

## LAW REFORM IN TORT: ABOLITION OF LIABILITY FOR "INTENTIONAL" IN- TERFERENCE WITH FAMILY RELATIONSHIPS

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### Introduction

In an era when expansion of liability is the dominant trend in the law of torts, one category of tort law is exceptional: liability for interference with family relationships. For torts falling within this category — especially the so-called "intentional" interference actions — abolition, not expansion, is the order of the day. The movement toward abolition is attributable in large measure to the energies of law reform commissions. Numerous commissions have identified liability for interference with family relationships as an area requiring examination with a view to reform. With few exceptions, they have concluded that the "intentional" interference torts are anachronistic and should be abolished by legislation. The movement toward abolition has also been propelled by growing acceptance of concepts of personal responsibility and "no fault" in family and personal relationships and by the progress of the movement toward sexual equality in the law. Faced with the alternative of applying to male family members actions that had applied only to females and expanding to wives actions that had been limited to husbands, legislatures have preferred abolition. This article canvasses the analysis of liability for "intentional" interference by law reform bodies and commentators, examines the arguments raised for and against abolition of liability and possible alternatives, records the conclusions reached in law reform reports on the subject, and

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The author appreciates the assistance provided by law reform commissions in making available reports, working papers, etc., used in the preparation of this article. Publications of law reform bodies will be cited in the footnotes as "British Columbia Report," "Ireland Working Paper No. 5", etc. Full citations are in the list of law reform publications at the end of the article.

identifies legislation enacted to terminate the traditional rights of action for "intentional" interference.<sup>1</sup>

### Tort Liability For "Intentional" Interference With Family Relationships

The actions in tort for "intentional" interference with family relationships are enticement, harbouring, seduction and criminal conversation.<sup>2</sup> The family relationships to which they apply are husband-wife and parent-child. Briefly stated, "enticement" is to persuade the plaintiff's spouse or child to leave the home (s)he had shared with the plaintiff; "harbouring" is to provide the plaintiff's spouse or child with shelter and other necessities of life outside the family home (thereby making it possible for the spouse or child to live apart from the plaintiff if (s)he had no other resources); "seduction" is to have sexual intercourse with the plaintiff's child; "criminal conversation" is to have sexual intercourse with the plaintiff's spouse — in other words, to be the other party in the commission of adultery by the spouse.<sup>3</sup> The *Matrimonial Causes Act*,

1. The United States is not included because conditions there are different from those prevailing in other countries with common law legal systems. Few states have law reform bodies comparable to those in the Commonwealth and Ireland. More than half a century ago, states began to enact so-called "heart balm acts" abolishing liability for "intentional" interference. Although the recent trend in American courts has been expansion of liability for interference with family relationships, actions for criminal conversation and alienation of a spouse's affections have been abolished in several states by judicial decision. This might induce legislators in other states to leave the task of abolition to the courts. See Harper, James & Gray, *Law of Torts*, ss. 8.1-8.9 (2d ed. 1986); Prosser & Keeton, *Law of Torts*, 915-39 (5th ed. 1984).

2. The tort of alienation of affections is not included because it is not recognized outside the United States. Some Canadian courts once entertained alienation of affections actions. See Comment, "Family Law — Loss of Consortium — Distinction Between Enticement and Alienation of Affections - A Revival of the Forms of Action?," (1961) 19 Faculty L. Rev. 135. These actions were, however, effectively eliminated from Canadian law by the decision in *Kungl v. Schiefer*, [1962] S.C.R. 443, 33 D.L.R. (2d) 278. See British Columbia Report, at 7-8.

The tort of abduction, which generally has been ignored by law reform agencies, legislatures and commentators, might properly be included in a list of "intentional" interference torts. But unlike the torts discussed in the text, abduction is a tort to the member of the plaintiff's family involving (except perhaps in the case of a young child unaware of the abduction) — a characteristic of tortious "unintentional" interference with family relationships. For this reason, it is preferable to address abduction in conjunction with "unintentional" interference torts. See 17, *infra*, and accompanying text.

3. See Fleming, *Law of Torts*, 614-17 (6th ed. 1983); McMahon & Binchy, *Irish Law of Torts*, 406-12, 420-23 (1981); Ontario Study, at 175-76, 185, 190-94. "Enticement" likely includes persuading one who has already left the family home not to return to it. See Salmond & Heuston, *Law of Torts*, 332 (18th ed. 1981). "Seduction" might include sexual contact other than intercourse — for example, homosexual conduct. See McMahon & Binchy, *op cit.*, at 420-21.

1857, abolished actions for criminal conversation in England<sup>4</sup> and replaced them with a statutory claim for damages for adultery.<sup>5</sup> Northern Ireland, Australia, New Zealand and parts of western Canada enacted similar legislation.<sup>6</sup>

Liability for criminal conversation (or adultery) does not require that the defendant have induced or persuaded the plaintiff's spouse to have intercourse and does not require that the defendant have been aware of the spouse's marital status. The act of adultery is all that is necessary. In essence, criminal conversation is a tort of strict liability.<sup>7</sup> So, it seems, is seduction: a defendant can, despite the implication of persuasion in the name of the tort, be liable without any persuasion or inducement<sup>8</sup> and without any knowledge of the plaintiff's parental relationship with the person seduced.<sup>9</sup> Enticement and harbouring, in contrast, do require knowledge of the spousal or parental relationship. The defendant must have known that the enticement or harbouring would cause the spouse or child to be absent from his or her spouse or parent without the latter's consent.<sup>10</sup> Enticement involves persuasion to

4. *Matrimonial Causes Act, 1857*, 20 & 21 Vict., c. 85, s., 59, repealed by *Statute Law Revision Act, 1892*, 55 & 56 Vict., c. 19, s. 1.
5. *Matrimonial Causes Act, 1857*, 20 & 21 Vict., c. 85, s. 33, later *Matrimonial Causes Act, 1965*, c. 72, s. 41, repealed by *Law Reform (Miscellaneous Provisions) Act, 1970*, c. 33, s. 7(2), sch.
6. *Matrimonial Causes Act (Northern Ireland), 1939*, 2 & 3 Geo. 6, c. 13, s. 18, repealed by *Matrimonial Causes (Northern Ireland) Order, 1978*, No. 1045 (N.I. 15), art. 63, sch. 5; *Domestic Relations Act*, Stat. Alta. 1927, c. 5, ss. 13-14, now *Domestic Relations Act*, R.S.A. 1980, c. D-37, ss. 13-14; *Divorce and Matrimonial Causes Act*, R.S.B.C. 1897, c. 62, ss. 18, 42, later *Family Relations Act*, R.S.B.C. 1979, c. 121, ss. 75-76, repealed by *Family Law Reform Amendments Act*, Stat. B.C. 1985, c. 72, s. 37; *Domestic Relations Ordinance*, Ord. N.W.T. 1969 (2d), c. 10, ss. 13-14, later *Domestic Relations Ordinance*, R.O.N.W.T. 1974, c. D-9, ss. 13-14, repealed by *Statute Law (Canadian Charter of Rights and Freedoms) Amendment Act*, Stat. N.W.T. 1985(3), c. 10, ss. 40-41. For the Australian and New Zealand legislation (now repealed), see Joske, *Laws of Marriage and Divorce in Australia and New Zealand*, 411-12 (3d ed. 1952); Toose, Watson & Benjafield, *Australian Divorce Law and Practice*, 353-55 (1968).
7. See Alexander, *The Family and the Law of Torts*, 6 (1979); McMahon & Binchy, *supra* note 3, at 407.
8. See British Columbia Report, at 10; McMahon & Binchy, *supra* note 3, at 420.
9. Since the premise of seduction liability has been that the child is disabled by the seduction from serving the parent, there would be no more reason to require that the defendant have known of the relationship than in an action for loss of services caused by tortious injury to the child. See Salmond, *Law of Torts*, 463, 464 (15th ed. 1969). But see Alexander, *supra* note 7, at 15 (unclear whether seducer must have been aware that seduction would interfere with parent's right to services).
10. See British Columbia Report, at 8; Fleming, *supra* note 3, at 614-15; Street, *Law of Torts*, 392 (4th ed. 1968).

part from the spouse or child.<sup>11</sup> However, with the possible exception of enticement of a spouse,<sup>12</sup> the defendant need not have acted with the purpose of disrupting the spousal or parental relationship. Although liability would not be imposed upon a person who simply harboured a spouse or child believed ill-treated at home, a person who persuaded a spouse or child to leave or remain away from home in the belief that this was in the spouse's or child's best interests might well be found liable. An in-law or member of a religious sect might become liable for enticement in these circumstances.<sup>13</sup>

"Intentional" interference with family relationships is thus an inaccurate description of criminal conversation, seduction, enticement and harbouring. The defendant might well be able to identify disruption of a family relationship as a possible consequence of his conduct, but he need not have acted with the intent of causing the disruption. However, the label "intentional" is widely applied.<sup>14</sup> "Unintentional" interference with family relationships is that caused by injuring a family member and remediable by actions for loss of services or *consortium* and claims under fatal accidents legislation.<sup>15</sup> "Intentional" and "unintentional" appear to signify that in one group of family relationship torts, the defendant acts intentionally in enticing, harbouring or having sexual relations with the plaintiff's spouse or child, whereas in the second group, the defendant typically causes an injury to the plaintiff's spouse or child in an accident.

The real distinction between the "intentional" and "unintentional" interference torts is that in the former, there usually is no tort to the family member concerned. The person enticed, harboured,

11. It is argued in Milner, "Injuries to Consortium in Modern Anglo-American Law," (1958) 7 *Int'l & Comp. L. Q.* 417, 420, that liability for harbouring also requires persuasion, for "harbouring is the logical corollary to enticement — the spouse was persuaded away from the home and persuaded to stay away". But persuasion is generally not considered a requirement of harbouring liability.
12. See Clerk & Lindsell, *Torts*, para. 16-13 (15th ed. 1982); East, "Enticement — The Writ of Ravishment Revived," [1977] *N.Z.L.J.* 507, 507-10.
13. See Fleming, *supra* note 3, at 614-15; McMahon & Binchy, *supra* note 3, at 410-12, 422-23; Winfield, *Tort*, 522-23 (8th ed. 1967). Sexual relations are not a requirement of liability for enticement and liability may exist in the absence of any sexual rivalry between the plaintiff and defendant. See Ontario Report, at 89-90.
14. See, *e.g.*, Alexander, *supra* note 7, at 5-10, 14-17; British Columbia Report, *passim*, Fleming, *supra* note 3, at 614-18 ("wilful interference").
15. See Alexander, *supra* note 7, at 10-13, 17-20; Fleming, *supra* note 3, at 618-24 ("negligent interference").

seduced or "conversed" with has consented to the defendant's conduct and has no action for it.<sup>16</sup> The only wrong is interference with the family relationship itself. When "unintentional" interference is actionable, there is a tort to and no effective consent by the family member. The family relationship remedy is additional to the personal injury remedy.<sup>17</sup>

With the exception of criminal conversation, which originated as a crime, the family relationship torts — "intentional" and "unintentional" — are descendants of the centuries-old action of a master for loss of the services of a servant. The master had a right to the services of his servant and could maintain an action for loss of services by reason of the enticement, harbouring, seduction or tortiously-inflicted injury of the servant. By analogy, the head of a family — the husband and father — was considered to have a right to the services of his wife and children. He could maintain an action for loss of services of a wife or child due to enticement, harbouring, seduction or tortious injury.<sup>18</sup> In the case of wives, the husband's claim evolved from loss of services (*servitium*) to encompass loss of *consortium* — spousal companionship, comfort, affection and sexual relations.<sup>19</sup>

The parallel treatment of master-servant, husband-wife and parent-child cases appears to have been appropriate, given the legal, social and economic positions of the respective members of the family. Many wives and children were valuable, albeit unwaged, domestic servants in the family household, farm or trade. Loss of their services could have the same economic consequences as loss

16. In some Canadian provinces, legislation established an action for seduction maintainable by the person seduced. See note 127, *infra*, and accompanying text. An action may also lie when the person seduced was too young to give an effective consent. See Linden, *Canadian Tort Law*, 55-57 (3rd ed. 1982). But see Fleming, *supra* note 3, at 76.
17. See Ontario Report, at 86-87. If the family member is required by force to accompany the defendant or have sexual intercourse with him, the defendant may be held liable for one of the "intentional" torts, but the principles of the "unintentional" (personal injury) torts would be more appropriately applied. The defendant's conduct is a tort to the victim. Liability for abduction (see note 2, *supra*) probably survives statutory abolition of liability for enticement and harbouring, but it would be anomalous for abduction liability to survive also abolition of actions for loss of *consortium* or services arising from injury to a spouse or child. See generally Salmond, *supra* note 9, at 331-35; Winfield, *supra* note 13, at 528-32.
18. See *Skinner v Allen* (1977), 18 O.R. (2d) 3, 81 D.L.R. (3d) 592 (Ont. C.A.); Brett, "Consortium and Servitium: A History and Some Proposals" (1955), 29 Aust. L.J. 321, 322-28; Clerk & Lindsell, *supra* note 12, para. 16-01; Ontario Study, at 175-77. Seduction of a wife would, however, be actionable as criminal conversation.
19. See Fleming, *supra* note 3, at 619; Milner, *supra* note 11, at 430-32.

of the services of a paid servant. The husband/father was considered the superior member of both the husband-wife and parent-child relationships and controlled the assets of the family. He was thought entitled to the services of his wife and children as well as his servants. On the other hand, wives and children had a substantial interest in the services and support of their husbands and fathers. Loss of a husband's or father's services, by injury or enticement, could have serious economic consequences for the members of his family. In reality, a wife's interest in the *consortium* of her husband was similar to a husband's interest in the *consortium* of his wife. But the practical interests of wives and children in the services and society of their husbands and parents were not given legal protection.<sup>20</sup> Not being the master or superior of her husband or father, a wife or child had no legally-recognized right to his services and no action for their loss.<sup>21</sup> A mother had no action for loss of a child's services unless the father was deceased or the child was illegitimate and not living with its father.<sup>22</sup>

The action for criminal conversation was also denied a wife. This has been attributed to the wife's lack of a property interest in her husband's services, the fictional unity of husband and wife, the fact that damages awarded the wife would become the husband's property — thereby permitting the husband to profit from commission of adultery — and a double standard which forgave adultery by a husband but not adultery by a wife. Inasmuch as the damages would become the husband's property and a wife could sue only if her husband joined the action as a plaintiff (an improbable act on his part when the action was founded on his adultery), suit was unlikely in any event.<sup>23</sup> When statutes replaced the tort action with a statutory claim for damages for adultery,<sup>24</sup> provision was

20. A limited exception was created by the enactment of fatal accidents legislation, beginning with *Fatal Accidents Act (Lord Campbell's Act)*, 1846, 9 & 10 Vict. c. 93. This afforded compensation for pecuniary loss caused by the death of a husband or parent, as well as a wife or child.

