can to mend his broken life, a task in which these courts cannot help him."

The realm of tort has hitherto been restricted for the most part to compensate physical or financial loss and it is this harm that tort seeks to remedy.

It is submitted that even genuine enticement actions are often brought with purely mercenary or vindictive natures. It is becoming increasingly evident that it is impossible to compensate what is derisively known as "heartbalm":

> "That people of any decent instincts do not bring an action which merely adds to the family disgrace and no preventive purpose is served since such torts seldom are committed with deliberate plan."[62]

The formulated approach that the law of torts applies to solving disputes lies at the base of this criticism. The pattern that the law of negligence applies of: a duty, a breach of that duty, causation established and damage suffered, while appropriate to property damage seems less acceptable in the complex world of human emotions where causes are often difficult to ascribe and damage of some kind often pertains to both parties of the dispute.

This brief comment brings attention to the vast gulf between the enticement action and the more traditional tortious remedies of such as nuisance and negligence. It is hoped that this theme will be emphasised further as the inquiry progresses.

V PUBLIC POLICY

> "He that thinks a state can be steered by the same laws in every kind as it was two or three hundred years since, may as well imagine that the clothes that fitted him when he was a child should serve him when he is grown a man - the dispositions, educations, and tempers of men and societies change in a long trail of time and so must their laws in some measure be changed or they will not be useful for their state and condition."[63]

Should the tort of enticement be retained as reflecting good public policy? This question will be first dealt with on the level of principle. It is submitted that in evaluating the desirability of this action two conflicting aspects emerge.

First, it is said, the preservation of the family unit is basic to our society[64]. This preservation is in the interests of the parties themselves, the children of the marriage and society generally. Accordingly, a primary function of the law is to make it clear that, once established, the family relationship carries rights, duties and obligations which cannot be defeated or avoided easily. Thus the enticement action buttresses a marriage by providing a financial deterrent to those who interfere with the marriage relationship.

Against this is the view that it is also the law's function to make provision for those exceptional cases where a marriage goes badly wrong. The law must make adjustments to meet this change in circumstances. It is submitted that the enticement action deters the making of such adjustments. It forces unhappy partners to remain together by the threat of distasteful publicity and financial loss to the third party. The comments of Lord Gardiner

suggest a more enlightened approach to the problems of extra-marital relationships would be to abolish the action[65].

> "It will do no harm to a happy marriage to allow unhappy marriages to be decently buried; and their burial allow those unhappy spouses to enjoy in their turn the blessings of a happy married life."

Which of these alternative views is to be preferred? The original action for enticement was based on the barbaric notion that a husband had a quasi-proprietory interest in the person of his wife.

This notion is abhorrent today and was clearly abandoned as a basis for the action with the extension to the wife of the right to make a claim[66]. Over the centuries the law has changed from these antiquated views of the marriage relationship.

In today's society, it is submitted, the family no longer performs the range of social, educational, recreational and economic functions which it once did. In past times a marriage was preserved at all costs to transmit wealth and power in an orderly fashion. A marriage break-down threatened the orderly process of succession for legitimate offspring.

In today's society the family no longer performs these functions. The purpose of marriage has changed. The maternal, childbearing function is less important as is the role of the family as an economic unit. The ultimate result is that the primary purpose for maintaining marital and parental relationships lies in the value they have for the parties themselves. The need to preserve an unhappy union is no longer as pressing due to this reduction in the range of familial functions.

It is not suggested that the first view outlined above has been eclipsed, but rather that the present law places greater emphasis on the fulfillment of the two marriage partners[67]. Indeed, it is submitted, that the unfortunate effect of retaining the enticement action is that it may become a weapon which can be used to subject a spouse to continual matrimonial misery rather than allow that person the opportunity to start a new life. It was Chilwell J's judgment in Shelbourne's[68] case that the union between Mrs Watt and Dr Shelbourne was the more suitable and a happier relationship than her first marriage. Thus, it is submitted that in this way the enticement action has lost its raison d'être and that the action should be abolished.

Another criticism levelled at this action is the assumptions it seems to make about the human character. The definition of "entice" is to allure a person from a place (in this case the home). The action for enticement, it is submitted, assumes that the enticer's conduct is the sole damaging influence and thus the enticer incurs civil liablity. Liability is not incurred by the person who may have done most damage to the marriage. This spouse is the one who has the most knowledge of the marriage situation and who leaves the matrimonial home. It is suggested that society today places greater faith in the individual marriage partners to resist the attentions of their parties. A spouse can no longer be viewed as an empty-headed chattel whose will can be manipulated at the whim of a malicious Don Juan.

