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Heart Balm Redux: Should the Cause of Action for Alienation of Affection be Revived as a Remedy for Economic Loss?

by

Dr. Sharlene A. McEvoy*

ABSTRACT

For many years alienation has been affection was a discredited cause of action. At least one state is considering reinstating it by statute. This article analyzes the civil claim as a possible remedy for economic loss resulting from a damaged relationship.

INTRODUCTION

The claim of alienation of affection has its origin in the Teutonic tribal notion that a husband had the right to kill the man who had committed adultery with his wife.¹

Later, instead of allowing the wronged male to kill his rival, the notion arose that the spouse/victim had the right to get financial recompense from the wrongdoer. The money would then be used to purchase a new wife.²

The Anglo Saxons allowed a civil claim for alienation of affection, which stemmed from the notion that the wife was the husband's property and, as with any property loss, the victim had a right to obtain compensation.³

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New York was the first state to adopt the tort by common law decision in 1866.⁴ Other states followed suit either by common law or statute. After reconsidering the issue, some states abolished the claim by statute.⁵ Other states did so judicially.⁶ Nevertheless, there are several states that maintain it as a viable cause of action including Illinois, South Dakota, Hawaii, Mississippi, Missouri, New Mexico, North Carolina and Utah.⁷

South Carolina ended the claim by judicial decision⁸ but has recently considered a bill to reinstate it.

Why permit a claim for alienation of affection? The reason that the marital relationship has certain rights and obligations including the society or companionship of the partner, sexual relations, and financial support. In other causes of action, a spouse can maintain an action for the loss of consortium as a result of the injury suffered by the partner.

This article urges a reconsideration of the tort as a remedy for the loss of financial support of a spouse due to adultery.

If such claims as intentional interference with a contractual relationship and interference with prospective economic advantage are recognized torts, why not permit a tortious claim for disruption of the marital relationship which is based on financial considerations as well as personal compatibility?

This article will analyze cases involving alienation of affection claims in the past and offer arguments as to why the tort once viewed as antiquated, might offer a remedy for the modern spousal relationship and its financial ramifications.

HUSBAND SUES BOYFRIEND

Oddo v. Presser⁹ is a case with facts that are typical of alienation of affection claims. Thomas Oddo married Debra Tyson in 1988. Oddo was employed as an investment adviser and as a wrestling coach at Davidson College while Debra worked as a vice-president at Bank of America.¹⁰ The couple had three children.

By 1999, Debra had become dissatisfied with her marriage and contacted a former boyfriend, Jeffrey L. Presser.¹¹ Debra and Presser met three times in March 1999, engaged in sexual relations and kept in touch via email.¹²

After Debra admitted that she was in love with another man, the Oddos separated and later divorced.

After Thomas Oddo learned that Presser and his wife had been involved,¹³ he sued Presser for compensatory and punitive damages for alienation of affection and criminal conversation.¹⁴ A jury found Presser liable to Oddo and awarded him \$910,000 in compensatory and \$500,000 in punitive damages. Presser appealed the judgment arguing that the damages were too speculative and uncertain.¹⁵

Oddo claimed that he left his jobs due to his acute mental distress and depression. The court allowed the judgment based on his investment counselor position to stand but agreed with the defendant that the loss of tuition benefits for his children at Davidson College was too speculative because the children were ten, seven and three years old, far from deciding whether or not to attend college. It was also unclear whether or not the school would continue to offer the benefit.¹⁶

The appellate court permitted the punitive damage awarded to stand because "evidence of sexual relations" will allow a plaintiff to get to the jury on the issue of punitive damages in a claim for alienation of affections."¹⁷ The court noted that in the Presser had "engaged in sexual intercourse

with Oddo's wife on two separate occasions prior to her legal separation from plaintiff."¹⁸

Utah also permits a cause of action for alienation of affections, but the question in Heiner v. Simpson¹⁹ was whether that claim could be pleaded along with the intentional and negligent infliction of emotional distress.²⁰ Paul Heiner was married to Christina Simpson for 25 years. Prior to her marriage, Christina, while in her teens, lived with Tom Simpson and his wife because of problems in her family.²¹ Tom Simpson and Christina began a sexual relationship that continued during her marriage to Heiner. Two of the children born during the marriage were Simpson's biological children. Christina and Heiner later divorced and Heiner sued Simpson for fraud, intentional and negligent infliction of emotional distress, and alienation of affection.²²

While the court dismissed the claim for fraud, it allowed the emotional distress claims along with the claim of alienation of affections as long as Heiner did not recover the same damages twice.²³

WIFE v. GIRLFRIEND/CURRENT WIFE

Another case from North Carolina, Hutelmyer v. Cox²⁴, involved the ex-wife of the plaintiff's ex-husband.