21. See Bailey, "A Married Woman's Right of Action for Loss of Consortium in Alberta," (1979) 17 Alta. L. Rev. 513, 513-25; Clerk & Lindsell, *supra* note 12, para. 16-01.

22. In principle, any person standing *in loco parentis* might have the action, but as between the father and the mother that person was the father. See British Columbia Report, at 12; Fleming, *supra* note 3, at 617-18; McMahon & Binchy, *supra* note 3, at 418-20.

23. See Bailey, *supra* note 21, at 514-25; Ontario Report, at 87.

24. See notes 4-6, *supra*, and accompanying text.

made only for claims by husbands.<sup>25</sup>

Today, of course, a wife can bring suit independently of her husband and the damages recovered are her own property. During the twentieth century there has been much litigation and commentary on the subject of whether wives had acquired or should acquire the actions for interference with family relationships available to husbands.<sup>26</sup> For purposes of law reform, with which the present article is primarily concerned, this is no longer in question. There is nothing in the respective positions of husband and wife or male and female that now can justify a distinction between them in respect of family relationship torts. Of course, only women can become pregnant; men cannot. That might be thought a justification for limiting actions for criminal conversation or adultery to cases of adultery by a wife. But if pregnancy is the concern, liability could be limited to cases in which pregnancy actually resulted instead of being dependent solely upon the genders of the adulterer and innocent spouse.<sup>27</sup> In recent years no law reform body has advocated maintenance of the sexual distinction. Denying to wives a right of action available to husbands conflicts with the contemporary policy of sexual equality in the law, entrenched by such provisions as Section 15 of the Canadian Charter of Rights.<sup>28</sup> (Some

25. Wives eventually were granted the right to obtain damages in some jurisdictions: *Attorney General Statutes Amendment Act, 1973, (No. 2)*, Stat. Alta. 1973, c. 61, s. 5(4), now *Domestic Relations Act*, R.S.A. 1980, c. D-37, s. 13; *Family Relations Act*, Stat. B.C. 1972, c. 20, s. 7, later *Family Relations Act*, R.S.B.C. 1979, c. 121, s. 76, repealed by *Family Law Reform Amendments Act*, Stat. B.C. 1985, c. 72, s. 37; *Matrimonial Causes Act, 1929*, No. 1946, s. 22 (S.A.); *Matrimonial Causes and Personal Status Code, 1948*, No. 73, s. 7 (W.A.); *Matrimonial Causes Act, 1959*, No. 104, s. 44, repealed by *Family Law Act, 1975*, No. 53, s. 3 (Aust); *Matrimonial Proceedings Act, 1963*, No. 71, s. 36, repealed by *Domestic Actions Act, 1975*, No. 53, s. 2 (N.Z.).
26. See, e.g., *Best v Samuel Fox & Co., Ltd.*, [1952] A.C. 716 (H.L.), and the numerous law journal comments on the case; Bailey, *supra* note 21; Brett, *supra* note 18, at 393-97.
27. Similarly, liability for seduction could be limited to cases in which pregnancy actually resulted. The Irish Law Reform Commission so proposed. Ireland Working Paper No. 6, at 64-65, and Ireland Report, at 11-12. It is uncertain whether the common law would permit an action to be brought for seduction of a son, when loss of services resulted. See British Columbia Report, at 11; McMahon & Binchy, *supra* note 3, at 420-21. It is difficult to deny that in contemporary societies there remains a double standard in family and community attitudes towards the sexual relations of a son and the sexual relations of a daughter, whether or not pregnancy occurs.
28. *Constitution Act, 1982*, Pt. I (Canadian Charter of Rights and Freedoms), s. 15 (Can.). See *Shwarchuk v. Hansen* (1984), 34 Sask. R. 211, 215-16 (Q.B.) (to allow husband claim for loss of *consortium* by reason of injury to wife but deny wife claim by reason for injury to husband violates Charter s. 15(1); disallowing claim by husband preferable to extending claim to wife).

of the legislation bringing provincial law into compliance with the Charter abolishes family relationship torts in order to avoid sex discrimination.<sup>29</sup>) Accordingly, further consideration in this article of liability for "intentional" interference with family relationships will proceed on the basis that if an action is to remain part of the law of torts, liability will not depend upon the sex of the plaintiff or other family member.

The application of master-servant torts to husband-wife and parent-child cases had important consequences beyond limiting the right of action to the "master" of the family relationship, i.e. the husband/father. It required not only that the plaintiff have a right to the services of the family member concerned (the wife or child), but also that the defendant's conduct result in loss of the services. In substance, the plaintiff's claim was for damage arising from loss of services.<sup>30</sup> In husband-wife cases, this came to mean simply that the plaintiff must prove loss of *servitium* or *consortium* caused by the defendant's conduct. If the husband would not have possessed the *consortium* of his wife in any event — as where she would have lived apart from the husband even if not enticed or harboured — there was no basis for recovery.<sup>31</sup> Few actions would fail entirely for this reason. In parent-child cases, however, a parent might well be denied recovery because the child was too young or, perhaps, too indolent to provide services in the family household, or because seduction caused no loss of service. Furthermore, a parent would not have an action for seduction, enticement or harbouring of a

29. *Charter Omnibus Act*, Stat. Alta. 1985, c. 15, s. 43 (seduction); *An Act Respecting Compliance of the Laws of the Province with the Canadian Charter of Rights and Freedoms, 1985*, Stat. N.B. 1985, c. 41, s. 4 (adultery damages, criminal conversation, enticement, harbouring, seduction); *Statute Law (Canadian Charter of Rights and Freedoms) Amendment Act*, Stat. N.W.T. 1985(3), c. 10, ss. 40, 65 (adultery damages; seduction); *Equality of Status of Married Persons Act*, Stat. Sask. 1984-85-86, c. E-10.3, s. 6 (adultery damages, criminal conversation, enticement of spouse, harbouring of spouse). Earlier, Alberta made available to wives actions for interference with a spousal relationship. *Domestic Relations Act*, R.S.A. 1980, c. D-37, ss. 13-14, 40-42. In some other provinces, the torts were abolished by earlier enactments advancing a policy of sexual equality in the law. *Equality of Status Act*, Stat. Man. 1982, c. 10, ss. 2-4; *Family Law Reform Act*, Stat. Ont. 1978, c. 2, s. 69, now *Dower and Miscellaneous Abolition Act*, R.S.O. 1980, c. 152, s. 69. See also *Skinner v. Allen* (1977), 18 O.R. (2d) 3, 81 D.L.R. (3d) 592 (Ont. C.A.) (equality provisions of *Family Law Reform Act*, Stat. Ont. 1975, c. 41, s. 1, now *Family Law Act*, Stat. Ont. 1986, c. 4, s. 64, had effect of abolishing husband's action for criminal conversation); Ireland Working Paper No. 5, at 8 (Article 40 of Constitution of Ireland may prohibit sex discrimination in criminal conversation actions).

30. See Clerk & Lindsell, *supra* note 12, para. 16-01.

31. See Ontario Report, at 90; Salmond & Heuston, *supra* note 3, at 335.



child in service outside the home because the child's master, not the parent, would be entitled to the child's services. On the other hand, a parent was allowed an action for seduction of an adult daughter when loss of service could be proved, even if her services in the family household would not have been substantial.<sup>32</sup> As will be seen, the loss of service element of liability is necessarily addressed when reform of parental relationship torts is considered.

## REFORM: RETENTION, REFORMULATION OR REMOVAL OF LIABILITY?

### *Criminal Conversation*

In addressing liability for criminal conversation, it is expedient first to refer to the legislative abolition in England, Northern Ireland, Australia, New Zealand and parts of Canada of the criminal conversation action and substitution of a claim for damages for adultery.<sup>33</sup> The legislation's linkage of claims for damages to proceedings for divorce and separation and its implications for matrimonial practice are beyond the scope of the present article, which is concerned only with tort liability and its equivalent. Insofar as liability for damages itself was concerned, the principal effect of the substitution of a statutory adultery claim for a criminal conversation action was that defences and discretionary bars to grant of a divorce on the ground of adultery would now defeat a claim for damages.<sup>34</sup> In jurisdictions where the common law action survives, no law reform body has proposed legislation of this type. It appears that enactment of such legislation is no longer thought an option worthy of serious consideration. Little discussion of it is found in law reform reports. Whether a spouse should be able to obtain

32 See British Columbia Report, at 10-12, McMahon & Binchy, *supra* note 3, at 415-18; Salmond, *supra* note 9, at 463-66; Winfield, *supra* note 13, at 528-32. Seduction usually is considered an action based upon sexual relations with an unmarried daughter (intercourse with a married daughter being criminal conversation, actionable by her husband), but there is authority for an action for the seduction of a married daughter who actually rendered service to the parent. See Clerk & Lindsell, *Torts*, para. 831 (13th ed. 1969); McMahon & Binchy, *op cit*, at 415. See also Fleming, *supra* note 3, at 618 (action maintainable under Australasian legislation).

33 See notes 4-6, 24-25, *supra* and accompanying text.

34 See Davies, *Family Law in Canada*, 98-100 (1984); Ontario Study, at 186-87; Tolstoy, *Law and Practice of Divorce and Matrimonial Causes*, 221-25 (6th ed. 1967). Under the most recent Australian and New Zealand legislation, damages could be obtained only in conjunction with a successful petition for divorce or, in New Zealand, for separation.

damages for adultery seems a very different question from whether a spouse should be able to obtain a divorce or separation. There is no need for it to receive the same answer. There may be circumstances making it inadvisable to grant a divorce or separation, but that does not mean that compensation should not be paid for harm caused by adultery.<sup>35</sup> It is, therefore, wise not to pursue the option of legislation along the lines of the *Matrimonial Causes Act, 1857*.<sup>36</sup> The statutory damages claim is subject to substantially the same arguments for retention or abolition as the common law action for criminal conversation.

The action for criminal conversation (or adultery) supposedly serves a compensatory function in two general respects. First, the plaintiff can be compensated for loss of benefits of the marital relationship that is a consequence of the adultery — the impairment and frequently the termination of the marriage, loss of what in substance are the elements of *servitium* and *consortium*.<sup>37</sup> If the plaintiff applies some of the damages received for the benefit of the children of the marriage, the children are indirectly compensated for the consequences to them of the disruption of the family flowing from the adultery. This, of course, assumes that one recognizes a causal connection between these effects and an act of sexual intercourse — not an obvious proposition by any means. Second, the plaintiff can be compensated for distress and embarrassment suffered because of the adultery. In this respect, one may concede the existence of a strong causal connection.<sup>38</sup> An additional supposed function of

35. *A fortiori*, it should not be necessary to obtain a divorce or separation in order to obtain compensation. This is too blunt an instrument for restriction of adultery litigation. Harm meriting compensation may exist even if the marriage does not break down, and a spouse should not be encouraged to petition for divorce or separation in order to obtain damages. See Ireland Working Paper No. 5, at 57-59. Recommendations against limiting damages claims to divorce or separation petitions are contained in Ireland Report, at 4-5; Royal Commission on Marriage and Divorce (Morton Commission), Report 1951-1955, para. 435 (1956) (Cmd. 9678); Scottish Memorandum No. 18, para. 2.33. A contrary recommendation (contingent upon rejection of the principal recommendation that liability for damages be abolished entirely) is made in Law Commission Report, para. 100.
36. Another feature of this legislation was to empower the court to direct that the damages be applied for the benefit of the children of the marriage or for maintenance of the wife who had committed adultery. See text accompanying notes 64-66, *infra*.
37. See text accompanying notes 18-20, *supra*.
38. Damages are by no means limited to the loss of services that underlies the other torts of "intentional" interference. For principles of assessing damages in criminal conversation actions, see Alexander, *supra* note 7, at 6-8; Davies, *supra* note 34, at 89-96; McMahon & Binchy, *supra* note 3, at 407-09.

liability is to deter adultery and thus to protect the integrity, stability and quality of family relationships (assuming the causal connection). Finally, a judgment for damages serves to assuage an aggrieved spouse and to vindicate his right to a marriage free of adultery. The ability to bring a lawsuit might contribute to social peace. Perhaps it provides an outlet for a spouse who would otherwise commit an act of revenge.

Numerous objections to liability for criminal conversation have been identified by law reform bodies and academic writers.<sup>39</sup> These include:

The action regards the husband as having a property right in his wife's body, which is now anachronistic and offensive.<sup>40</sup> To give a wife a corresponding right in her husband's body would also be anachronistic and offensive.

It is "barbarous",<sup>41</sup> or at least "offensive to the modern mind",<sup>42</sup> to base an action on sexual intercourse and put a price on it. It is also illogical in view of the other causes of marital breakdown and the absence of liability for sexual conduct other than heterosexual intercourse.

Liability premised upon adultery is out of keeping with contemporary mores concerning sexual activity, spousal autonomy and personal freedom.

A defendant may be liable even though he was aware of the spouses' marriage. It is unjust to impose liability upon a person who was not aware of the wrongful quality of his conduct (the wrong being participation in adultery, not mere fornication).

The spouse who committed adultery in many cases should

39. The most detailed consideration of arguments for and against abolition of liability is contained in Ireland Working Paper No. 5, at 47-61, which favoured retention of liability (with some modifications), and Shatter, *Family Law in the Republic of Ireland*, 95-98 (1981), which criticized the working paper and advocated abolition. See also Bailey, *supra* note 21, at 526-29; British Columbia Report, at 15; Law Commission Working Paper No. 9, para. 132; Northern Ireland Consultative Document, para. 46.
40. An Irish judge is reported to have charged a jury in 1972 that "you regard, as the English law seemed to regard, the wife as a chattel, as something that the husband owned, and you compensate him for what he has lost — just as you would compensate him for a thoroughbred mare or a cow". *Braun v Roche* (Ir. High Ct., 1972), quoted in McMahon & Binchy, *supra* note 3, at 408 n. 20.
41. Law Commission Working Paper No. 9, para. 132.
42. Fleming, *supra* note 3, at 616.

be considered as responsible for its occurrence as the defendant, and in some cases should be considered more responsible. It is therefore wrong to impose liability for damages upon a defendant while maintaining the rule that a spouse is not liable for damages — a position derived from the invalid idea that a wife “is *always* the seduced and in some way to be perceived as a victim rather than as an autonomous person”.<sup>43</sup>

Adultery may be a consequence of marital breakdown rather than a cause. A plaintiff is allowed to recover damages for a situation for which he bears partial responsibility. Liability is inconsistent with modern divorce laws which remove the respondent's adultery as a ground for divorce and substitute the ground of “marital breakdown”. This recognizes the complexity of the causes of breakdown of a marriage and the primary responsibility of both spouses for the course of the marriage. Only the spouses themselves can preserve a marriage. Legal sanctions cannot do so.

