May A Married Woman Maintain an Action of Criminal Conversation in Pennsylvania?

Darlington Hoopes Jr.

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MAY A MARRIED WOMAN MAINTAIN AN ACTION OF CRIMINAL CONVERSATION IN PENNSYLVANIA?

Does a married woman, in Pennsylvania, have a civil action against one who commits adultery with her husband?

A brief review of history will assist the reader in understanding the nature of this problem. Ancient Hebrew women were treated with great respect, and in this position they were entitled to prosecute any woman who defiled their marriage beds. The northern European tribes regarded a man's wife as his chattel, and in this status she was treated as was any slave or servant and was thus denied access to the courts. The husband, on the other hand, was entitled to redress in the courts for any act which deprived him of his wife's services. High on the list of services, or duties, which a wife owed her husband was the exclusive enjoyment of her sexual charms, and any infringement on this duty was a grave offense. The Teutonic tribes, who later invaded Great Britain and contributed largely to the Anglo-Saxon culture permitted the husband to kill both the wife and her lover if he found them in the act. This remedy was too harsh, perhaps it was depriving the tribe of too many warriors, and the penalty was reduced to emasculation of the paramour. With the rise of Christianity in Britain, these punishments were further reduced. At first the guilty party was required to provide a new wife to the offended husband and later punishment consisted of a money judgment.

Out of this background the Anglo-Saxon tribunals drew the legal concept of "consortium."

"In its original application the term... (consortium) was used to designate a right which the law recognized in a husband growing out of the marital union, to have performance by the wife of all those duties and obligations in respect to him which she took upon herself when she entered into it; the right to conjugal fellowship of the wife, to her company, cooperation, and aid in every conjugal relationship; fellowship, and assistance of the wife; ... in which a husband's right is peculiar and exclusive..." 2

Thus we see that the early common law concept of consortium was based on the theory that a man's wife was his chattel.

In Pennsylvania, "consortium" has been construed to include, "loss of services, injury to social position, impairment of family honor, and mental suffering coming from the spouse's infidelity." 3

It is readily seen that the duty of consortium has always been recognized as being owed by the wife to her husband. However, not until recent times has the duty been recognized as being owed by the husband to his wife and remedy for interference therewith afforded in the courts. The extension of the duty of consortium

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1 Mr. Lipman's article "The Breakdown of Consortium" in 30 Col. L. Rev. 651, provided much of the material for the historical outline above.
2 12 C.J. § 532.
is consonant with the doctrine, so characteristic of the current ethic, of the equality of women, both single and married.

No remedy for interference with consortium was afforded the wife in early courts, not only because the duty was not recognized as mutual between husband and wife, but also because the married woman was under disability to sue in the courts. Prior to the enactment of the married women's statutes, "the legal existence of the wife was merged in that of her husband, and they were termed and regarded as one person in law. She could not contract in her own name, own property, sue or be sued." These statutes removed a married woman's common law disability and entitled her to sue or be sued as if she were single. The Pennsylvania act, in part, states: "Hereafter a married woman may sue or be sued civilly, in all respects, and in any form of action, and with the same effect and results and consequences, as an unmarried person." The other American legislatures have employed similar language in their acts.

After the married women's disability to sue was removed by the Act of 1893 the Pennsylvania Supreme Court was called on to determine whether a married woman could sue for loss of consortium in an action of alienation of affections and in its opinion in the case of *Gernerd v. Gernerd*, handed down in 1898, said:

"The right of a wife to maintain an action for the same cause... (alienation of affections)... has been denied, because of the common law unity of husband and wife and of her want of property in his society and assistance. There was certainly an inconsistency in permitting a recovery where her husband was a necessary party to the action, and she had no separate legal existence or interest, and the damages recovered would belong to him, but the gist of the action is the same in either case. There is no substantial difference in the right which each has to the society, companionship and aid of the other, and the injury is the same whether it affects the husband or the wife. Where the wife has been freed from her common law disabilities and may sue in her own name and rights for torts done her, we see no reason to doubt her right to maintain an action against one who has wrongfully induced her husband to leave her."

Most American courts have also arrived at this conclusion on similar reasoning.