The cases where the action for enticement might be said to be warranted are very small. This is admitted by the Tort and General Law Reform Committee in its

report[69]. There are situations, in the Committee's view, where people would rightly consider it highly unjust if the law did not provide some remedy to a husband or wife whose home was disrupted by another man or woman. The case of a business partnership, where one spouse had a special skill was noted. This is obviously an exceptional circumstance and, it is submitted not adequate justification for keeping this tort. The small number of enticement actions brought adds empirical weight to the claim.

The reasoning of the Committee seems to include a "punitive" basis for retaining the action. It seems concerned with morality and the culpability of the defendant rather than any actual loss suffered. It is submitted that enticement of a spouse is likely to be a symptom rather than a cause of marriage failure.

It should be further noted that on the "usual" enticement case, without the complications of a business partnership; when actual loss has occurred this may be ameliorated by recourse to provisions in the Social Security Act 1964. The powers to make emergency payments in certain cases under section 61 of the Act will ensure no-one is left destitute. This "remedy" may appear small in value, but damages awarded in enticement cases, as has been seen, are usually small anyway.

IV PRACTICAL CRITICISMS OF THE ACTION FOR ENTICEMENT

Apart from these criticisms levelled on the basis of principle, there are other reasons, of a practical nature, why, it is submitted, the action for enticement should be abolished. In the Report of

the Tort and General Law Reform Committee[70] a number of these criticisms were evaluated. None was seen as justifying per se the abolition of the action in the eyes of the Committee. Nevertheless, it is submitted that they, along with the other reasons contribute to the overall undesirability of the action and thus deserve consideration.

One justification for the action is seen as the deterrent value which it has to play. It is alleged that spouses will be unwilling to indulge in extra-marital relationships if a claim for enticement may be brought. In practical terms, it is submitted, the effect of retaining this action is questionable. Damages awarded in the past have been relatively low and thus financial loss is unlikely to deter. From the plaintiff's view there is also the danger in this area of moving into the realm of fantasy in assuming that "in this day and age money can adequately compensate for such injury whereas mankinds experience is that it cannot"[71]. The damages awarded are not intended as punitive damages[72] and cannot in any way pretend to adequately reflect the real injury inflicted. The injury suffered is to a great extent to the emotions and is beyond monetary evaluation. To this extent the damage is beyond the scope of the law and must lie where it falls.

A claim for enticement is often difficult to establish. The plaintiff must show the initiative for causing his wife to leave him was taken by the third party. This may cause some difficulty as both the "enticed" spouse and the enticer may both contribute to the ultimate separation of the marriage partners. In addition to this, continuing loss of consortium by the plaintiff, of a permanent duration must be shown.

An enticement action may also be used as an instrument for blackmail[73]. Though this may equally be said of other tort actions, it is submitted that especially if there is collusion between spouses, the particularly distasteful and bitter nature of the claim, and the fact that there is no restriction on the publication of reports of the procedings[74] lends some weight to this criticism.

It is also generally supposed that this action is harder for a woman to succeed in[75]. In practice, it is submitted, that the law may be discriminatory due perhpas to juror's stereotypic thinking that a man is more likely to entice a woman than a woman entices a man. Certainly in New Zealand since the Domestic Action Act 1975 enticement has exclusively, to the writer's knowledge, the domain of the male as plaintiff, adding some empirical justification to this stereotype.

As has been pointed out the assessment of damages is a problem with enticement. Under the Act[76] only damages for loss of consortium and services are allowed. Yet the task of putting a monetary value on an erring spouse is notoriously difficult. It is submitted that in practice damages are often sought not for compensation as such but as a method of "getting back" at the unfaithful spouse or as a contribution for alleviating the losses suffered under the Matrimonial Property Act 1976[77].

The question of damages also raises an interesting paradox in that a husband suing for the enticement of his wife will get more on damages if she is proved to be of good character than if she is a "worthless" woman[78]. This logically follows from the view that as a wife-chattel the poor wife is of less value

to the husband than a good wife. A ridiculous situation which in effect discourages a good marriage relationship by rewarding the poor wife's lover and penalizing the good wife's lover.