If a person other than a spouse is to be held liable for disruption of a spousal relationship and the consequences of the disruption, liability should be based upon enticement, not adultery.

An aggrieved spouse is encouraged to collect evidence (by such means as hiring detectives or personally spying upon the defendant and the other spouse) and institute litigation rather than to deal realistically with marital breakdown. The commencement of proceedings may prevent an otherwise-possible reconciliation between the spouses.

Few claims for damages are brought, thereby indicating a lack of need for an action. Often adultery causes no “actual” loss to the other spouse, as when the spouses were already estranged.

When suits are initiated, they are likely to be motivated by spite, hatred or a desire for revenge. Insofar as economic considerations are involved, a plaintiff's motivation may be “mercenary”. Persons of decency and honour do not call attention to sexual activities or marital difficulties and do not exploit them for monetary gain.

43. Ireland Working Paper No. 5, at 49.

Defendants, prospective defendants and spouses are pressured by the prospect of public proceedings to make settlements favourable to plaintiffs. (The terms of settlement might include the unwilling return of the spouse to the plaintiff as well as a substantial payment of money.) The threat of a damages claim and publicity provides opportunities for blackmail.

In adultery litigation there may be collusion between and perjury by the defendant and the alleged adulterer. Alternatively, there may be collusion between and perjury by the plaintiff and his spouse to support a false claim. At any rate, the plaintiff has a strong incentive — recovery of a substantial sum of damages — to hypocritically extol the virtues of the spouse accused of adultery. Conversely, it is to the advantage of the defendant to belittle the spouse's accomplishments and character in order to reduce the damages awarded.<sup>44</sup>

When damages are awarded they are compensatory in theory but not in practice. In reality they are based upon considerations of punishment and the defendant's wealth. The plaintiff's distress, loss of benefits of family life, etc., cannot be evaluated or compensated in monetary terms.

Damages litigation prolongs and adds to the distress, embarrassment and bitterness suffered by all involved, including family members not party to the litigation.<sup>45</sup>

The contention that fear of liability deters adultery has been found wanting. The Law Commission did not believe that liability was a risk that was often weighed or, if weighed, that would often deter.<sup>46</sup> The Scottish Law Commission observed:

The existence of the right has not prevented an increase in the number of divorce decrees for adultery. Further, there are many reasons why adultery occurs. Sometimes the persons concerned may drift into a situation where they determine to have sexual intercourse without long premeditation; sometimes the adultery will be deliberately planned and the adulterous spouse

44. See Williams, "Some Reforms in the Law of Tort", (1961) 24 M.L.R. 101, 108, who cynically observed that a clever wife will give up helping her husband before committing adultery.

45. See authorities cited in note 39, *supra*, New Zealand Report, at 5-9; Newfoundland Study, at 302-03; Ontario Report, at 97; Scottish Report No. 42, paras 4, 9-16.

46. Law Commission Working Paper No. 9, para. 135. See also Ontario Report, at 97.

and the paramour hope that the other spouse will not find out; sometimes the adultery may be an incident of a stable illicit union which the wife, being unable to obtain a divorce, has formed with the paramour in order to live in a 'family household' with him. In many of these cases, the legal implications will be either unknown or discounted.<sup>47</sup>

The Law Commission considered "a little far-fetched" the proposition that the right to claim damages reduced retaliatory assaults by aggrieved spouses. "[A]t the moment when an angry husband hears what has happened he very seldom knows that he can get damages from his adulterer. By the time that he consults his lawyer his first anger will be over and the danger of physical assault will generally be small."<sup>48</sup>

Some of the arguments against liability for criminal conversation and adultery have been answered by the Irish Law Reform Commission. Regarding "the rather barbarous theoretical basis of the action", which savours of a proprietary interest in one's spouse,"

Many areas of our modern law contain legal principles of a high standard judged by contemporary views although the particular law itself derives (or is alleged to derive) historically from old rules that may well be offensive to modern sensibilities. Thus, for example, the law permitting persons to use force in the defence of others embodies the policy of encouraging altruism, which by contemporary standards is adjudged a virtue. Yet its origins are said to lie in a period when servants — and, to an extent, wives — were regarded in law as the chattels of their master or husbands. No one would propose setting aside the sound modern law relating to the defence of others simply on account of its questionable historical pedigree. Similarly, if the action for criminal conversation serves a sound policy purpose judged by the standards of today — "the protection of family relations and of stable married life" — its origins should not be of more than historical interest and should certainly not be considered as a primary ground for seeking abolition of the action.<sup>49</sup>

47. Scottish Report No. 42, para. 11.

48. Law Commission Working Paper No. 9, para. 135.

49. Ireland Working Paper No. 5, at 47-48.

The problem of the defendant unaware that his partner was married could be addressed by making reason to know the other party was married an element of liability, placing the onus of proof on this point upon the defendant lest he escape liability too easily by a plea of ignorance of the other's marital status.<sup>50</sup> But a "more uncompromising response" would be that, "in the world today, where people have become increasingly mobile and are adopting a wider range of lifestyles, it should not be assumed conclusively that any adult is unmarried, and that, in those cases where a spouse emerges unexpectedly the defendant should not be relieved of all liability".<sup>51</sup> That the guilty spouse shared responsibility with the defendant was, "really an argument for extending the action so that it will also lie against the guilty spouse — and not an argument for abolishing the action".<sup>52</sup> Abuse of the criminal conversation action by blackmail and spouse connivance did not appear to be significant in Ireland — certainly not so significant as to suggest abolition of the action. It could be argued that adulterers do not deserve much sympathy and the risk of blackmail was likely to be apparent to most of them.<sup>53</sup>

The Irish Commission believed that liability deterred adultery and thereby protected marital relationships. The existence of the action was relatively widely known. "Although it is hardly the case that the existence of the right of action is a major deterrent, it is reasonable to assume that it has *some* deterrent effect."<sup>54</sup> In addition, "it is right to stigmatise adultery as a civil wrong — thus marking society's disapproval of unacceptable behaviour".<sup>55</sup> The Commission also believed that the existence of the criminal conversation action prevented acts of revenge.

One is, it should be remembered, speaking of the danger of

50. *Ibid.*, at 59-60. The Scottish Law Commission also favoured requiring the defendant to prove that he did not know of the marriage, assuming that claims for damages were not abolished. Scottish Memorandum No. 18, para. 2.29. Neither commission satisfactorily explained why the plaintiff should not bear the onus of proof on this proposed element of liability, as on others. It seems unlikely that many defendants would escape liability easily by a plea of ignorance. The Scottish commission also raised the question of whether knowledge of marital status should be required for liability when the defendant commits a criminal offence, particularly rape.

51. Ireland Working Paper No. 5, at 60.

52. *Ibid.*, at 49.

53. *Ibid.*, at 49-50.

54. *Ibid.*, at 53.

55. *Ibid.*, at 54.

serious, even deadly, assaults, and it may be argued that, if the abolition of the action were to result in any increase in the risk of such serious assaults, the price of abolition is too high. . . . [I]t would appear that the existence of the right of action is reasonably well-known in our jurisdiction, so that a number of spouses may be affected by this knowledge even before they consult a solicitor. Finally, since the discovery that one's spouse has committed adultery has a considerable effect on many people, the confidence of the English Law Commission that the risk of revengeful conduct will be greatly reduced as the "first anger" fades may be misplaced — especially in so far as conditions in Ireland are concerned.<sup>56</sup>

It is submitted that the deterrence and revenge arguments cannot justify the continued existence of criminal conversation actions or claims for damages for adultery. While in the words of the Irish Law Reform Commission, "it is reasonable to assume that [the action] has *some* deterrent effect," it is not reasonable to assume that the action has such a significant deterrent effect as to outweigh the arguments against its existence. Furthermore, with respect to the real object of the Commission's concern — the protection of family life from harmful disruption — one cannot rightly assume that potential liability has a preventative effect. Regarding the action's function in providing an alternative to unlawful retaliation, as one critic of the Irish Commission observed,

There is no evidence that in other jurisdictions when similar actions have been abolished there has been an upsurge in "acts of revenge". It is stretching credibility to its limits to believe that a husband intent on assaulting a third person for committing adultery with his wife makes a rational decision as to whether he should physically attack or sue the offender.<sup>57</sup>

That much of the public strongly disapproves of adultery is no argument for requiring people who commit adultery to pay large sums of money to other people. Liability, then, can only be justified by a need for compensation and by the defendants' responsibility for the harms for which compensation is to be paid.

There are, no doubt, instances in which a person induces another

56. *Ibid.*, at 54-55.

57. Shatter, *supra* note 39, at 97.



to commit adultery, leading to a marital breakdown which otherwise would not have occurred. But this does not justify the continued existence of liability for criminal conversation or adultery, especially when liability reaches a much wider range of cases. As a general rule, the suffering of emotional distress, embarrassment and loss of the non-material benefits of marriage should not be actionable. If there is to be liability for these harms, it should be on the basis of the defendant's intent to cause the harm,<sup>58</sup> not on the basis of an instance of consensual sexual intercourse, albeit intercourse in circumstances widely regarded as improper. If worthy compensatory purposes are served by the tort of criminal conversation and damages liability for adultery, they are well outweighed by the arguments against liability listed earlier. Recommendations for abolition of liability would, therefore be well-founded.<sup>59</sup> This has been the conclusion of every law reform body to address the matter other than the Law Reform Commission of Ireland.<sup>60</sup>

No law reform commission other than Ireland's has attempted to reformulate the action for criminal conversation in order to meet the objections raised against it. The Irish Commission proposed that the action in its common law form be abolished and replaced by a "family action for adultery". This action would be brought

58. This is approximately the position in American law with respect to the actions for infliction of emotional distress and for alienation of the affections of a spouse. Neither action is part of the common law outside the United States. Either action would serve the social interests in compensating and deterring the infliction of emotional distress and the breaking-up of marriages much better than the action for criminal conversation.
59. Modern academic opinion outside the United States appears to support abolition unanimously. See Bailey, *supra* note 21, at 526-29; Brett, *supra* note 18, at 432; Davies, *Annotation, Skinner v Allen*, (1978) 4 C.C.L.T. 233, 236; Shatter, *supra* note 39, at 95-97; Williams, *supra* note 44, at 107-11.
60. British Columbia Report, at 15, Law Commission Report, paras, 99, 102; New Zealand Report, at 9; Newfoundland Study, at 341; Ontario Report, at 98; Saskatchewan Proposals No. 43, at 14-15; Scottish Report No. 42, para. 17. There actually was a second commission in favour of liability for adultery — that of Papua New Guinea. It proposed establishment of a claim for compensation (in a modest amount) for adultery and for enticement with the purpose of adulterous relations. (Mediation procedures were also proposed.) The common law actions of enticement and harbouring of a spouse would be abolished. Papua New Guinea Law Reform Commission, Report, No. 5, Adultery (1977). See McRae, Note: The Law Reform Commission's Report on Adultery, (1977) 5 Mel. L. Rev. 115. The Commission's recommendations were based substantially upon the traditional cultural values of Papua New Guinea's indigenous peoples. As the social conditions addressed by the Commission are very different from those prevailing in Western societies, with which the present article is concerned, the Commission's report is not addressed in this article. The report's recommendations have not been adopted in legislation.

by the innocent spouse, but damages would be awarded to both spouses and their unmarried minor children in accordance with the damage suffered by each. (Family members not ordinarily residing with the plaintiff would be excluded.) The extent to which the guilty spouse was responsible for the adultery would be taken into consideration in determining the amount of damages to be awarded that spouse. Any condonation, connivance, neglect or other misconduct by the plaintiff would be taken into consideration in fixing the amount of damages to be awarded the plaintiff. (Damages could be denied entirely for these reasons.) The action would not lie when the spouses were not ordinarily residing together at the time of the adultery. The defendant would not be liable when it was proved that (s)he did not know and could not reasonably have known that the plaintiff's spouse was married.<sup>61</sup>

The Irish Law Reform Commission's proposal is open to most of the objections raised against liability for criminal conversation — especially in its premises of deterrence and responsibility for causing marital breakdown — and to the objection that it would embroil children in marital conflicts and litigation.<sup>62</sup> Legislation of this type has not been considered favourably by law reform bodies in other countries or by the Irish Parliament, which rejected the commission's recommendations and instead simply abolished liability for criminal conversation.<sup>63</sup>

The Irish Commission's proposal for damages to be settled upon the children and the guilty spouse was inspired by provisions in the *Matrimonial Causes Act, 1857*, and acts patterned on it,<sup>64</sup> which empowered the court to settle all or part of the damages awarded for adultery upon the children or as provision for maintenance of the wife. This feature of the matrimonial causes legislation, like the others,<sup>65</sup> has not commended itself to any law reform body outside Ireland. Ordering a defendant to pay a sum for the maintenance of a spouse who committed adultery is based upon an anachronistic view of adultery as a seduction which breaks up

61. Ireland Report, at 3-6. Draft Family Life Protection Bill, ss 3-8.

62. See Shatter, *supra* note 39, at 96-97.

63. *Family Law Act, 1981*, No. 22, s. 1 (Ir.).