We may conclude that the right of consortium is today recognized as mutual between husband and wife. However, it is interesting to note that until *Hitaffer v. Argonne Co., Inc.* in negligent injury cases the wife was universally denied recovery for loss of consortium. The courts had refused to give her any recovery except for loss of services and this loss has generally been annexed to the damages which her husband has recovered in his suit for the injury. There are a few courts which have recently broken away from that rule. In *Hitaffer v. Argonne Co., Inc.*, the Circuit Court for the District of Columbia granted a wife damages for the

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4 Plotkin v. Plotkin, 32 Del. 455; 125 A. 455 (1924).
5 Act of 1893, June 8, P.L. 344, 3; as amended Act of 1913, March 27, P.L. 11, 1. 48 P.S. 111.
6 Ibid.
7 185 Pa. 233; 39 A. 884 (1898).
loss of her husband's love and affection and services, namely, sexual intercourse, after stating that the rules upon which the other jurisdictions have based their holdings were archaic and impractical. Courts in New York and New Jersey have also granted married women recovery for loss of consortium in analogous cases. However the concept of "consortium" may be broadened, it is safe to conclude that the concept today includes the right to exclusive intercourse with the spouse, and insofar as the right to exclusive intercourse is concerned, consortium may be said to imply mutual rights and duties upon both husband and wife.

Long before married women attained equal status with their husbands in the courts, the common law developed several remedies for infringement of a husband's right of consortium. We will now consider these remedies paying particular attention to a husband's rights against one who committed adultery with his wife.

At Blackstone's time the common law provided several forms of action for a man whose domestic tranquility has been disturbed. Blackstone lists three: abduction; adultery or criminal conversation; and battery of a wife. At a later date the common law added the remedy of alienation of affections. Blackstone commented:

"Adultery or criminal conversation with a man's wife, though it is a public crime, left by our laws to coercion of the spiritual courts; yet, considered as a civil action (and surely there can be no greater), the law gives satisfaction to the husband for it by action of trespass vi et armis, where damages are usually very large and exemplary." 11

Only criminal conversation or adultery involved the husband's right to exclusive intercourse so only it need be considered in this paper.

Criminal conversation was the common law civil action which a husband employed in gaining redress for "one who, without his consent, had sexual relations with his wife." 12

All American jurisdictions adopting the common law recognized that a husband was entitled to this remedy. The rationale upon which this action is brought was explained by the United States Supreme Court in Tinker v. Colwell 13 as follows:

"The assault vi et armis is a fiction of the law, assumed at first in early times, to give jurisdiction of the cause of action as a trespass, to the courts, which then proceeded to permit recovery of damages by the husband for his wounded feelings and honor, the defilement of the marriage bed, and for the doubt thrown upon the legitimacy of the children."

The New York court in Goldman v. Cohen 14 stated another basis for recovery thusly:

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10 80 A.2d 589 (N.J. 1951).
11 Jones Blackstone Vol. 2., p. 1678, § 182.
12 Restatement of Torts, § 685.
13 193 U.S. 473, 481; 24 S.Ct. 505, 506; 48 L.Ed. 754 (1904).
"This . . . (action) . . . is for punishment and atonement rather than compensation. It comes within the range of concurrent and supplementary adjuncts to the criminal law for the prevention and redress of wrongs."

The reasoning used in the above two cases expressed the principal grounds which the other jurisdictions used in granting relief to an injured husband. 15

When the common law bar, which denied married women access to the courts, was removed many courts were unwilling to grant a wife the right to bring an action for criminal conversation. The objections which were raised were discussed in the case of Doe v. Roe 16 wherein the Supreme Court of Maine said:

"The question is whether such an action is maintainable. For such a wrong the law does not leave the injured wife without redress. She may obtain a divorce and a restoration of all her property real and personal, and in addition thereto, alimony . . . and the law will punish the guilty parties criminally. But does the law, in addition to these remedies, secure to her a right of action to recover from her husband's paramour? We think not . . . It is true that a husband may maintain an action for the seduction of his wife. But such an action has grounds on which to rest that cannot be invoked in support of a similar action in favor of the wife. A wife's infidelity may impose upon her husband the support of another man's child, and, what is still worse, it may throw suspicion upon the legitimacy of his own children. A husband's infidelity can inflict no such consequences upon his wife. If she remains virtuous, no suspicion can attach to the legitimacy of her children . . . ."