Dorothy Hutelmyer sued Margie B. Cox for alienation of affection and criminal conversation. The facts were that Dorothy and Joseph Hutelmyer were married in 1978 and lived together with their three children until 1996. When the Hutelmyers divorced, Joseph married Cox in 1997.²⁵

Dorothy testified that she and Joseph enjoyed a fairy tale marriage that was "joyous, warm and devoted."²⁶ They took numerous family vacations, coached their children's teams, and volunteered with local organizations. Dorothy and Joseph took business trips together and Joseph wrote love

poems to his wife and even gave her a collection of love songs as a Valentine Day's gift one year. The couple maintained an active sexual relationship.²⁷

After Margie Cox separated from her first husband in May 1992 she became flirtatious with Joseph Hutelmyer for whom she worked as a secretary.²⁸

They began to spend more time together, dining and working late at the office. She began accompanying Hutelmyer on his business trips instead of wife Dorothy.²⁹

Joseph began staying over night at Cox's home and the couple openly displayed their affection at work. As he began to spend less time with his wife and family, his intimacy with Dorothy declined.

In January, 1996, Joseph told Dorothy that he was leaving. The latter testified that she was shocked and heartbroken at this announcement.³⁰

Cox admitted that she and Joseph began a sexual relationship in 1994 which continued through 1996. She claimed that she believed that he had moved into an apartment but admitted that Joseph had told her that he wanted to mend his relationship with his wife.³¹

Dorothy Hutelmyer brought evidence of her emotional and physical distress she suffered as the result of the ending of her marriage as well as loss of income, life insurance and pension benefits.³²

The jury returned a verdict finding Cox liable for alienation and criminal conversation awarding Dorothy Hutelmyer \$500,000 in compensatory and \$500,000 in punitive damages.³³

Hawaii also recognizes a claim for alienation of affection.

In Hunt v. Chang,³⁴ Joan H. Hunt sued for herself and her minor child for alienation of affections.

The Supreme Court of Hawaii cited the five elements of a cause of action established in a case called Long v. Fischer.³⁵

1. The defendant must have exercised improper, willful and malicious influence on the Plaintiff's spouse in derogation of the plaintiff's marital rights.
2. Plaintiff's spouse must not have voluntarily accepted defendant's advances at the outset of the affair.
3. Plaintiff's spouse must not have actively contributed to the procurement by intentionally seeking the companionship and affection of the defendant.
4. The plaintiff must prove he or she was not at fault in causing the other spouse's affections to stray.
5. The willful and malicious influence of the defendant on the plaintiff's spouse must be proven as the procuring cause of the loss of love and affection which plaintiff's spouse formerly held for the plaintiff.³⁶

Joan Hunt and James were married in June, 1964 and their son was born 29 days after their marriage.³⁷ Evidence showed that James Hunt had problems with alcohol and that he regularly changed employers. Joan and son, Jimmy followed James to his various jobs in different states.³⁸

In 1977, Joan filed a divorce complaint against James in California because of his drinking and gambling but James promised to stop and so she dropped the divorce petition.³⁹

In September 1974, James went to Hawaii to work as a general manager at a restaurant while Joan and Jimmy remained in Phoenix.

James Hunt met Elaine Chang in October, 1974. The latter admitted that she knew he was married. A few months later Hunt and Chang moved in together.⁴⁰

Chang supported Hunt while he was living with her including trips abroad and to Las Vegas. Chang even gave Hunt money with which to gamble.