64. See notes 4-6, *supra*, and accompanying text.

65. See text accompanying notes 33-36, *supra*

an otherwise stable marriage. In reality, the spouse bears substantial responsibility for the occurrence of adultery and its consequences for the other spouse and the children. Apart from the obligation to maintain a child born of the adultery, requiring a person to maintain or otherwise compensate his partner in adultery is entirely unwarranted. An argument can be made for liability to the children of a marriage when the defendant has deliberately broken up the marriage, as by enticing a parent from the family home, but ordering payment to a child because a parent committed adultery is unwarranted, harmful and gross. The economic consequences to children of their parents' separation can be addressed in a claim for maintenance by the parent with whom the children reside after the separation. If, however, this is considered inadequate, an appropriate lump-sum contribution toward the maintenance of the children could be required of an adulterer who bore substantial responsibility for breaking up a family home.<sup>66</sup>

### *Enticement of a spouse*

Enticement became a remedy for interference with family relationships in the form of a master's remedy for loss of the services of his servant. The services were identified and evaluated in economic terms. A husband whose wife was enticed away from the family home or disabled by tortious injury could recover compensation for the money's worth of her domestic services in the household, including the care of children. Gradually, the non-economic benefits of the spousal relationship came to be recognized as "services" whose loss could be compensated. The husband's claim evolved from one of loss of services (*servitium*) to one of loss of *consortium*, including such non-economic elements as spousal society, comfort, affection and sexual relations.<sup>67</sup> In this respect, the enticement action and criminal conversation action<sup>68</sup> serve similar

66. See Law Commission Working Paper No. 9, paras. 136-40; Williams, *supra* note 44, at 109-10. The Law Commission recommended that there be no liability. *Op cit*, paras. 141-42; Law Commission Report, paras. 99-102. The Scottish Law Commission concluded that giving children a claim to damages for adultery would be undesirable and inappropriate. It noted that if children were given such claim, there presumably would be a duty to make a claim on their behalf in every case. Scottish Memorandum No. 18, para. 2.28

67. See Fleming, *supra* note 3, at 619; Milner, *supra* note 11, at 430-32.

68. See text accompanying notes 37-38, *supra*

compensatory functions. There can be little doubt of a causal connection between enticement and loss of *consortium* if the enticed spouse would otherwise have remained in the family home and provided something of material or non-material benefit to the plaintiff. While it has been stated that damages may include compensation for injury to the plaintiff's feelings and honour,<sup>69</sup> this does not receive the emphasis given to it in the law of adultery and it is questionable whether damages recoverable in an enticement action properly include such compensation.<sup>70</sup>

In addition to its compensatory functions, the enticement action may serve to deter enticement and thus protect the continuity and stability of marital relationships. The action may deter enticement not only by confronting would-be enticers with the risk of having to pay damages but also by authoritatively declaring that enticement is wrongful. (This seems unnecessary in the case of criminal conversation because of community awareness of and attitudes toward adultery.) Finally, the action vindicates the right to freedom from enticement of a spouse and provides solace to persons whose marriages have been disrupted or broken thereby.

The objections raised against liability for enticement are almost as numerous as, and in many respects parallel to, the objections to liability for criminal conversation and adultery.<sup>71</sup> These include:

The action's premise is that the plaintiff has a property right to the services and society of the other spouse, which is now untenable.

A defendant should not be held liable for enticing away the plaintiff's spouse when the spouse is under no enforceable duty to remain with the plaintiff.

The enticement action is out of step with the modern understanding of and attitude towards marital breakdown: it assigns responsibility for the spouses' separation to a third party instead of to both spouses, conditions leading to separation often being traceable to the plaintiff's conduct; it regards

69. Fleming, *supra* note 3, at 615.

70. See British Columbia Report, at 9; Ontario Report, at 90-91.

71. The most detailed consideration of arguments for and against abolition of liability is contained in Ireland Working Paper No. 5, at 62-68. See also Bailey, *supra* note 21, at 526-29; New Zealand Report, at 7-9; Northern Ireland Consultative Document, para. 48; Scottish Report No. 42, para. 45.

the separation as caused by the defendant's persuasion instead of the freely-made decision of the departing spouse; and it fails to recognize that it may be beneficial, or at least socially acceptable, for a spouse to leave an unhappy marital relationship in order to form a new and apparently better relationship with someone else.

The action is unsatisfactory in failing to recognize, except in a limited category of "justification," the situations in which it is, or may reasonably be thought to be, in a spouse's interests to persuade her or him to leave the other spouse. Neither does it satisfactorily deal with "advice" given by friends and relatives. Appropriate limits to liability have not been established and maintained.

Liability does not deter enticement or prevent marital breakdown. The action is little-known amongst the public, unlike liability for adultery. If known, the remote possibility of litigation would be unlikely to dampen either a potential defendant's efforts to persuade a spouse to depart the marital home or the spouse's desire to depart.

The enticement action is rarely brought and very rarely successful, thereby indicating the lack of need for it.<sup>72</sup> There is no public demand for continuance of liability for enticement (in contrast to the support for continued liability for adultery).

No compensation for the effects of enticement is required. The principal need arising from spousal separation is to make provision for maintenance of the family members and for care of the children. This need can be addressed adequately in proceedings between the spouses. A person who contributed to marital breakdown by enticement should not in effect be made a co-respondent to matrimonial litigation and required to settle a sum on a spouse or the children.

Enticement actions may be motivated by spite or a desire for retribution. They may be used to pursue family quarrels, especially with in-laws, or disputes with a religious community or commune the spouse was persuaded to join.

72. If, however, the right to claim damages for adultery is abolished, enticement suits (or threats of suit) might become popular. See East, *supra* note 12; Wilson, "Enticement of a Spouse: A Revival?", [1976] N.Z.L.J. 383.

The action is a potential instrument of blackmail by unscrupulous spouses. On the other side, there may be collusion between the defendant and the allegedly enticed spouse when a suit is initiated.

Enticement litigation is unseemly and brings public embarrassment and distress not only to the litigants but also to the children of families concerned. It prolongs and increases bitterness and diminishes the chances of spousal reconciliation.

Damages for the non-economic consequences of enticement cannot be assessed with any degree of accuracy.<sup>73</sup>

Rebuttal arguments have been given by Ireland's Law Reform Commission and New Zealand's Torts and General Law Reform Committee, both of which reported in favour of liability for enticement.<sup>74</sup> They proceed along the following lines:

The anachronistic basis of the action is not a reason for its abolition if it serves a social purpose judged valuable by today's standards.

Although unlikely to have much force as a deterrent, the enticement action performs a useful social function in supporting the public policy against intentional disruption of family life and in providing compensation to those who have suffered as a consequence of such disruption. The effects of family breakdown can be serious and compensation is needed.

Divorce and separation proceedings, if maintainable at all, are not an adequate remedy and an aggrieved spouse may be unwilling to commence them. A deserted spouse may not be able to obtain sufficient funds for maintenance or compensation for economic loss from the other spouse.

The enticed spouse is not to be regarded as a "free agent" in the sense of being free to leave the marital relationship. This is generally considered wrongful as desertion and subject to sanctions in matrimonial and maintenance proceedings between the spouses. The "free agent" argument is inconsistent with laws limiting divorce to certain kinds of "fault" or,

73. See authorities cited in note 71, *supra*; British Columbia Report, at 16-17; Law Commission Working Paper No. 9, paras. 132-42; Law Commission Working Paper no. 19; paras. 91-92, Ontario Report, at 97.

74. Ireland Working Paper No. 5, at 62-68; Ireland Report, at 6-8; New Zealand Report, at 7-9. See also Payne, "Enticing and Harboring Spouses," (1958), 21 M.L.R. 296, 297-99, and the arguments canvassed in Bailey, *supra* note 21, at 526-29.

as in Ireland, prohibiting divorce entirely.

That a spouse departs the family home as a result of a freely-made decision — it is not necessary to liability that the spouse's will be overborne — should not exclude liability. Holding a defendant liable on the basis of inducing the decision is analogous to other forms of inducement liability, such as inducing breach of contract, and sound when (as must be proved) the inducement is a cause of an event that would not have occurred in its absence.

The risk of successful blackmail or collusion is remote — no greater than in various other proceedings. It is to be distinguished from liability for adultery, which is based upon a single act into which a person might be trapped.

That enticement litigation is distasteful and distressing is not sufficient reason for denying compensation. Bitterness and harm to children may be caused by the absence of a remedy, as when the spouse in whose charge the children are left lacks the ability to care for them adequately. If a deserted spouse elects to bring suit for enticement, a relatively unusual action, bitterness and distress already exist.

The difficulties of establishing the limits of liability and of assessing damages are present in other areas of the law and not a reason for rejecting liability entirely.

These arguments have more force than the arguments in favour of liability for criminal conversation or adultery. It is generally accepted that liability for enticement is more justifiable than liability for adultery in that a defendant must have persuaded a spouse to leave the other intentionally, with knowledge of the marital relationship; a defendant cannot be liable unless the spouse actually does leave, which often is a serious loss to the other spouse and children of the marriage; and liability does not depend upon the occurrence of sexual intercourse between the spouse and the defendant.<sup>75</sup> The only reason why a law reform body might recommend abolition of enticement and not criminal conversation is public opinion that adulterers should be made to pay. Blackmail, as distinct from bona fide settlement of a claim, is unlikely. Liability for enticement of a spouse is not an anachronism if it is acknowledged that it has become a remedy primarily for the loss of *consortium* rather

75. See Brett, *supra* note 18, at 432-33; Law Commission Working Paper No. 9, para. 132; New Zealand Report, at 8-9.

than for the loss of *servitium* and that it is supported by a perceived need to provide for compensation of these losses, not by a proprietary right to possess the *servitium* and *consortium* of a spouse.

The New Zealand committee proposed that the enticement action be freed from its historical connection with loss of services, that just cause for the enticed spouse to leave the other and the defendant's reasonable belief that the spouse had such cause be defences to liability, and that the court be empowered to settle damages on the children of the marriage.<sup>76</sup> The Irish Law Reform Commission's proposals for enticement were similar to its proposals for liability for adultery.<sup>77</sup> There would be a "family action" brought by the aggrieved spouse, with damages awarded to both spouses and their unmarried minor children in accordance with the harm suffered by each. (Family members not ordinarily residing with the plaintiff at the time of the enticement would be excluded.) It would be necessary to establish that the enticed spouse ordinarily resided with the plaintiff but not that he or she performed any act of service. Damages would include compensation for expenses and financial losses sustained as a result of the enticement, for mental distress, and for injury to "the continuity, stability and quality of the relationship with the enticed spouse." Condonation, connivance, neglect or other misconduct by the plaintiff would be taken into consideration in determining the amount of damages awarded the plaintiff. (Damages could be denied entirely.<sup>78</sup>)

The British Columbia Law Reform Commission considered a more fundamental reform: the establishment by statute of an action for wilful, unreasonable interference with the spousal or parent-child relationship. Such an action could be the basis of injunctive relief as well as an award for damages. The Commission acknowledged that there was a perceived need for society to express its disapproval of certain kinds of conduct injurious to family relationships and that there were cases in which a remedy might be desirable. (The example given was in substance that of an employer who schemed to keep a valued employee from moving with his spouse when the spouse was transferred by her employer to another city.) The Commission, however, doubted that liability would deter intentional interference and protect family relation-

76. New Zealand Report, at 9-12.

77. See text accompanying note 61, *supra*.

78. Ireland Report, at 6-8, Draft Family Life Protection Bill, ss. 9-11. Provision was made for damages to be settled on the plaintiff's spouse in order to ensure that the spouse could obtain damages when the spouse's will had been "effectively overborne" by the defendant. Ireland Working Paper No. 5, at 68.



ships. If a new tort were created by legislation, it would be difficult to decide when an action would lie and what the remedy would be, and it could lead to some abuses encountered in the common law actions. The Commission recommended against the creation of such a tort.<sup>79</sup>

The British Columbia Commission and most other law reform bodies have found the arguments for abolishing liability for enticement of a spouse more persuasive than the arguments for retaining liability, with or without modifications. Their reports have recommended abolition, Ireland and New Zealand excepted.<sup>80</sup> The Irish Commission's recommendation was rejected by the Irish Parliament, which terminated liability for enticement with no provision for a substitute.<sup>81</sup> The New Zealand Parliament did decide to preserve the action for enticement while removing the right to claim damages for adultery,<sup>82</sup> but five years later decided that enticement should be abolished as well.<sup>83</sup> It is submitted that the arguments for abolition are, as a whole, stronger than those for retention and that legislation barring actions for enticement is desirable. There are many forms of conduct which adversely affect other people but do not incur an obligation to make reparation. A spouse's interest in the presence, services and *consortium* of the other spouse should not be translated into liability for damages should the other spouse be persuaded to separate.<sup>84</sup>

### Harbouring of a spouse

The tort of harbouring closely resembles enticement in its origins and compensatory functions. They are complementary and may be raised in the same case. In one, the plaintiff has lost spousal *servitium* and *consortium* because his spouse is persuaded to leave when

79. British Columbia Report, at 25-26. See also British Columbia Working Paper No. 42, at 31-35.

80. British Columbia Report, at 17; Law Commission Report, paras, 101-02; Law Reform Committee Report, paras, 23-24; Newfoundland Study, at 341; Ontario Report, at 98; Saskatchewan Proposals No. 43, at 14-15, Scottish Report No. 42, paras. 45-46; Scottish Report No. 76, para. 4.1; South Australia Report, at 6. Concerning the Papua New Guinea report, see note 60, *supra*.

81. *Family Law Act, 1981*, No. 22, s. 1 (Ir.)

82. *Domestic Actions Act, 1975*, No. 53, ss. 2-3 (N.Z.).

83. *Family Proceedings Act, 1980*, No. 94, s. 190, amending *Domestic Actions Act, 1975*, No. 53, s. 3 (N.Z.).

84. Academic opinion in favour of abolition includes Bailey, *supra* note 21, at 528-29; Davies *supra* note 59, at 236; Shatter, *supra* note 39, at 96-97; Williams, *supra* note 44, at 107-10. Opposed: Brett, *supra* note 18, at 432-33; Payne, *supra* note 74, at 297-99.

she otherwise would have stayed. In the other, the plaintiff has lost spousal *servitium* and *consortium* because his spouse does not come back when she otherwise would have returned. Many of the arguments concerning liability for enticement could also be applied to harbouring.