The character trails of the parties may also undermine the value of the action. It is submitted that where a third party is an extrovert of "excludes charm, personality and warmth[79]" positive evidence of enticement may be more readily ascertained than if the alleged enticer was an introvert or of a more quiet nature. This may happen even though the inducement in emotional terms was of equal force in both cases.

Thus, for the above reasons, in practice the enticement action has a number of problems detracting from its value as a justified tortious remedy and many of its aims in practice have indeed been frustrated by these difficulties.

VI FAMILY LAW

The Domestic Actions Act was enacted in 1975. This Act retained the tort of enticement of a spouse while abolishing damages for adultery. As has been seen the Report culminating in this legislation gave only ~~tyrid~~ tepid support to the action[80].

Since 1968 when the Report was first published and particularly since 1975 there have been significant changes in the field of family law. These changes, it is submitted, necessitated a further look at the value of the enticement action. It is beyond the scope of this paper to outline the detailed history of our family law - a brief comment will suffice.

WO WOTHERSPOON, R. Enticement: the marketable vice - a case note on Shelbourne v. Watt.

From last century the legislative emphasis in family law has been on the "fault principle". The "matrimonial offence" such as adultery or desertion was deeply engrained on our legal culture. The effect of a decision in divorce proceedings on a matrimonial offence ground was to declare the respondant "guilty" and the petitioner "innocent". The law was concerned with apportioning responsibility and blame for a marriage break-down. The whole process penalized the guilty party and benefitted the innocent. The Matrimonial Proceedings Act 1963 section 21 reflects this concern to some extent. This section outlines the grounds for divorce: "a conglomerate of matrimonial offences, grounds closely akin to a break-down, grounds which are a mixture of break-down and offence and special categories i.e. the insanity grounds."[81]

Dealing with the complex world of human relationships in recent years the trend has been to recognise that moral culpability is no longer an appropriate measuring stick in the marital break-down situation.

> "Ask any qualified marriage counsellor to distinguish the innocent from the guilty party in the last ten marriages he has dealt with. He will tell you it is impossible to apply such concepts to the complex relationships of married people.[82]"

The process of no longer allocating blame has a beneficial effect for all parties concerned. It draws some of the needless bitterness and rancour that generally arises in such situations. The absence of imputations of guilt spare children the painful sense that one parent has been branded evil and morally culpable while the other by comparison is a paragon of virtue. The Law Commission[83] when considering what good divorce law should achieve considers the destruction of the legal shell which the marriage has become should be effected with the

maximum fairness and the minimum bitterness, distress and humiliation. The whole concept of the matrimonial offence is, it is submitted, ridiculous. The labels of "guilty" and "innocent"[84] are meaningless in such an overwhelming situation. The sociologist's view has long been expressed in these terms. The concern must be for the welfare of the parties involved. The legal position has often been at odds with this desire. The law sought to adjudicate in a manner more appropriate to criminal proceedings than marital break-down. It is submitted that since 1975 the Matrimonial Property Act 1976 and the Family Proceedings Bill (No. 2) 1979 have gone some way to bring the law into line with the sociologist's view of family relations. It is further submitted that these changes have made the tort action for enticement inappropriate.

The Matrimonial Property Act 1976 in its long title describes itself as: an Act to reform the law of matrimonial property; to recognise the equal contribution of husband and wife to the marriage partnership; to provide for the just division of matrimonial property when the marriage ends. This intention is basically carried out by dividing the matrimonial property equally between the spouses[85]. This Act in recognising an equal contribution by both spouses to the matrimonial situation demonstrates the "no-fault" principle expressed above. Section 18(3) of the Act[86] adds further evidence to this view. The enticement action can be a potent weapon for defeating the state purposes of this Act. From one case decided in 1969[87] the passing of this Act has led to a noticable increase in the number of enticement claims being brought since that date[88]. Many of these actions are undertaken by a husband who hopes thereby to recoup some of the "losses" that a

settlement under the Act has entailed. Clearly this is an improper purpose for the tort. If distribution under the Matrimonial Property Act 1976 is seen as harsh and inequitable the fault lies with that Act and the remedy with Parliament. The enticement action should not be used to defeat the purposes of this Act. The bringing of the action is not justified in these circumstances. Howard v Aldridge[89] may have some relevance to this situation. The damages in that case as assessed by the jury ($5,000) before the non-suit was upheld were affected in some way by the "crie de couer" of the plaintiff suffering the "big carve-up" under the Matrimonial Property Act 1976. This situation demonstrates that enticement in the practitioner's view appeals more as a tactical play to pervert the Matrimonial Property Act 1976 than an action to gain justifiable compensation.