Joan Hunt claimed that James wrote her twice a week and called her every Sunday from August, 1974 until June, 1975. James said that he wrote only two or three times a month.⁴¹

Eventually James wrote Joan that they were "through."⁴²

Joan later learned from a friend that Elaine Chang and James "were very friendly." When Joan called James in Hawaii, he asked her not to come to Honolulu and said that she and Jimmy should stay in Arizona.⁴³

Elaine Chang broke in on the conversation and told Joan "I am supporting him and you are using my telephone and I don't want you to call this house now or ever again."⁴⁴

James later testified that he had thought of divorcing Joan and that he was not in love with her when left for Hawaii.⁴⁵

Joan testified that she and James "were very much in love. Had been for years."⁴⁶

The Hawaii Supreme Court held that Joan Hunt had failed to prove all five elements of the claim for alienation of affection established by the case Long v. Fischer.⁴⁷

The court found that Chang had exercised "improper, willful, and malicious influence on James Hunt in derogation of Joan Hunt's marital rights and that the latter "was not at fault in causing the spouse's affections to stray," but that Joan Hunt's claim fell short because, although James Hunt

voluntarily accepted Chang's advances at the outset and actively contributed to Chang's effort of procuring, Joan Hunt failed to prove Chang's willful and malicious influence on James caused the loss of love and affection thus failing to establish a claim for alienation of affection.⁴⁸

The court also rejected Joan Hunt's claim for alienation of affection for James, Jr. because a minor child does not have a cause of action for alienation of affection.⁴⁹

THE EMPLOYER/EMPLOYEE SITUATION

Thornburg v. Federal Express Corp. provided an unusual set of facts for an alienation of affection claim.⁵⁰ Keith and Roberta Thornburg had been married since 1986. In 1997, Roberta began an affair with Wade Hunt, her supervisor, when both worked for Federal Express.⁵¹

Keith Thornburg confronted Hunt and the latter ended the relationship with Roberta. The Thornburgs later reconciled their marriage.⁵²

Some Fed-Ex employees filed grievances concerning Hunt's sexual misbehavior on the job claiming discrimination. During the Fed-Ex investigation, the Hunt-Thornburg liaison came to light.⁵³

Roberta Thornburg was so upset by the disclosure that she became disabled from doing her job and had to assume "light duty" assignments.⁵⁴

Fed-Ex tried to help her find another job and later offered her a transfer to an office in Savannah. Roberta wanted to accept the offer but Keith Thornburg refused to move and told her if she accepted, the marriage was over.⁵⁵

Roberta took the transfer and moved with her two children to Savannah while her spouse was out of town.

Upon arriving home and discovering his wife and family gone, Thornburg went to the Fed-Ex office where

Roberta had worked and inquired about her whereabouts. Fed-Ex declined to provide any information.⁵⁶

As a result, Thornburg sued Federal Express alleging 1) alienation of affection, 2) negligent infliction of emotional distress and 3) the intentional infliction of emotional distress. The Missouri Court of Appeals dismissed all the claims.⁵⁷

The Thornburg case is not the only one in which an employer was sued for alienation of affections. A Utah case, *Jackson v. Righter* considered the issue of employer vicarious liability for the tort. Jackson's ex wife worked for Novell, Inc. Her supervisor promoted her and gave her bonuses and gifts.⁵⁸

Ms. Jackson and her supervisor became close, traveled together and began an affair. When the relationship ended, Mrs. Jackson began an affair with her co-worker.⁵⁹ Mr. Jackson discovered his wife's affairs and attempted to reconcile the marriage without success and subsequently divorced.⁶⁰

Jackson sued Novell and the two employees. The suit against the former was based on vicarious liability for the negligent supervision and retention of the employees.⁶¹

The Utah Supreme Court held that some actions, like the employees' conduct, was outside of the scope of employment. Employers should not have a duty to monitor their employees to determine any personal relationships between them because they would clearly be outside of the scope of employment.⁶²

REVIVE THE TORT OF ALIENATION OF AFFECTION?

Among the reasons to permit a civil action for the tort of alienation of affection were to ensure the legitimacy of children because property was passed from father to son. This issue would seem to be less important today because of the existence of paternity and DNA testing.⁶³

Another reason for the tort was to protect the husband's property rights to his wife. Women are no longer considered chattel of the husband.⁶⁴ In fact women have achieved equality with men in many areas.

A third reason for the tort was to protect marriage from outside interference. This would seem to be the most legitimate reason because permitting such lawsuits would be a deterrent to outsiders who might interfere with the relationship. By and large modern marriage is an economic as well as a personal relationship. In the modern marriage, both parties contribute economically to the enterprise. When a third party interferes with the marital relationship, the economic impact can be devastating.