Most of the modern literature on harbouring refers to the judgment of Devlin, J., in *Winchester v. Fleming*,<sup>85</sup> in which it was observed that, "The reason why harbouring was considered objectionable was because it interfered with the economic process by which a wife, refused food and shelter elsewhere than in the matrimonial home, would eventually be forced to return to it."<sup>86</sup> Devlin, J., said that, "In a society that is organised on the basis that everyone is in the last resort to be housed and fed by the State, the bottom has dropped out of the action for harbouring."<sup>87</sup> A more fundamental reason for repudiating liability for harbouring, also identified in *Winchester v. Fleming*, is that denying a spouse shelter and sustenance is not now an acceptable means of keeping a family intact. Modern opinion would not approve of a deliberate effort to force an adult - by denying food and shelter - to return unwillingly to her or his spouse. "Society would not today tolerate a vindictive husband who hounded his wife, however grievously she might have erred, from house to house through the ranks of her friends and relations in order to recapture her, as one might a fugitive slave."<sup>88</sup> It may be added that there is little likelihood that liability for harbouring deters disruption of spousal relationships and the tort's contribution to the achievement of spousal reconciliation must be very small.<sup>89</sup>

No one in recent years has had a kind word to say about liability for harbouring a spouse. About the most that can be said in its favour is that it can fill a gap left by the law of enticement if enticement does not include inducing a spouse who has already left the plaintiff not to return. If liability for enticement is to be retained, it would seem sensible to treat persuading a spouse to leave

85. [1958] 1 Q.B. 259.

86. *Ibid.*, at 265.

87. *Ibid.* He also asked rhetorically whether the Crown or some local authority would be liable for harbouring if the wife was "driven to seek public assistance".

88. *Ibid.*

89. See Ireland Working Paper No. 5, at 69-71.

and persuading a spouse not to return equivalently. However, helping or even persuading a spouse to maintain an already-achieved separation may be considered less blameworthy and less harmful than persuading a spouse to initiate a separation. Little, if any, blame would now attach to providing assistance (as distinct from inducement) to a spouse who wishes to maintain a separation. If desired, liability for enticement could be extended to encompass inducing a spouse not to return to the plaintiff while abolishing liability for harbouring.<sup>90</sup>

Every law reform body to consider the subject — even Ireland's — has recommended abolition of tort liability for harbouring a spouse.<sup>91</sup> The soundness of this conclusion seems beyond dispute.

### Enticement of a child

The nature of the action for enticement of a child and the basis of arguments for its abolition are well-stated in a passage from a former edition of *Winfield on Tort*:

It is a tort to do any act to a child which wrongfully deprives the parent of its services.

Our law here displays an unfortunate and vicious historical twist. The ground on which any remedy of this kind ought to be based is outrage or injury to the parent as head of the family. But in fact the action *per quod servitium amisit*, which began as a remedy for a master against one who interfered with his servant so as to deprive him of his services, was extended by 1653 to similar interference with a child. The tort is in form therefore merely a species of the more general tort of interfering with the relations of master and servant.... The law thus made a false start by holding that the remedy must depend not on the question, "Have the family rights of the parent been injured?" but on the question, "Has the parent

90. This was proposed by the Irish Law Reform Commission. Ireland Report, Draft Family Life Protection Bill, s 2(1) (definition of "enticement"). Arguments for retention and abolition of liability for harbouring are considered in Ireland Working Paper No. 5, at 69-71. No other law reform body has thought it necessary to provide such support to recommendations for abolition of this tort.

91. British Columbia Report, at 17; Ireland Report, at 8-9; Law Commission Report, paras. 101-02; Law Reform Committee Report, paras. 23-24; New Zealand Report, at 13-14; Newfoundland Study, at 341; Ontario Report, at 98; Saskatchewan Proposals No. 43, at 14-15; South Australia Report, at 6. Also in support of abolition: Bailey, *supra* note 21, at 528-29; Davies *supra* note 59, at 236; Shatter, *supra* note 39, at 96-97.

lost the services of the child?" Upon the whole the courts have done their best to reduce the requirement of "service" to something very like a fiction.... [T]he idea of service makes the age of the child irrelevant in the sense that, provided loss of service is proved, it is immaterial whether the child is or is not of full age. But... [the law] will not help a parent if the child is too young to be capable of rendering service....<sup>92</sup>

In the seventeenth century, children could well be viewed as servants, valuable to a parent because of their labour in the household, on the farm, or in the family trade. Loss of a child's services could be thought the primary harm to a parent if a child was absent from the household or injured. There being no action for interference with parental rights as such, it was logical to permit a parent damaged by loss of his child's services to sue in the guise of the child's master. The enticement action today can but rarely serve a compensatory function in this respect. Few minor children provide their parents with services or income in an amount exceeding the cost to the parents of maintaining them in the household.

The only important compensatory function that liability for enticement could serve in a modern society is to provide damages for loss of the non-material benefits to a parent of the parent-child relationship — the companionship, affection, comfort and joy a child provides — and for the emotional distress and embarrassment caused by the defendant's conduct and its consequences. It is not clear that the enticement action actually affords recovery of such damages, and they could not in any event be recovered when the loss of service requirement is not satisfied. The requirement would not be satisfied when the plaintiff was not entitled to the services of the child<sup>93</sup> or the child, because of its age or other reasons, was not providing services to the plaintiff. (Provision of services of a minor nature would, however, suffice.<sup>94</sup>) The parent's action for enticement of a child is to be contrasted with a husband's action for enticement of his wife. In the latter, the basis

92. Winfield, *supra* note 13, at 528-29.

93. As it was the father who was entitled to the child's services, the mother of a legitimate child with a living father was denied compensation for the harm she sustained. An award of legal custody to the mother arguably confers upon her entitlement to sue for enticement, and modern principles of equal joint custody might result in either or both parents having an action for the same enticement. See Bradbrook & Tracey, "Loss of Services: An Anachronistic Alternative to the Child Custody Laws," (1977), 4 Monash U. L. Rev. 71, 73-74; British Columbia Report, at 12-13; Fleming, *supra* note 3, at 617-18.

94. This is inferred from the treatment of the loss of services requirement in actions for seduction. See text accompanying note 32, *supra*, notes 112-13, *infra*.

of damages evolved from loss of *servitium* to loss of *consortium*. Husbands were acknowledged to have a right to the services and *consortium* of their wives on the basis of the marital relationship, and loss usually could be established when the wife would have cohabited with the husband but for the enticement. Thus the action could, under modern conditions, fulfill a need to compensate for deprivation of the benefits of a family relationship by enticing away one's spouse. The same cannot be said of the action for enticement of a child.

The anomalous and dysfunctional character of the enticement action as an action for loss of a child's services has been an important factor in consideration of the action by law reform bodies.<sup>95</sup> Equally important to recommendations for reform has been the existence of other legal proceedings that may be taken by a parent aggrieved by a child's departure: custody, guardianship or wardship proceedings and applications for habeas corpus. These proceedings are intended to establish and give effect to a parent's right to custody rather than to compensate for violation of a right to custody. However, a right of enforcement by order may be considered adequate and preferable to a remedy in damages.<sup>96</sup>

In custody and guardianship proceedings, the welfare of the child would be the paramount consideration. In enticement actions, short of whatever mistreatment of the child might constitute "justification" for encouraging it to leave its parent, the welfare of the child is not considered at all — another argument for removing this form of liability from the law of torts.<sup>97</sup> In custody proceedings the preferences of the child are considered, and a writ of habeas corpus might not be granted against the wish of an older teenager. The wishes of the child seem irrelevant to enticement actions. Liability might unduly restrict the freedom of older minors, preventing them from selecting their own lifestyles and forming associations of their choice — not only personal, but also religious.<sup>98</sup> The

95. See British Columbia Report, at 9-10; Ireland Working Paper No. 6, at 68, 70-71; Northern Ireland Consultative Document, para. 49; Ontario Study, at 175-77; Saskatchewan Tentative Proposals No. 23, at 37-40.

96. See British Columbia Report, at 18-20; Law Reform Committee Report, para. 23; Northern Ireland Consultative Document, para. 49; New Zealand Report, at 13.

97. See Ireland Working Paper No. 6, at 68-69; Saskatchewan Tentative Proposals No. 23, at 37-39. It has been claimed that "the departure from home of a young child is in the great majority of instances a symptom or consequence of a deep family malaise". Shatter, *supra* note 39, at 99.

98. See British Columbia Report, at 25; Ireland Working Paper No. 6, at 68-69.

freedom of an adult child does not appear to be seriously threatened by enticement actions, but the possible application of enticement actions to adult children providing service to a parent seems inconsistent with the freedom from parental control accorded adults.<sup>99</sup>

What, then, are the arguments for retaining liability for enticement of a child? According to the Law Reform Commission of Ireland, for a family to function effectively and for parents to be able to discharge the duty of rearing and educating their children, it is essential that the family be secure from outside interference. The existence of the action for enticement serves to deter persons who otherwise might intrude into family relationships. Abolition of the action could place children in the position of having to make a decision of fundamental importance (whether to leave home) at an age when they have neither the experience nor the maturity to make such decisions. The action's historical origin as one for loss of services is not a valid argument against the action if it achieves an objective judged desirable by contemporary standards. The Commission appears to have concluded that enticement actions did not unduly restrict the freedom of minors — their desires should not exclude liability — and that a damages remedy was necessary to protect the interests of the parent and other family members.<sup>100</sup>

The Irish Law Reform Commission proposed legislative alteration of the enticement action to meet the objections that had been raised. The action would be freed of the requirement of the service relationship between the plaintiff and the child. It would be made a remedy for emotional distress and harm to family relationships rather than one for loss of services. Expenses and financial losses sustained as a result of enticement would also be recoverable. In assessing damages, the court would have regard to the extent, if any, to which the welfare of the child had been affected by enticement. (A proposal to make the child's welfare the "paramount consideration" in enticement litigation was dropped by the Commission.) Liability for the enticement of adult or married children would be excluded.<sup>101</sup>

99. See British Columbia Report, at 20-21 (considering possible use of enticement actions against religious cults); Ireland Working Paper No. 6, at 69-70 (proposing that action lie only in respect of unmarried minors, with eighteen as age of majority).

100. Ireland Working Paper No. 6, at 67-69

101. *Ibid.*, at 67-72; Ireland Report, at 14-15, Draft Family Life Protection Bill, ss. 18-19. Enticement was defined to include wrongfully taking a child away from the parent and wrongfully detaining a child, thus making abduction or imprisonment of a child actionable as enticement. S. 2(1).

Against this it may be argued that there is no evidence that this obscure and rarely-litigated action has the effect of deterring interference with the relationship between a child and its family. Its survival would not prevent children from being attracted away from their families by a personal relationship, religious establishment, commune or employment that is not in the child's best interests. Neither would it accomplish the return of children to their families. When brought, an enticement action may disserve the child's interests by further alienating the child from its family.<sup>102</sup> The only situation in which enticement liability is likely to be a deterrent is when a claim for damages is threatened during the course of an intra-family dispute over custody of the child.

There is no need to have an enticement action available as a weapon to be used by custody disputants. Other mechanisms for the enforcement of custody rights and the protection of children are available to parents and the courts. Parents should not be encouraged by the prospect of a monetary award and the absence of consideration of the child's interests and desires to bypass these mechanisms and instead commence an enticement action.<sup>103</sup> Whilst acknowledging that the companionship of a child — even one whose relationship with the parent is not so strong as to resist persuasion to leave the parent — is of considerable value and that enticement of a child can cause its parent much distress, granting a parent money as solace for distress or loss of the child's society is unjustified. Neither is there today an economic interest that requires a parent to be compensated.<sup>104</sup> There is even less justification for the "family action" proposed by the Irish Law Reform Commission, which would enable all members of the family, including the enticed child, to claim damages and thus involve them all in the dispute.<sup>105</sup>

With the exception of the Law Reform Commission of Ireland, every law reform body to have made a recommendation on the action for enticing a child has proposed its abolition.<sup>106</sup> The

102. See Shatter, *supra* note 39, at 98-99.

103. See Bradbrook & Tracey, *supra* note 93, at 72-76.

104. See New Zealand Report, at 13 ("There seems no social justification for the award of monetary compensation to the parent.")

105. Ireland Report, at 14-15, Draft Family Life Protection Bill, ss. 18-19.

106. British Columbia Report, at 21; Law Commission Report, paras. 101-02; Law Reform Committee Report, paras. 23-24; New Zealand Report, at 12-13; Newfoundland Study, at 341; Ontario Report, at 104-05; Saskatchewan Proposals No. 39, at 33. Also favouring abolition are Bradbrook & Tracey, *supra* note 93, at 78-80; Shatter, *supra* note 39, at 98-99. The British Columbia Law Reform Commission considered and rejected the establishment of an action for wilful, unreasonable interference with a parent-child or spousal relationship. This is discussed in the text accompanying note 79, *supra*.

arguments raised against enticement liability are persuasive. Recommendations for abolition of the action are, it is submitted, fully justified.

### Harbouring of a child

All discussion of possible reform of the action for harbouring a child is bracketed with discussion of the action for enticement. The two actions are complimentary — one arising at the time the child leaves home, the other arising while the child is away from home — and almost everything that has been said for or against the enticement action applies also to harbouring. They have a common origin in the action *per quod servitium amisit* and their compensatory functions are essentially identical.

The action for harbouring of a spouse has no defenders today because it is unacceptable to modern opinion that the law require the denial of shelter to an adult for the purpose of compelling her to return to her husband. In contrast, it may still reasonably be thought proper to deny shelter and sustenance to a minor with the object of requiring him to return to his parent — that it is wrong for someone who knows that there is a parent who wants the child's return to give the child the means to remain away, thus keeping apart a parent and child who might otherwise live together. There is, consequently, no unanimity of opinion on liability for harbouring a child. If the action for enticement of a child is retained, the action for harbouring might be retained, too, especially if persuading a child not to return to its parent would not be treated as enticement. On the other hand, conduct that results in a child remaining apart from its parent may be considered less culpable and less damaging than conduct that causes the child to separate from its parent, and it may be thought undesirable to treat as wrongful the provision of food and shelter when the provider believes that this is in the child's best interests. Enticement could be defined to include persuading a child not to return to its parent and harbouring dispensed with.<sup>107</sup>

A case can be made for retention of harbouring in the law of torts for the purpose of affording injunctive relief. Harbouring

107 See Ireland Report, Draft *Family Life Protection Bill*, s. 2(1), which defines enticement of a child to include (wrongfully) inducing a child to leave its parent(s), inducing a child to remain apart from its parent(s), taking a child from its parent(s), detaining a child, and causing a child to be detained. An action for harbouring is, however, also provided for in ss 18-19.