Several other jurisdictions followed the rationale employed by this court. 17

Oppenheim v. Kridel 18 is the leading case granting a married woman the right to maintain an action of criminal conversation. The New York Court first quoted the United States Supreme Court, which had said:

"The assault vi et armis is a fiction of the law, assumed at first, in early times, to give jurisdiction of the cause of action as a trespass, to the courts, which then proceeded to permit the recovery of damages by the husband for his wounded feelings and honor, the defilement of the marriage bed, and for the doubt thrown upon the legitimacy of the children." 19

After conceding that this is the reason a husband is entitled to the action, the New York Court went on to say:

"Barring the fictions which apply only to procedure, whatever reasons there were for giving the husband at common law the right to maintain an action for adultery committed with his wife, exist today in behalf of the woman for a like illegal act committed with her husband. If he had feelings and honor which were hurt by such improper conduct, who will say today that she has not the same, perhaps even a keener sense of

16 20 A. 83, 82 Me. 503 (1890).
17 Duffles v. Dflies 45 N.W. 522, 76 Wis. 374 (1890); Hodges v. Wetzler 55 A. 49; 69 N.J.L. 490 (1903); Lockwood v. Lockwood 67 Minn. 476, 70 N.W. 784 (1897).
18 256 N.Y. 156; 140 N.E. 227 (1923).
19 n. 13.
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the wrong done to her and to her home? If he considered it a defilement of the marriage-bed, why should not she view it in the same light? The statement that he had property interest in her body and a right to a personal enjoyment of his wife are archaic unless used in a refined sense worthy of the times and which give to the wife the same interest in her husband. The fiction of assault whereby the courts were given jurisdiction has long since vanished except for historical interest. The danger of doubt being thrown upon the legitimacy of the children, which seems to be the principal reason assigned in all the authorities for the protection of the husband and the maintenance of the action by him, may be offset by the interest which the wife has in the bodily and mental health of her children when they are legitimate. Science today teaches us the dire consequences which sometimes follow the promiscuous intercourse by a man. It is common knowledge that the sins of the father are sometimes visited not only upon the wife in the resultant diseases contracted through breaches of the marriage contract. The husband must not have discredit thrown upon the legitimacy of his children. The wife should have no doubt about the health and cleanliness of her husband or of her offspring. Illegitimacy is important. Children of sound mind and body are equally important.

The court here has stated a sound basis for granting a married woman a cause of action against one who has sexual intercourse with her husband. The courts of Massachusetts,20 Alabama,21 Kentucky,22 and Virginia,23 to mention a few, have also permitted a married woman to maintain an action for criminal conversation.

The New York Courts failed to answer the theory, raised by the Supreme Court of Maine, that a husband would have to support children borne by his wife as a result of her illicit relationship with another man, while a wife would not be similarly affected by an illicit relationship on the part of her husband. I cannot agree with this rationale. Our laws require a man to support all his children, legitimate or illegitimate. It follows from this, that if a husband does father an illegitimate child, that his wife and family will be forced to lower their standard of living to enable the husband to support his spuriously begotten child. Moreover, these payments made during his lifetime would reduce the potential inheritance of his wife and heirs. On this basis a wife should certainly be given a remedy to recover for these losses.

The Restatement of Torts in section 690 says:

"One who alienates the affections of a husband . . . or who has sexual intercourse with him is liable to the wife for the harm thereby caused to any of her legally protected interests under the same conditions as would permit the husband to recover for similar wrongs as stated in sections 683-689."

21 Parker v. Newman 200 Ala. 103, 75 So. 479 (1917).
22 Roberts v. Roberts 230 Ky. 165, 18 S.W. 2d 981 (1929).
Therefore we can add the authority of the learned group of scholars, who codified the law of torts, to those supporting a wife's right to maintain an action of criminal conversation.

The Pennsylvania appellate courts, who recognized that a husband was entitled to maintain an action for criminal conversation as early as 1798,²⁴ have never been called on to determine whether a wife may bring an action against one who seduced or was seduced by her husband.