Consider the case of Candi Wagner who married Gary Vessel. After nine years of marriage and three children, Wagner learned that Vessel was having an affair.⁶⁵ Wagner discovered letters written by one Cathy Nolen to Vessel. Wagner's lawyer characterized the letters as part of a seduction that destroyed Wagners' marriage.⁶⁶

The Utah jury agreed that Nolen caused the alienation of Vessel's affection and awarded Wagner \$500,000 payable in installments of \$540 per month. Nolen's wages were garnished to fund the award.⁶⁷

There are many challenges in bringing these suits. First, the plaintiff must show that the marriage was sound before the complained of affair occurred.⁶⁸ Second, it is not enough to prove that there was an affair but that it was the cause of the end of the marriage.

Third, lawyers are reluctant to represent plaintiffs on a contingency basis because the outcome is never assured. Plaintiffs can lose the case or settle out of court because they want to maintain their privacy.⁶⁹

Critics claim alienation of affection has been used as a form of blackmail to extract money from the guilty party who

has engaged in an affair and who may decide to settle a case to avoid untoward publicity.⁷⁰

Despite the fact that many states have abolished the cause of action, at least one is considering its reinstatement.

A bill introduced into the South Carolina legislature in 2008 would revive the claim.⁷¹

Supporters say that the law would protect families and make third parties think twice about breaching a marriage because such an act would have grave financial consequences for the culprit.

The sponsor of the South Carolina law, Jake Knolls, says that if there are consequences when someone steals your property, there should be reparations paid when someone steals your spouse.⁷²

CONCLUSION

While there appears to be sentiment to revive the cause of action for alienation of affection given court decisions and other developments, there are some objections due to its historic origins. Perhaps the tort should be reestablished but renamed to intentional interference with an economic relationship, focusing on the financial implications of disrupting a marriage when both parties are contributing to the relationship. This would satisfy those who feel that reinstating the alienation of affection would revive memories of women being regarded as property.

ENDNOTES

¹ Bruce V. Nguyen, "Hey, That's My Wife! - - The Tort of Alienation of Affection in Missouri," 68 Mo.L.Rev 241 (2003) at 243. (hereinafter "That's My Wife")

² *Id.*

³ *Id.* at 244.

⁴ *Id.* See also Hermance v. James 47 Barb 120 (N.Y. Gen Term 1866)

⁵ States abolishing alienation of affections include the following: Alabama, Ala.Code 6-5-331 (1993); Arizona, Ariz.Rev.Stat. Ann.25-341 (West 2000); Arkansas, Ark. Code Ann. 16-118-106 (Michie 2001); California, Cal. Civ. Code 43.5 (West 1982); Colorado, Colo. Rev. Stat. 13-20-202 (1997); Connecticut, Conn. Gen. Stat. 52-572b (1991); Delaware, Del Code. Ann. Tit 10, 3924 (1999); District of Columbia, D.C. Code Ann. 16-923 (2001); Florida, Fla. Stat. ch 771.01 (1997); Georgia, Ga. Code Ann. 51-1-17 (1998); Indiana, Ind. Code 34-12-2-1 (1998); Kansas, Kan.Stat. Ann.23-208 (2995); Maine, Me. Rev. Stat. Ann. tit 14 301 (West (2001); Maryland, Md. Code Ann. Family Law 3-103 (1999); Massachusetts, Mass. Gen. Laws Ann. Ch. 207, 47B (West 1998); Michigan, Mich. Comp. Laws 551.301 (repealed 1980); Minnesota, Minn. Stat 553.01 (2000); Montana, Mont. Rev. Code Ann. 27-1-601 (Smith 2001); Nebraska, Neb. Rev. Stat. 25-21, 188 (1995); Nevada, Nev. Rev. Stat. 41.380 (2002); New Hampshire, N.H. Rev. Stat. Ann. 460:2 (1992); New Jersey, N.J. Stat. Ann.2A23-1 (West 2000); New York, N.Y. Civ. Rights Law 80-a (McKinney 1992); North Dakota, N.D. Cent. Code 14-02-06 (1997); Ohio, Ohio Rev. Code Ann. 2305.29 (Anderson 2001); Oklahoma, Okla. Stat. tit. 76, 8.1 (1995); Oregon, Or. Rev. Stat. 30.840 (1999); Pennsylvania, 23 Pa.Cons.Stat.1901 (2001); Rhode Island, R.I. gen. Laws 9-1-42 (1997); Tennessee, Tenn. Code Ann. 36-3-701 (2001); Texas, Tex. Fam. Code Ann.1.107 (Vernon 1998); Vermont, Vt. Stat. Ann. tit 15, 1001 (1989); Virginia, Va. Code Ann. 8.01-220 (Michie 2000); West Virginia, W. Va. Code 56-3-2a (1997); Wisconsin, Wis. Stat. Ann. 768.01 (West 2001); Wyoming, Wyo. Stat. Ann. 1-23-101 (Michie 2001). Veeder points out that two states have not adopted the cause of action. *Id.* Alaska has not addressed the cause of action by statute or case law. *Id.* See Moulin v. Monteleone, 115 So. 447, 448 (La. 1928) (refusing to recognize the cause of action for alienation of affections in Louisiana).