The Family Proceedings Bill (No. 2) 1979 is, it is submitted another reason why the action for enticement should be abolished. A separate status for family law matters is to be recognised by the Family Courts Bill 1979. In keeping with this new régime the formulation of the Family Proceedings Bill (No. 2) 1979 which, when passed will continue the modern trend which emphasizes a greater flexibility being given to the Courts in family law matters and demonstrates the discernible movement away from the "matrimonial offence" emphasis which has hitherto pervaded the divorce area. This Bill gives a greater emphasis to conciliation and counselling of the marriage partners[90]. In Clause 22 of the Bill the grounds for separation are given as "such a state of serious disharmony between the parties to a marriage of such a nature that it is unreasonable to require that the parties continue ..... cohabitation with each other". This reinforces the

new emphasis of the Domestic Proceedings Act 1968 section 19 in giving the newly constituted Family Court a discretion and flexibility in looking at the individual marriage partners involved. The new "no-fault" single ground for divorce incorporated in Clause 39 of the Family Proceedings Bill (No. 2) 1979 further illustrates this trend. This, it is hoped will put an end to the acrimonious enquiries under the 1963 Act[91] which was marked by endless recriminations and resulted in an inevitable stigma for one party. The object now, it is submitted has become a definition of the existing situation in a marriage so that the issue is not the isolation of responsibility but the estimation of effects. This being so, it is submitted that the tort of enticement no longer fits acceptably into this framework. The nature of the judicial enquiry is centred around a fault finding exercise. The plaintiff seeks to lay ultimate responsibility for the marriage break-down on the "enticer". It is an adversary process in the true sense. It is submitted that this action not only defeats the objects of the Matrimonial Property Act 1976 but is also inconsistent with the New Zealand family law scheme. Developments since the luke-warm support of the Tort and General Law Reform Committee in 1968 have made it even less appropriate to today's legal structure and attitudes. The bitterness and distastes of the enquiry is a reminder of old concepts of the matrimonial offender. The action has little to benefit the individuals involved and has harmful effects to any children of the marriage in their relations with their parents. It is an inherently divisive and painful experience for all parties.

VIII CONCLUSION

This paper has attempted to evaluate the action for enticement of a spouse in terms of the decision in Shelbourne v Watt. It has gone considerably beyond the case in order to evaluate the desirability of retaining the action today. This has been done with reference to the value of the action in terms of public policy. It is suggested that society's concepts have changed markedly over the centuries since the action was first established and that our conceptions of the marriage parnership as an emotional rather than an economic bond and of human relationships generally are no longer reflected by the enticement action in its present form.

It has also been submitted that the practical difficulties of establishing the action and its many technical drawbacks i.e. difficulty of proof and the assessment of damages for instance also limit the effective pursuance of whatever policy determinants this action was once seen to have. The very nature of the enticement enquiry is repugnant to happy family life, merely accentuating division and rancour in a break-down situation.

It has also been suggested that the law of torts is inappropriate to the family law situation. Furthermore the changes suffered is to be compensated in financial terms which appear quite inadequate to the form of damage which the plaintiff in an enticement action may have suffered.

The New Zealand family law structure has also been briefly considered with particular reference to the Matrimonial Property Act 1976 and the Family Proceedings Bill (No. 2) 1979. It can be appreciated that the

objects of this legislation and the general tenor of attitudes towards family law in modern society are both put under strain by the nature of the enticement action.

It has also been seen that the interests of the parties are rarely served by this action and it has been generally regarded as anachronism over recent years at least in need of substantial reform.

Though Shelbourne's case has re-established the action as a difficult one to establish, the question remains of whether this law should remain on the statute books, particularly in view of the few situations where it can still operate effectively. It is submitted that the action has long been inappropriate to retain, that no positive reasons remain for its retention and that New Zealand should recognise this fact.

IX RECOMMENDATION

There appears to be no present likelihood of action being taken by Parliament[92]. However it is recommended that the action for enticement be given immediate Parliamentary scrutiny with a view to its abolition for the reasons outlined above. This would be in line with the English example[93], the view in Canada[94] and South Australia as well as a number of the United States which have abolished the analogous action for "alienation of affections"[95]. This action particularly at this time would be in line with the current New Zealand family law situation.