However, the Pennsylvania courts have heard cases of alienation of affections, a later common law remedy governed by the rule that: "One who, without a privilege to do so, purposely alienates a wife's affections from her husband, is liable for the harm thereby caused to any of his legally protected interests."²⁵ In 1898 the Supreme Court of this state, in *Gernerd v. Gernerd*²⁶ held:

"The right of a husband to maintain an action against one who has wrongfully induced his wife to separate from him seems not to have been doubted since the case of Winsmore v. Greenbank ... decided in 1745. The right of a wife to maintain an action for this same cause has been denied, because of the common law unity of husband and wife and of her want of property in his society and assistance. There was certainly an inconsistency in permitting a recovery where her husband was a necessary party to the action, and she had no separate legal existence or interest, and the damages recovered would belong to him, but the gist of the action is the same in either case. There is no substantial difference in the right which each has to the society, companionship and aid of the other, and the injury is the same whether it affects the husband or the wife. Where the wife has been freed from her common law disabilities and may sue in her own name and right for torts done her, we see no reason to doubt her right to maintain an action against one who has wrongfully induced her husband to leave her."

The *Gernerd* case recognized that there was no substantial difference in the injuries which the husband sustained by loss of consortium and those which his wife would suffer. As the court was willing to apply this reasoning in a case of alienation of affections there can be no doubt that it would also be willing to apply the same rationale in the case where a married woman asks for redress in criminal conversation.

The only objection which might be raised is that this reasoning would not apply because the action of alienation of affections was abolished by the Pennsylvania Legislature in 1935.²⁷ However, it is interesting to note that the legislature in passing this bill also contemplated abolishing the action of criminal conversation, but the House struck out the section pertaining to criminal conversation between

²⁴ Fry v. Derstler—2 Yeats 278 (1798) and Gardiner v. Maderia—2 Yeats 466 (1798).
²⁵ Restatement of Torts, § 690.
²⁶ 185 Pa. 233; 39 A. 884 (1898).
the first and second readings of the bill. So obviously the legislature intended that this action should continue to be part of the common law of this jurisdiction. Moreover, in Antonelli v. Zenakis, decided in 1949, the court held:

"The Act of June 22, 1935 P.L. 450, § 1, as amended by the Acts of June 25, 1937 P.L. 2313, § 1, 48 P.S. § 170, abolishes the action for alienation of affections, but did not abolish the rights of action for criminal conversation . . . (Citing Restatement of Torts §§ 683 and 685, and C.J.S. Vol. 42, pg. 320, § 668) . . . the elements of damage for which recovery can be had are . . . Injury to the husband's social position, irreparable disgrace in the community where he lived and was engaged in business, and dishonor to himself and his family, or other injuries peculiarly associated with an action for criminal conversation."

Although this action was brought by an injured husband, it is clear, as we have previously noted, that in our modern day a wife would be damaged in the same manner and to the same extent, and therefore for the same reasons she should be permitted to recover in criminal conversation.

This same opinion was expressed by Judge Wingerd of Franklin County in Grove v. Widney wherein he said, by way of dicta,

"There are according to the A.L.I. Restatement of the Law of Torts §§ 683, 684 and 685, three distinct causes of action in tort for direct interference with the marriage relation: (1) alienation of a wife's affection; (2) inducing a wife to separate from or refusing to return to her husband, and (3) criminal conversation. Since the removal of disability of married women, a wife may maintain the same actions in tort for direct interference with the marriage relation as the husband. Germerd v. Germerd, 185 Pa. 233; Lyon v. Lyon, 197 Pa. 212; Am. Jur. 135, 136, § 535; Reading v. Gazzam, 200 Pa. 70."

Therefore, having seen that criminal conversation lies for defilement of the marriage bed, and that the wife is no longer denied access to the courts, and that the same reasons exist for affording the remedy to the wife as for affording the remedy to the husband, it should follow that the Pennsylvania courts, when confronted with such a case, should recognize the right of the wife to recover for criminal conversation.

Darlington Hoopes, Jr.

Note: After this article was written for publication the Common Pleas Court of Dauphin County, in Hoopert v. Obestine 77 D&C (Pa.) 409 (1952), held that a married woman was entitled to maintain an action for criminal conversation. The rationale that court used in reaching this decision was similar to that employed in the foregoing article.

29 68 D.&C. (Pa.) 541, 542 (1950).