⁶ States judicially abolishing the cause of action for alienation of affections include Idaho, Iowa, Kentucky, South Carolina and Washington: O'Neill v. Schuckardt, 733 P.2d 693, 698 (Idaho 1986); Funderman v. Mickelson, 304 N.W.2d 790, 794 (Iowa 1981); Hoye v. Hoye, 824 S.W.2d 422, 422 (Ky.1992); Russo v. Sutton, 422 S.E.2d 750, 751 (S.C.1992); Wyman v. Wallace, 615 P.2d 452, 455 (Wash.1980) [hereinafter Wyman II]. Four of these five abolished it as a common law doctrine (Idaho, Iowa, Kentucky and Washington) while one (South Carolina) abolished the cause of action which was based upon a statute. Veeder, 1999 S.D. 23, P12, 589 N.W.2d at 614.

⁷ States maintaining a cause of action for alienation of affections include: Illinois (740 Ill. Comp. Stat. 5/1 (West 1993)); South Dakota (S.D.C.L. 20-9-7 (Michie)), Hawaii (Hunt v. Chang, 594 P.2d 118, 123 (Haw. 1979)), Mississippi (Kirk v. Koch, 607 So.2d 1220, 1222 (Miss. 1992)), Missouri (Van Vooren v. Schwarz, 899 S.W.2d 594, 595 (Mo. Ct. App. 1995)), New Mexico (Birchfield v. Birchfiel, 217 P. 616, 618-19 (N.M. 1923), North Carolina (Hutelmyer v. Cox, 514 S.E.2d 554, 560 (N.C. Ct. App. 1999) and Utah (Heiner v. Simpson, 23 P.3d 1041, 1042 (Utah 2001)).

⁸ Russo v. Sutton 422 S.E. 2d 750 (S.C.1992).

⁹ 158 N.C. App 360 581 S.E. 2d 123; 2003 N.C. App LEXIS 1796 (2003).

¹⁰ 581 S.E.2d 126.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id* at 128.

¹⁷ *Id* at 129.

¹⁸ *Id.*

¹⁹ 23 P.3d 1041, 421 Utah A2v. Rep 7, 2001 UT 39.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ 514 S.E. 2d 554, 133 N.C. App 364 (1999).

²⁵ 514 S.E. 2d 557.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id* at 558.

³¹ *Id.*

³² *Id* at 561.

³³ *Id.*

³⁴ 594 P.2d. 118, 60 Hav 608 (1979).

³⁵ 210 Kan.21, 499 P.2d 1063 (1972).

³⁶ 594 P.2d 123.

³⁷ 594 P.2d 120.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id* at 121.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id* at 122.

⁴⁶ *Id.*

⁴⁷ 210 Kan 21 supra note 35.

⁴⁸ 594 p.2d 125.

⁴⁹ *Id.*

⁵⁰ 62 S.W. 3d 421 (Mo Ct App 2001)

⁵¹ *Id* at 424

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id* at 425.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ 891 P.2d. 1387 (Utah 1995).

⁵⁹ *Id* at 1390.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id* at 1393-94.

⁶³ "Hey, That's My Wife! Supra note 1 at 252.

⁶⁴ *Id.*

⁶⁵ Michael Kranish, "The Price of Breaking Up a Marriage," Boston Sunday Globe, Aug 26, 2001, at D1 and D2.

⁶⁶ *Id* at D2.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ "S.C. Bill Would Let Jilted Spouses Sue," N.H. Register, April, 2008 at

B4.

⁷² *Id.*