FOOTNOTES

1 [1979] 1 N.Z.L.R. 50.

2 In old pleading this is translated: "Whereby he lost the company [of his wife]". A person who tortiously injured another's wife whereby the husband was deprived of the consortium and services of his wife was liable in damages to the husband. A wife had no corresponding right of action. This action was expressly abolished by the Accident Compensation Act]972 section 5(2).

3 See Winsmore v Greenbank (1945) 577.

4 Newton v Hardy (1933) 149. L.T. 165; 49 T.L.R. 522.

5 Supra n.3.

6 [1932] 2. K.B. 497.

7 This means conjugal fellowship of husband and wife and the right of each to the company, co-operation, affection and aid of the other in every conjugal relation.

Lawrence v Biddle [1966] 2 Q.B. 504.
Cutts v Chumley [1967] 1 W.L.R. 742.
Best v Samuel Fox [1952] A.C. 716.

8 Sanderson v Hudson The Times, January 29, 1923.

9 (1904) 20 T.L.R. 261.

10 Supra n.6.

11 Fleming, The Law of Torts (Law Book Co, Sydney) 5th ed 1977, 635.

12 [1958] 1 Q.B. 259.

13 Supra n.9.

14 (1791) Peake 114.

15 Brizard v Heynen (1914) 16 D.L.R. 839.

16 (1923) 39 T.L.R. 429.

17 (1930) 43 C.L.R. 493.

WO WOTHERSPOON, R. Enticement: the marketable vice - a case note on Shelbourne v. Watt.

18 Supra n.16.

19 For example "Legal fossils incapable of further growth" - Pritchard v Pritchard (1963) 3 All. E.R. 601, 608.

20 Harbouring consists merely in providing shelter for an errant wife. If the defendant is aware of the marital situation it is not clear whether the husband must first make demand: see Spencer v Relph [1969] N.Z.L.R. 713, 727. It has been rendered virtually obsolete by requiring proof (damage being essential) that the wife would otherwise have returned to her husband - Winchester v Fleming [1958] 1 Q.B. 259.

The Committee stated: "The only importance of enticement at the present day is in the field of husband and wife where we think that an adequate remedy is available in divorce proceedings". Cmnd 2017 para 23.

21 Working Paper No. 9 Matrimonial and Related Proceedings - Financial Relief - para 142.

22 Paras 90-92.

23 Law Com. No. 25 para 102.

24 Section 5(a).

25 Report of: Miscellaneous Actions, February 1968.

26 At page 7: "It appears to us that the number of cases where damages against the co-respondant could be considered just and appropriate in the light of his responsibility for the final break-up would be very small; and it appears further that it is precisely in those cases where they are just, namely where the co-respondant has been the cause of the respondant's leaving home, that the action for enticement provides an appropriate remedy."

27 "22: Actions for seduction (1) In an action to recover damages for seduction brought by a parent of the woman seduced, or by a person standing to her in the place of a parent, it is not necessary to allege or prove that she was in the service of the plaintiff, or that he sustained any loss by reason of the seduction."

28 In addition this would mean the evidence brought in the divorce claim would not prejudice the separate enticement claim.

29 "It may be noted that in defining the action for enticement in that way the legislature was going no more than recognizing the essential nature of the tort as settled by the authorities which had been comprehensively reviewed by this Court in Spencer v Relph [1969] N.Z.L.R. 713". Per Richardson J. Shelbourne v Watt [1979] 1 N.Z.L.R. 50, 51.

30 [1969] N.Z.L.R. 713.

31 Damages varied depending on the wealth and behaviour of the defendant and would be fixed by the judge and jury between usually £1,000 and £7,000 e.g. £3,500 in McElroy v Grieve - The Times, April 9, 1936.

32 Followed in Bowles v Truth (N.Z.) Ltd [1965] N.Z.L.R. 768 it seesm that exemplary damages would not ordinarily be awarded in an enticement action however Uren v John Fairfax and Sons Pty Ltd (1966) 40 A.L.J.R. 124 where the Australian High Court refused to follow Rookes v Barnard [1964] A.C. 1129 and held that exemplary damages might be awarded if it appeared that the defendant exhibited "a contumelious disregard of the plaintiff's rights". c.f. Australian Consolidated Press v Uren [1967] 3 All E.R. 523 (P.C.).