(unlike enticement, seduction and criminal conversion) is continuing conduct that practically can be stopped by court order. Such an order would not require the child to return to the plaintiff but might lead to the child's return. However, the use of harbouring action to obtain an injunction or other equitable remedy seems to conflict with the policies of a variety of other legal proceedings. In custody, guardianship, wardship and child welfare proceedings, the welfare of the child is the paramount concern and a child's wishes may be respected. In habeas corpus actions, the writ is unlikely to be granted over the objections of the minor concerned, if above a certain age (likely fourteen or sixteen).<sup>108</sup> A court can, without the action for harbouring, act to prohibit interference with its custody orders and may be empowered to otherwise prohibit interference with rights of custody.<sup>109</sup>

With the exception of the Irish Law Reform Commission, which recommended liability for harbouring in a form similar to that which had been recommended for enticement,<sup>110</sup> every law reform body to have made recommendation on the action for harbouring a child has proposed its abolition.<sup>111</sup> There is certainly as much, if not more, reason to terminate this action as to terminate the action for enticement.

### *Seduction of a Child*

Seduction is the most anomalous of all the torts of "intentional" interference with family relationships. A defendant becomes subject to liability by an act of sexual intercourse — the same conduct that gives rise to an action for criminal conversation. But a plaintiff has an action for seduction only on the basis of loss of the services of the person seduced, as in enticement and harbouring, not on the basis of his family relationship with that person, as in criminal conversation. Whereas liability for enticement or harbouring is

108. See Bradbrook & Tracey, *supra* note 93, at 72-76, and text accompanying notes 96-98, *supra*.

109. See British Columbia Report, at 18-20.

110. Ireland Report, at 14-15, Draft *Family Life Protection Bill*, ss. 18-19. Liability was to be limited to cases of "wrongful" harbouring. Defendants would be able to argue that harbouring was not "wrongful" because done for humane or charitable reasons.

111. British Columbia Report, at 21; Law Commission Report, paras. 101-02; Law Reform Committee Report, paras. 23-24; New Zealand Report, at 13; Newfoundland Study, at 341; Ontario Report, at 104-05; Saskatchewan Tentative Proposals No. 53, Draft *Seduction Actions Abolition Act*, s. 2. Also recommending abolition are Bradbrook & Tracey, *supra* note 93, at 78-80; Shatter, *supra* note 39, at 98-99.

limited to cases in which the defendant knew that the plaintiff would be separated from his spouse or child, a person can become liable for seduction without any knowledge that this would damage a parent-child relationship. (The child need not be so young as to put the defendant on notice that sexual relations likely would cause such damage.) Although it is possible that damages for emotional distress and loss of the benefits of the parent-child relationship could be awarded in a parent's action for enticement or harbouring, the only damages clearly recoverable are for loss of the child's services. The seduction action, however, has become a means of recovery for injury to the plaintiff's feelings, damage to his pride and "family honour," and expenses incurred as a result of the seduction.<sup>112</sup>

A seduction action thus can provide compensation for all significant harm that a parent is likely to sustain. But many parents are denied compensation entirely because loss of services remains a requirement of liability. The plaintiff must have had a right to the child's service and must prove loss of service. Courts have done their best to erode these requirements. De facto service usually has been enough to give a father a right to its continuance and the loss of minor household service has been found sufficient for liability. But a parent has no right to a daughter's services when she serves only an employer outside the family household, and there is no loss of services when seduction has no physical consequences. Loss of services usually would be established by a pregnancy that disabled the daughter from performing services. Disability caused by venereal disease transmitted by the defendant probably would suffice. So might disabling emotional distress resulting from the seduction.<sup>113</sup>

In addition to its role as a vehicle for the recovery of damages, the action for seduction may serve to deter fornication and prevent pregnancy and birth out of wedlock. But defenders and opponents of liability for seduction agree that while potential liability may have a deterrent effect in individual cases, it has no significant deterrent effect overall. High numbers of illegitimate children

112. On principles of damages in seduction actions, see British Columbia Report, at 11; Fleming, *supra* note 3, at 617; Salmond, *supra* note 9, at 466; Shatter, *supra* note 39, at 94-95.

113. See generally British Columbia Report, at 10-13; Clerk and Lindsell, *supra* note 32, paras. 831-37; Fleming *supra* note 3, at 616-68; McMahon & Binchy, *supra* note 3, at 415-20; Salmond, *supra* note 9, at 463-66.

are found in countries where a seduction action may be maintained.<sup>114</sup> Finally, the action for seduction expresses society's disapproval of the defendant's conduct.<sup>115</sup> Certainly in the past, opprobrium attached to both a "seducer" and his partner. In some communities, feelings remain strong on the subject.<sup>116</sup> But whether condemnation of extra-marital sexual relations is at present so general and so strong as to warrant retention of liability for seduction is open to serious question.

Some law reform bodies have summarily dismissed the action for seduction as one which now has no justification or serves no useful purpose.<sup>117</sup> When there has been a more detailed analysis of the action, its foundation in loss of services has been targeted for criticism. There seems to be a consensus that as an action for loss of services seduction is inappropriate, fictional and — in denying recovery to parents who cannot establish a right to or loss of services — unjust. The only division of opinion in this regard concerns whether it follows that the action should be remoulded into a parent's action for emotional distress, loss of family honour, etc., or abolished entirely.<sup>118</sup>

Numerous additional arguments against liability for seduction have been identified:

As implied by the name of the action and the fact that liability is established without proof of any inducement, persuasion or pressure to have sexual intercourse, the action assumes that fornication is the product of seduction of the female by the male (at least when the female is young), females being naive and vulnerable to a man's sexual advances. This is not

114 See Ireland Working Paper No. 6, at 58; Law Commission Working Paper No. 19, para. 88 n. 56; Manitoba Report, at 18.

115. See statement of Council of Law Society, quoted in Law Commission Working Paper No. 19, para. 88 n. 56.

116. See South Australia Report, at 6, referring to feelings within the local Italian and Greek communities which led the Law Reform Committee not to recommend abolition of the seduction action.

117. Law Commission Working Paper No. 19, para. 88; New Zealand Report, at 12; South Australia Report, at 6.

118. See Ireland Working Paper No. 6, at 59-60; Law Reform Committee Report, paras. 21-22; Manitoba Report, at 4-5, 16-17; Northern Ireland Consultative Document, para. 49; Ontario Study, at 175-77. The more general arguments against common law remedies for "intentional" interference with family relationships — see British Columbia Report, at 1; Salmond & Heuston, *supra* note 3, at 326; Winfield, *supra* note 13, at 528-29, quoted in the text accompanying note 92, *supra* — apply with the greatest force to seduction.

in accord with reality and not tenable if women are to have legal equality with men. In some instances, the female is the real seducer or otherwise has taken the initiative. In many others, there was no seduction but only a mutual decision to have sexual relations.

The action depends upon an outmoded concept of a "respectable" family's honour that is damaged by a daughter's "fall". It is unsound legal policy to assume that there is a class of "good" families who eschew sex outside marriage and provide them with a monetary recovery. In any event, in contemporary society a family is unlikely to suffer substantial loss of reputation on account of a daughter's "seduction," especially when no pregnancy results. The low number of seduction actions litigated recently is evidence of this.

Bringing a claim for damages on the basis of a family member's sexual conduct is inconsistent with the maintenance of family honour. It does not strengthen a family's reputation and can be particularly damaging to the person allegedly seduced.<sup>119</sup>

Liability for seduction is inconsistent with current sexual mores, which tolerate cohabitation as well as sexual relations outside marriage. A person who engages in such tolerated and widely-practised conduct should not have to run the risk of liability. To the extent sexual conduct remains subject to general condemnation — as in the case of rape and sexual relations with younger minors — that condemnation can be expressed and deterrence achieved through provisions of the criminal law.

The action is unsound in including (when loss of services can be established) sexual relations with a child who has reached the age of majority or has been married. In these circumstances, neither the child nor the parent has an interest in the child's chastity that requires protection by a tort action. The only liability for seduction of a married person

119. The bad character or improper conduct of that person can be adduced in evidence in order to reduce the damages recoverable. *British Columbia Report*, at 11; *Clerk & Lindsell*, *supra* note 32, para. 839; *Salmond*, *supra* note 9, at 466.

should be, if any, to that person's spouse for adultery.<sup>120</sup>

Liability for seduction cannot be justified as a means of obtaining compensation for expenses or disability caused by sexual intercourse. When intercourse causes pregnancy, disease or emotional distress, a person should be liable for medical expenses and disability only if in having intercourse with the child he committed a tort to the child. In that event, the child has a tort action against the defendant and can be fully compensated. In addition, the parent might have the tort action for loss of services or recovery of medical expenses that arises when a child is tortiously injured. When sexual relations result in the birth of a child, the father is liable for its maintenance. Any deficiency in maintenance provisions should be remedied by their amendment, not by use of a tort action for seduction.<sup>121</sup>

The existence of the action provides opportunities for blackmail. A father (or other potential plaintiff) and daughter may trap a person into making payment rather than run the risk that there will be brought against him an action that is highly embarrassing and difficult to defend.<sup>122</sup>

Rebuttal arguments have been marshalled by the Irish Law Reform Commission to support retention of a seduction action in some form. In substance:

That the action was and remains founded upon a "proprietary" or "quasi-proprietary" interest in the seduced person's services (which if not established bars recovery) is not justification for abolition of the action. Instead the action should be altered so as to remove this as an element of liability and enable parents to bring an action on the basis of their

120. Williams, *supra* note 44, at 111, called "absurd" a decision to allow a father an action for the seduction of a daughter during the eighth year of her marriage, *Harper v. Luffkin* (1827), 7 B. & C. 387, 108 E.R. 767, 6 L.J.O.S.K.B. 23, *sub nom. Harpur v. Luffkin*, 1 Man. & Ry. 166 (K.B.).

121. It has been held that the cost of maintaining the child can be included in the damages awarded in a seduction action. *Flynn v. Connell*, [1919] 2 I.R. 427, 443-44 (K.B.D.). *Contra, Chadwick v. McCree*, 56 O.L.R. 143, 147-48, [1924] 4 D.L.R. 1107, 1110 (Ont. A.D.).

122 Arguments concerning the seduction action are considered in the greatest detail in Ireland Working Paper No. 6, at 58-66, and Manitoba Report, at 16-20. See also British Columbia Report, at 23; Law Reform Committee Report, paras. 21-22; Northern Ireland Consultative Document, para. 49; Saskatchewan Tentative Proposals No. 23, at 37-40.

parental relationship with the person seduced.

While there are many instances of fornication in which the female was not seduced "in the true sense of the word", there are some such cases and the law ought to provide a remedy for them.

The "facts of life" are that families are judged by the moral conduct of their members. Loss of family reputation and honour can be caused by seduction when there is awareness of it by others.

The conduct involved offends against the standards of the community. It is therefore reasonable that the person responsible for it compensate the family for the dishonour and emotional distress that results.

Liability for the seduction of children who have reached the age of majority or have been married can be excluded by legislation.

The contention that the action provides opportunities for blackmail is unproven. There is no evidence of significant abuse of the right of action (in Ireland).<sup>123</sup>

The Commission proposed legislation that would transform seduction into an action maintainable by either parent, with damages payable to the parents, the person seduced and the parents' other children in accordance with the harm (financial loss and expense, mental distress and damage to the family relationship) suffered by each. Liability would be limited to cases in which pregnancy resulted, these being the cases in which there was likely to be some public awareness of the seduction. Liability would be excluded when the seduced daughter had reached the age of eighteen before the seduction or had ever been married, even after the seduction.<sup>124</sup>

In response to the Irish Law Reform Commission's arguments and proposals, it may be said that while there is little evidence of blackmail available, a parent's ability to bring a seduction action

123. Ireland Working Paper No. 6, at 58-66

124. *Ibid.*, at 62-66; Ireland Report, at 11-14, Draft *Family Life Protection Bill*, ss. 16-17.

The rationale for excluding liability when the daughter entered a marriage after the seduction seems to be that her marriage would considerably reduce damage to the honour of her family. Damage might instead be sustained by her new husband. The working paper's proposals would have permitted an action to be maintained if the daughter's marriage ended before the seduction and she remained unmarried.

is a powerful weapon by which a potential defendant may be pressured to make a settlement demanded by the potential plaintiff. Perhaps this is why so few seduction actions are now litigated. The settlement may be the proverbial "shotgun marriage" instead of a monetary payment. The Commission's proposals do not meet the criticism that a defendant is subject to liability without any real "seduction". The sexual act itself suffices. The Commission assumes — especially in authorizing the court to award damages to the daughter — that the female is the vulnerable victim of the male's advances, not his willing partner, equally responsible for the act, and that she becomes tainted.<sup>125</sup> This assumption could be sound only for a small proportion of cases in which intercourse occurs, and it is difficult to appreciate how litigation would then promote the female's well-being. Requiring that pregnancy resulted has the virtue of limiting liability to the cases in which sexual relations have the most serious consequences, but it creates unjustifiable gender discrimination. Sexual relations with a son could cause serious emotional distress and loss of family honour, especially if they were homosexual, but would not be actionable.

With regard to the Commission's proposals to free the seduction action from the requirement that the plaintiff establish a right to and loss of services and to provide for recovery of damages by the person seduced, legislation to accomplish this was long ago adopted in a number of jurisdictions. Legislatures in Canada, Australia and New Zealand enacted statutes dispensing, at least to some extent, with the requirement of proof that a daughter was serving the plaintiff and that services were lost.<sup>126</sup> Alberta and Saskatchewan conferred an action upon an unmarried female who

125. See Manitoba Report, at 17-18.

126. *Seduction Act*, R.S.A. 1980, c. S-7, repealed by *Charter Omnibus Act*, Stat. Alta. 1985, c. 15, s. 43(1); *Seduction Act*, R.S.M. 1970, c. S60, repealed by *Equality of Status Act*, Stat. Man. 1982, c. 10, s. 4; *Seduction Ordinance*, R.O.N.W.T. 1974, c. S-6, repealed by *Statute Law (Canadian Charter of Rights and Freedoms) Amendment Act*, Stat. N.W.T. 1985(3), c. 10, s. 105; *Seduction Act*, R.S.O. 1970, c. 428, repealed by *Family Law Reform Act*, Stat. Ont. 1978, s. 69(5); *Seduction Act*, R.S.S. 1978, c. S-43; *Evidence Act, 1910*, No. 20, s. 118 (Tas.); *Wrongs Act, 1958*, No. 6420, s. 14 (Vic.); *Evidence Act, 1906*, No. 28, s. 49 (W.A.); *Evidence Act, 1908*, No. 56, s. 22, repealed by *Domestic Actions Act, 1975*, No. 33, s. 6(1) (N.Z.). On interpretation of the statutes, see Fleming, *supra* note 3, at 618; Ireland Working Paper No. 6, at 51-53; Manitoba Report, at 5-12; Thorner & Reddekopp, "A Question of Seduction: The Case of *Macmillan v. Brownlee*," (1982) 20 Alta. L. Rev. 447, 451-55, 464-71.

was seduced.<sup>127</sup> Law reform bodies in Canada and New Zealand have proposed the repeal of such statutes and abolition of all liability for seduction.<sup>128</sup> This has been done in New Zealand and most of the Canadian provinces that had enacted Seduction Acts.<sup>129</sup>

With the exception of the Law Reform Commission of Ireland and the Law Reform Committee of South Australia, all law reform bodies to have made a recommendation on seduction have proposed abolition of liability.<sup>130</sup> A decision to abolish the seduction action or retain it in some form will ultimately depend upon consideration of whether a potential defendant's conduct is, under modern social conditions, so wrongful and so harmful to a potential plaintiff that liability in damages is justified. It is submitted that the answer is "no" and that abolition is the only sound course.