33 Inglis, Family Law (2nd ed, Sweet and Maxwell, Wellington 1968) Vol 1., 219.

34 The conduct must be "deliberate and malicious" Best v Samuel Fox [1952] A.C. 716, 735, or "conscious and wilful" [1952] A.C. 716, 730.

35 There could be no damages as the plaintiff is not losing anything in terms of loss of consortium or services - See Weedon v Turnbell (1973) 5 T.R. 357; Izard v Izard (1889) 14 P.D. 45.

36 It would seem that mere advice and protection given by a parent to a child for the benefit of the child would not give rise to an enticement action - See Gottlieb v Glieser [1958] 1 Q.B. 267.

37 [1969] N.Z.L.R. 713.

38 This matter will be dealt with under VII Family Law.

39 Unreported, A. 40/77, 25 October 1977, Chilwell J.

40 Supra n.37.

41 Supra n.19.

42 Supra n.1.

43 Supra n.1. p. 52.

44 Supra n.39. p. 11.

45 Supra n.37.

46 Supra n.1. 60.

47 Supra n.1.

48 Idem.

49 Unreported, A. 1150.78, 14 September, 1979, McMullin J.

50 Supra n.1.

51 Supra n.38.

52 Unreported, A. 55/77, 13 June, 1980, Roper J.

53 Supra n.1.

54 Supra n.52. p.13

55 New Zealand Truth, Tuesday May 6, 1980, 1.

56 Unreported, A. 373/77, 19 May 1978, Mahon J.

57 Supra n.37.

58 Supra n.1.

59 Idem

60 Fleming, The Law of Torts, Law Book Co, Sydney, 5th ed, 1978, 2.

61 Gottleib v Gleiser [1958] 1 Q.B. 267, 268.

62 Report on Family Law, Ontario Law Reform Commission - Part I, 1969, 93.

63 Sir Matthew Hale "Considerations teaching the Amendment or Alteration of Laws" - Hargrave Law Tracts pp. 269-270.

WO WOTHERSPOON, R. Enticement: the marketable vice - a case note on Shelbourne v. Watt.

64 See Richardson J's comments in Shelbourne v Watt [1979] 1 N.Z.L.R. 50, 54.

65 Comments made in an address to the National Marriage Guidance Council, 5 May 1963.

66 Domestic Actions Act 1975 Section 5, expressing the common law views expressed in Gottleib v Gleiser [1958]] Q.B. 267, 268.

67 See VII Family Law post - and comments on Family Proceedings Bill (No. 2) 1979.

68 Supra n.39.

69 Supra n.25.

70 Supra n.25. p. 7.

71 Per Scarman J. Pritchard v Pritchard [1966] 3 All. E.R. 601, 611.

72 Supra n.32.

73 Per McCardie J. in Place v Searle [1932] 2 K.B. 497, 501 "unless carefully watched and checked by the courts they may easily develop into recognized methods of wrongful pressure and improper extortion".

74 Though this was recommended by the Tort and General Law Reform Committee, (Misc. Actions), February 1968, it was not implemented in the Domestic Actions Act 1975.

75 Glanville Williams "Some Reforms in the Law of Tort" (1961) 24 Mod. L.R. 101, 108.

76 Domestic Actions Act 1975, section.

77 See VII Family Law post.

78 Supra n.77. 108. This question was discussed fully in Arlet v Arlet The Times, October 18, 1960.

79 Supra n.39. p. 12.

80 Supra n.25. 8.

81 Jeffries "Matrimonial Fault, is it now Relevant?" 1972 N.Z.L.F. 513.

82 Mace, "Marriage Breakdown or Matrimonial Offence: A Clinical or Legal Approach to Divorce (1965) 14 A.U.L.R. 178, 181.

83 Cmd 3123 para 15.

84 Except in terms of ascertaining custody or maintenance perhaps.

85 See for example section 11 (equal division of household and household chattels).

86 Conduct of a spouse will not be taken into account to diminish property rights unless it is "gross and palpable".

87 Supra n.37.

88 See The Capital Letter. Vol 3. No. 29 (12 August 1980) p.2.

89 Supra n.49.

90 Part II of the Bill deals with this aspect.

91 Matrimonial Proceedings Act 1963.

92 N.Z. Parliamentary Debates 22nd May 1980 by the Minister of Justice (Hon. J.K. McLay).

93 Law Reform (Miscellaneous Provisions) Act 1970

94 Supra n.62.

95 Wrongs Act 1972 (S.A.) section 35.