## CONCLUSION

With the exception of the Law Reform Commission of Ireland — which made the most detailed examination of the subject — law reform bodies have been substantially unanimous in concluding that the torts of "intentional" interference with family relationships should be abolished.<sup>131</sup> Numerous legislatures have taken this step in whole or part.<sup>132</sup> Law reformers, legislators and academic writers have found the arguments against these torts persuasive, and the necessary legislation easy to draft. The torts still exist in

127 *Seduction Act*, R.S.A. 1980, c. S-7, s. 4, repealed by *Charter Omnibus Act*, Stat. Alta. 1985, c. 15, s. 43(1); *Seduction Act*, R.S.S. 1978, c. S-43, s. 5.

128. Manitoba Report, at 20; New Zealand Report, at 12; Ontario Report, at 104-05; Saskatchewan Proposals No. 39, at 33. See also British Columbia Report, at 22-23, which asserts that modification by statute has proved to be an unsatisfactory solution to the "anomalous and anachronistic nature" of the seduction action.

129. The repealing legislation is cited in note 126, *supra*.

130. British Columbia Report, at 23; Law Commission Report, paras. 101-02; Law Reform Committee Report, para. 24; Manitoba Report, at 20; New Zealand Report, at 12; Newfoundland Study, at 341; Ontario Report, at 104-05; Saskatchewan Proposals No. 39, at 33. Also in favour of abolition is Shatter, *supra* note 39, at 98-99. The South Australian committee believed that the action served no useful purpose but that changing the law would be unwise because of feelings about seduction in the state's Italian and Greek communities. South Australia Report, at 6. The South Australian Parliament nevertheless abolished the action. *Wrongs Act, 1936*, No. 2267, s. 35, as amended by *Statutes Amendment (Law of Property and Wrongs) Act, 1972*, No. 19, s. 13 (S.A.).

131. See the list of law reform publications and recommendations at the end of this article.

132. Legislation abolishing liability for "intentional" interference torts is listed at the end of this article.



much of the common law world, but the movement toward abolition has certainly not run its course. It may be that a few years hence, actions for "intentional" interference with family relationships will no longer be maintainable in any of the principal common law countries other than the United States.<sup>133</sup> If so, a colourful portion of tort law will pass into history and a desirable reform will have been accomplished.

LAW REFORM PUBLICATIONS AND RECOMMENDATIONS ON  
LIABILITY FOR "INTENTIONAL" INTERFERENCE WITH FAMILY  
RELATIONSHIPS

Australia:

South Australia, Law Reform Committee: Report, No. 11, *Law Relating to Women and Women's Rights* (1970) (recommended abolition of enticement and harbouring; retention of seduction).

Canada:

British Columbia, Law Reform Commission: Working Paper, No. 42, *Intentional Interference with Domestic Relations* (1983); Report No. 68, *Intentional Interference with Domestic Relations* (1983) (recommended abolition of adultery damages, enticement, harbouring, seduction).

Manitoba, Law Reform Commission: Report, No. 9C, *The Seduction Act* (1979) (recommended abolition of seduction).

Newfoundland, Family Law Study: *Family Law in Newfoundland* (1973) (recommended abolition of criminal conversation, enticement, harbouring, seduction).

Ontario, Law Reform Commission: Study of Family Law, Research Report, Vol. VI: *Torts* (1968); Report, No. 25, *Family Law, Part I: Torts* (1969) (recommended abolition of criminal conversation, enticement, harbouring, seduction).

Saskatchewan, Law Reform Commission: Tentative Proposals, No. 36, for an *Equality of Status of Married Persons Act* (1981); Proposals, No. 43, for an *Equality of Status of Married Persons Act* (1982) (recommended abolition of adultery

133. Bradbrook & Tracey, *supra* note 93, at 76-78, asserted that abolition of enticement liability is beyond the Commonwealth's legislative competence: only the states can abolish a spouse's right of action against a person other than the second spouse.

damages, criminal conversation, enticement of spouse, harbouring of spouse); Tentative Proposals, No. 23, Relating to The Civil Rights of Children (1979); Proposals, No. 39, on Custody, Parental Guardianship and The Civil Rights of Minors (1981); Tentative Proposals, No. 53, Relating to Testamentary Custody and Guardianship of Children (1984) (recommended abolition of enticement of child, harbouring of child, seduction).

Ireland:

Law Reform Commission: Working Paper, No. 5, *The Law Relating to Criminal Conversation and the Enticement and Harbouring of a Spouse* (1978); Working Paper, No. 6, *The Law Relating to Seduction and the Enticement and Harbouring of a Child* (1979); Report, No. 1, *First Report on Family Law* (1981) (recommended abolition of harbouring of spouse; retention with modifications of criminal conversation, enticement, harbouring of child, seduction).

New Zealand:

Law Revision Commission, Torts and General Law Reform Committee: Report, *Miscellaneous Actions* (1968) (recommended abolition of adultery damages, enticement of child, harbouring, seduction; retention with modifications of enticement of spouse).

United Kingdom:

Law Reform Committee: Report, No. 11, *Loss of Services, etc.* (1963) (recommended abolition of enticement, harbouring, seduction).

Law Commission: Working Paper, No. 9, *Family Law: Matrimonial and Related Proceedings — Financial Relief* (1967); Working Paper, No. 19, *The Actions for Loss of Services, Loss of Consortium, Seduction and Enticement* (1968); Report, No. 25, *Family Law: Report on Financial Provision in Matrimonial Proceedings* (1969) (recommended abolition of adultery damages, enticement, harbouring, seduction).

Scottish Law Commission:

Memorandum, No. 18, *Liability of a Paramour in Damages for Adultery and Enticement of a Spouse* (1974); Report, No. 42, *Family Law: Report on Liability for Adultery and Enticement of a Spouse* (1976); Report, No. 76, *Outdated Rules in the Law of Husband and Wife* (1983) (recommended abolition of adultery damages

and enticement of spouse).

Northern Ireland, Office of Law Reform:

*The Reform of Family Law in Northern Ireland: A Consultative Document* (1977) (no recommendations).

LEGISLATION ABOLISHING LIABILITY FOR "INTENTIONAL"  
INTERFERENCE WITH FAMILY RELATIONSHIPS

Australia:

Commonwealth: *Family Law Act, 1975*, No. 53, s. 120 (adultery damages, criminal conversation, enticement of spouse).<sup>133</sup>

South Australia: *Wrongs Act, 1936*, No. 2267, s. 35, as amended by *Statutes Amendment (Law of Property and Wrongs) Act, 1972*, No. 19, s. 13 (enticement, harbouring, seduction).

Canada:

Alberta: *Charter Omnibus Act*, Stat. Alta. 1985, c. 15, s. 43 (seduction).

British Columbia: *Family Relations Act*, R.S.B.C. 1979, c. 121, ss. 75-76, as amended by *Family Law Reform Amendments Act*, Stat. B.C. 1985, c. 72, ss. 36-37 (adultery damages, criminal conversation, enticement of spouse, harbouring of spouse).

Manitoba:

*Equality of Status Act*, Stat. Man. 1982, c. 10, ss. 2-4 (adultery damages, criminal conversation, enticement, harbouring, seduction).

New Brunswick:

*An Act Respecting Compliance of the Laws of the Province with the Canadian Charter of Rights and Freedoms*, 1985, Stat. N.B. 1985, c. 41, s. 4 (adultery damages, criminal conversation, enticement, harbouring, seduction).

Northwest Territories:

*Domestic Relations Act*, R.O.N.W.T. 1974, c. D-9, s. 13, as amended by *Statute Law (Canadian Charter of Rights and Freedoms) Amendment Act*, Stat. N.W.T. 1985(3), c. 10, s. 40 (adultery damages); *Judicature Act*, R.O.N.W.T. 1974, c. J-1, s. 19.3, enacted by *Statute Law (Canadian Charter of Rights and Freedoms) Amendment Act*, Stat. N.W.T. 1985(3), c. 10, s. 65 (seduction).

## Ontario:

*Family Law Reform Act*, Stat. Ont. 1978, c. 2, s. 69, now *Dower and Miscellaneous Abolition Act*, R.S.O. 1980, c. 152, s. 69 (adultery damages, criminal conversation, enticement, harbouring, seduction).

## Saskatchewan:

*Equality of Status of Married Persons Act*, Stat. Sask, 1984-85-86, c. E-10.3, s. 6 (adultery damages, criminal conversation, enticement of spouse, harbouring of spouse).

## Ireland:

*Family Law Act*, 1981, No. 22, s. 1 (criminal conversation, enticement of spouse, harbouring of spouse).

## New Zealand:

*Domestic Actions Act*, 1975, No. 53, ss. 2-4, as amended by *Family Proceedings Act*, 1980, No. 94, s. 190 (adultery damages, enticement, harbouring, seduction).

## United Kingdom:

England: *Law Reform (Miscellaneous Provisions) Act, 1970*, c. 33, ss. 4-5 (adultery damages, enticement, harbouring, seduction).

Scotland: *Divorce (Scotland) Act, 1976*, c. 39, s. 10 (adultery damages); *Law Reform (Husband and Wife) (Scotland) Act, 1984*, c. 15, s. 2(2) (enticement of spouse).

Northern Ireland: *Matrimonial Causes (Northern Ireland) Order, 1978*, No. 1045 (N.I. 15), arts. 57-58 (adultery damages, enticement of spouse, harbouring of spouse); *Administration of Justice Act, 1982*, c. 53, s. 68, sch. 6, para. 1 (enticement of child, harbouring of child, seduction).

PRISON EDUCATION IN  
WESTERN AUSTRALIA:  
A CASE STUDY OF POLICY ANALYSIS  
IN SENTENCE ADMINISTRATION

JOHN W. EKSTEDT\*

INTRODUCTION

The activity of policy analysis, particularly as applied to policies influencing the administration of justice, is a new discipline represented by a small but growing body of literature. Analytical activities organized to study the development and implementation of *policies* (as opposed to the more typical "behavioural" studies on subjects like the functioning of juries or the effect of specific therapeutic interventions with offenders) are fairly recent. Consequently, the work which has been reported tends to concentrate on policies in relatively new or innovative areas of policy making. One is not likely to find much policy analysis related to the use of prisons as an appropriate disposition in sentencing with its associated security levels, etc. However, one is likely to find a fair body of policy analysis on alternatives to imprisonment such as the use of community service orders, diversion programmes, alternative dispute resolution schemes, etc.

Most authorities seem to agree that policy analysis as we know it today had its beginnings in military and industrial operations, involving elements of operations research and management science,

Footnotes

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This article resulted from a study undertaken while the author was a Visiting Fellow at the University of Western Australia Law School, between February and December 1986. The author wishes to note his sincere appreciation to the Dean and Faculty of the Law School for their hospitality and support. As well, thanks is due to Mr Rod Broadhurst, Principal Education Officer, Western Australian Prisons Department, and to the Prison Education Staff for their patience and guidance.

and has evolved to play a significant role in the continuing assessment of policy making in private corporations and government departments.

Some have argued that the role of policy analysis is to assist the policy maker in reaching rational decisions about the future. For instance, as Quade points out:

“There is need, first of all, for a systematic investigation of the decision maker’s objectives and of the relevant criteria for deciding among the alternatives that promise to achieve these objectives. Next, the alternatives need to be identified, examined for feasibility, and then compared in terms of their effectiveness and cost, taking time and risk into account. Finally an attempt must be made to design better alternatives and select other goals if those previously examined are found wanting”.<sup>1</sup>

However, others have argued that, while policy analysis is an exercise in rationality, it is at least as much concerned with making sense of the past as it is with making speculations about the future. As Weick states:

“Rationality makes sense of what has been, not what will be. It is a process of justification in which past deeds are made to appear sensible . . . it will never be true that the plan as first stated will have been exactly accomplished. But something will have been accomplished, and it is this something, and the making sense of this something, that constitute rationality.”<sup>2</sup>

It appears necessary and appropriate that policy analysis be associated with initiatives taken by policy makers to review policy decisions made in the past. This is arguably as important as its use in assessing those factors affecting the present or future implementation of a policy or appearing to raise demands for new policy.

As the craft of policy analysis has developed and as we have seen more applications in the field of criminal justice, at least two matters are becoming clear:

- 1 E.S. Quade, “Introduction,” in E.S. Quade and W.I. Boucher (ed’s), *System Analysis and Public Policy* (New York: Elsevier Publishing Co., 1968), 11.
- 2 K.E. Weick, *Social Psychology of Organization* (Reading, Mass.: Addison-Wesley Pub. Co., 1969), 38.

1. While it is difficult to perceive criminal justice as a system similar in organization to a large private corporation or a department of government, the skills of policy analysis are nevertheless extremely useful in understanding the directions which are taken in the adjudication and disposition of offenders; and
2. the activity of policy analysis must involve determining the rationality of past behaviour as well as making a contribution to rational choices for the future.

The purpose of this article is to report on a policy review of prison education programmes in Western Australia which was undertaken by the author over a three month period beginning in August and ending in November, 1986. This policy review exemplified many of the characteristics of a typical exercise in policy analysis including the presence of factors which were pressing the policy makers to undertake such a review, the requirement within the review to rationalize past behaviour, and the means by which such a review might contribute to new policy or important modifications to old policy.

A number of factors and circumstances combined to generate interest in a policy review of prison education programmes in Western Australia during the 1986/87 fiscal year.<sup>3</sup> A major reorganization study had been initiated by the Prisons Department in the previous fiscal year with significant implications related to the structure and operation of all branches, divisions, institutions and programmes within the department.<sup>4</sup> In addition, several movements and changes had been taking place within the education branch of the Prisons Department stimulating a desire, apart from any larger organizational changes, for a study of their effect on programme planning and budgeting. These are briefly outlined as follows<sup>5</sup>:

1. The expansion of education services to country prisons and the

3. The fiscal year for government services in Western Australia is 1 July through 30 June.
4. While this review of Education Programmes was under way, the Prison Department's reorganization study was completed and major structural and administrative changes were announced. That study and the changes resulting from it have not been addressed in this article, as it was substantially completed by the time of the Department's announcement.
5. These were articulated in a memorandum from the Principal Education Officer to the Deputy Director of Prison Services, 19 May 1986.

subsequent increased contact with Aboriginal and very short-term prisoners.

2. The decline in substantial and consistent aid from the Commonwealth Education Department and the subsequent need for increased self-reliance.
3. The emergence of greater emphasis on inter-disciplinary programme development increased pressure for educators to take on a wider role in the Department's and divisions' general activities.
4. The advent of new curricula and curriculum teaching strategies and services (e.g. computerised instruction, transition/life skills, etc.). Increasing needs for in-house curriculum development particularly in literacy, aboriginal education and other adult basic education activities.
5. Persistent and increasing demand for education in conjunction with an expanding prison population and unfavourable physical climate. Timetabling problems associated with ensuring appropriate responses to this situation.
6. Increasing need for improved co-ordination and continuity in trade and semi-trade work skill programmes — the capacity of the branch to accommodate and support the academic component of these activities.

These factors were considered together with the budget restrictions and time limitations imposed on this policy review."

It was determined that the review should be guided by attention to three (3) general categories of interest:

- 1) The organisation and administration of education programmes within the Prisons Department (present and preferred models);
- 2) the role of the education officer within the institutional prison setting (provision of services, management of offenders, etc.); and
- 3) the definition of an appropriate curriculum base for prison education in Western Australia including structure, content, resources, student evaluation and accreditation.

6 Agreed between the author and the Prison Education Officer, 7 August 1986 (meeting at Prisons Department Headquarters, Perth).



## METHODOLOGY

The methodology for this review basically involved four categories of activities:

- 1) Participation in a conference of prison education staff, support personnel and administrators at Canning College on 30 June 1986. As part of this conference, a paper was presented on prison education with particular attention to programmes operating in North America.
- 2) A survey of education branch files at the Prisons Department headquarters in Perth. This survey of files was for the purpose of gaining general familiarity with the operations of the education branch including a summary of past conference proceedings which had addressed one or more of the items of interest associated with the review of prison education programmes.
- 3) Visits to a number of institutions operated by the Prisons Department (see Appendix A) for the purpose of gaining familiarity with the settings within which prison education programmes are delivered and to obtain impressions from non-education personnel on the special problems of the institutions and the place of prison education within them.
- 4) Interviews with Prisons Department personnel (see Appendix A). The majority of these interviews took place within the institutions visited and primarily involved education staff, prison administrators and inmates. These interviews were directed, in the sense that all interviewees were asked to comment on issues associated with the three general categories of study which were identified earlier.

## THE CONCEPT OF PRISON EDUCATION

Prison education, as practised today in many countries including Australia, is a recent phenomenon. So recent, in fact, that it is quite usual to describe the genesis of modern prison education as having occurred during the decade of the sixties and having only reached bare beginnings in terms of programme development during the decade of the seventies.<sup>7</sup>

The origins of the concept of modern prison education, however,

7. E.g., J.W. Ekstedt and C.T. Griffiths, *Corrections in Canada Policy and Practice* (Toronto: Butterworths, 1984), 182 *et seq.*

were evident in North America over a century ago. In Canada, there were attempts as early as 1848 to introduce basic literacy courses in the major penitentiaries. It is interesting that these early attempts at basic formal education were considered as necessary for the spiritual development of the inmate. The teaching of the technical skill of reading was seen as fundamental to the process of behavioural change not so much because of any advancement in the ability to read but because of what was read (primarily religious material).

In the latter part of the nineteenth century and the early part of the twentieth century, reading religious material was considered by prison authorities as an appropriate punishment for misbehaviour. It was therefore possible to justify basic literacy courses as contributing to the proper punishment of the offender. However, the more reading became identified with rehabilitation and less with punishment (in keeping with changing philosophies of imprisonment) the more it was resisted as a proper activity for prisoners. The explanation for this is that custodial staff regard punishment within the institution as a tool for the maintenance of order and control. Rehabilitation techniques, on the other hand, are both described by therapists and perceived by custodial staff as being for the benefit of the inmate (perhaps in sacrifice of other institutional objectives). Thus prison education became identified with the multitude of therapies which emerged in the name of rehabilitation and was resisted much as the other therapies were.

One of the means by which literacy skills and other similar study programmes were introduced into prisons and made acceptable was to consider prison education not as a requirement either for punishment or rehabilitation, but as a reward for exemplary institutional behaviour. Consequently, prison education emerged, after the second World War, as an "inmate-management" technique used as a carrot to induce acceptable institutional behaviour and was seen by both inmates and staff as a soft form of doing time.

Very recently (late 1970's, early 1980's) attempts have been made to visualize the place of education in the prison context less from the perspective of punishment, rehabilitation or inmate-management and more in keeping with concepts of educational psychology or philosophy. In other words, formal education within prisons is viewed as contributing to the potential ability of an offender to grow beyond the need or requirement to engage in

criminal behaviour. Real education, it is argued, contributes to an individual's ability to choose not to commit criminal offences and is, consequently, one of the most useful crime prevention strategies.

However, this approach implies that formal education programmes in prisons must deliberately not be associated with institutional structures of punishment, rehabilitation or inmate-management. These associations, it is argued, are contradictory to a philosophy of education which:

“... emphasises the role of cognitive growth in producing changes in moral reasoning which in turn facilitates changed behaviour. This is based on two premises. First, the criminal has been more a decision maker than a victim. Despite environmental, family, and class factors there remains a strong element of choice in the act of becoming a criminal. The second premise is that the decisions of the criminal are made in the context of a certain stage of cognitive/moral development and that this stage can be altered in order to facilitate different decisions within the same or similar environment.”<sup>8</sup>

This philosophy presents some difficulties when introduced in a prison context. It is extremely difficult to separate any programme within a prison from the inmate-management issues associated with the prison. It is also extremely difficult to separate prison programmes from either the concept of punishment or rehabilitation. Almost all prison systems are organised to deliver their services on one side of that spectrum or the other. To attempt to deny the association of a programme with either punishment or rehabilitation is to create a difficult confusion in the minds of the staff associated with the running of the institution.

Additionally, such a philosophy assumes a degree of formality in the presentation of education programmes which is unique in the prison context. Many institutions which attempt to operate on this philosophical basis incorporate formal structures of curricula and programmes which may lead all the way through to a university degree. At the very least, this philosophy requires attention to a structure of course work and an environment for learning which is humanistic and gives evidence of the type of education which

8. S. Duguid, “History and Moral Education in Correctional Education” (1979), 4 Canadian J. of Education 83-84.

we normally associate with the liberal arts. This is somewhat more complex than providing prisoners with opportunities for work in the fine arts (painting, drama, music, etc.) and basic literacy (reading skills, numerical skills, etc.).

Partially because of the inability to place prison education in a definitive location and philosophy, other problems have emerged. Generally prison education tends to exist at the bottom rung of the ladder in terms of budget allocation and, as a result, becomes the first or early location of pruning in the face of required cuts. Even where the economy does not threaten the survival of these programmes, it is generally true that:

“... physical facilities for educational programmes are inadequate in most institutions, ... there has been a failure to establish standards for the selection and training of educational staff and institutions and ... there is no uniformity in measuring the educational achievements of inmates among the different institutions”.<sup>9</sup>

This brief history of the evolution of modern prison education helps to explain the current problems of prison education within most jurisdictions including Western Australia. It will be seen that problems associated with the delivery of prison education in Western Australia are related to these difficulties of definition and the consequent lack of clarity concerning the place of prison education in association with all the other necessary programmes and initiatives taken within the prison environment.

## PRISON EDUCATION IN WESTERN AUSTRALIA

It is not the intent here to document the history of prison education in Western Australia or to offer much in the way of detailed information on present programmes. As indicated earlier, the conditions associated with the policy review required an emphasis on questions of organization, role and structuring of content. Information with regard to elements of programme growth, numbers of enrolees, specific location of programmes, historical development, budgeting, etc. are easily obtained through information provided in annual reports and other documents produced by and within

9 Ekstedt and Griffiths, *op cit*, n. 4, 184.

the Prisons Department. Consequently, this section will concentrate on the recording of impressions gained during the several visits to representative prisons offering education programmes and including interviews with administrative staff, teachers and inmates. The content of these observations will be organized in the three categories of interest identified earlier in this report.

## Organization

Prison education programmes in Western Australia are organized on the basis of a bureaucratic model which assumes the necessity for the centralized administration of critical support services. This is a bureaucratic model which is common to the organization of closed institutions such as prisons and mental health facilities.

The assumption behind this model is that there are certain types of institutional structures which, if left to operate as autonomous or quasi-autonomous agencies, will act to shield themselves from external influences and, as a result, the potential will increase within these institutions or agencies toward the perpetuation of injustices. There is a further assumption that, in the human services area at least, injustices against persons will increase in proportion to the lack of opportunity for the institution or elements within it to be controlled or administered from locations outside the institution.

It would appear that prison education in Western Australia has proceeded in the belief that there is something about the activity of formal education in prisons which has the potential to moderate what might be considered some of the more negative requirements of institutional life. As indicated in the introduction, these would include both punitive (security-control) measures and therapeutic (involuntary treatment) initiatives.

Additionally, it is assumed that formal education programmes offer the student (in this case the inmate) with a humanizing opportunity not available through any other activity within the institution. Because of this, formal education programmes are the least compatible of all institutional activities related to the overriding purpose of the prison: to punish and control offenders.

These views were articulated consistently by those persons interviewed for purposes of the policy review. While there was some ambivalence with regard to the requirement for a centralized administration of prison education programmes to assure that this

perspective on prison education would be maintained, most persons agreed that, should the administration of education programmes within the prisons fall under local administration (the superintendent of the institution), the danger would increase that the unique character of prison education could be lost.

The centralized administration of prison education in Western Australia was structured within the Prisoner Services Division of the Prisons Department at the time of the study. A principal education officer reported to the Deputy Director of Prisoner Services, both of whom were located at the Prisons Department Headquarters in Perth. Two supervisory personnel reported to the Principal Education Officer and carried responsibility for the direct supervision of personnel in the various "stations". These two supervisory personnel were also located near the major metropolitan centre of Perth, one being located at the maximum security institution in Fremantle and the other at the medium security institution at Caning Vale.

The highest degree of ambivalence with regard to the value of centralized administration was found in the country stations. This is not surprising. Regardless of the philosophical position one takes about the value of internal or external supervision in the administration of programmes within closed institutions, the need for contact with administratively responsible persons remains. The problem with centralized administration is that the farther an employee is physically or geographically removed from it, the less value it has. If the supervisory or administrative contact is truly deficient (due to geography, budget, or any other reason), the employee will develop a desire for administrative control which is closer to home. This is justified, even for those who believe local control may endanger the programme (as discussed above), because the lack of administrative support may cause the employee to feel that local control has been assumed anyway or leave the employee disillusioned in that there appears to be no one with whom they can exercise their influence to bring about desired changes.

Given these factors, some personnel in the country stations would opt for local administration, even in the face of its dangers, because it would give them a feeling of greater control over their own environment and a greater potential influence on decision making. It was also the perception of the author that, in the country stations visited, the education staff felt personally closer to the

superintendent and other administrative personnel within the institution than might be the case in the larger centres. Therefore, the impression was created that in the country stations the education staff were not as fearful about their ability to exercise control over their own local environment as might be the case in the large institutions associated with the more depersonalized urban environment.

As will be seen in the discussion of the prison educator's role, the central organizational question is the question of centralized or decentralized administration. It may be that this question will be resolved unilaterally and for reasons that have nothing to do with the character or quality of prison education in Western Australia. Whatever happens, it is important to understand the implications associated with moving one way or the other. Important to this understanding is clarification of issues associated with the role of the education staff and education programmes within a prison setting.

### The Role of Education Personnel in the Prison Context

The prison educator in Western Australia has been described as "one-third counsellor; one-third organiser/administrator; and one-third teacher/tutor".<sup>10</sup>

While an overview of the organization of prison education in Western Australia might indicate that this division of labour would be expected and may even be desirable, it is not likely that it is an accurate assessment of the current situation in those prisons visited. In most of the locations and particularly in the country stations, the percentage of time spent on organization and administration was clearly the greatest both in terms of percentage of time and energy drain. One education officer indicated an estimate of 80% of time spent on administrative matters and all education officers indicated a disproportionate commitment to this area of activity. This situation, of course, may be unavoidable given the availability of manpower and other resources and the obvious interest on the part of the Prisons Department to make some form

10. Comments in memorandum of 19 May 1986, Principal Education Officer to Deputy Director of Prison Services.

of commitment, however incomplete, in all the institutional prison settings of Western Australia.

In every jurisdiction the author has visited over the last two decades, programmes like prison education have had to be delivered on the basis of a choice between a minimal service in many locations or a more adequately developed programme in fewer locations. Many jurisdictions have opted for the commitment to prison education in a limited number of institutions (usually a single institution) in order to provide for a highly developed education programme which, on evaluation, can demonstrate significant or at least measurable results.

Given a variety of considerations, the commitment to provide some form of education opportunity in all prisons is probably better than an elaborate set of opportunities in a few prisons or in a single institution set aside wholly for the purpose of prison education. However, the commitment to provide a service without discrimination across the full range of institutions in a jurisdiction (as is the case in Western Australia) does have its consequences. These consequences, apart from the disproportionate commitment to administration already mentioned, include (in Western Australia):

- (1) A developing frustration on the part of education personnel that their professional skills are deteriorating. This was referred to several times in interviews as a "deskilling" process. Obviously, the sense of this is that teachers feel disengaged from their own profession and from the activity of teaching.
- (2) Education staff become isolated, especially in country locations, not only from other teaching or education professionals but from those persons working in similar institutions. The result of this is a potential sense of isolation not only from the teaching profession but from the specific activity of prison education.
- (3) The commitment to generalize a programme (prison education) across a vast geographical jurisdiction promotes a tendency to enforce standards of practice which are good for the jurisdiction as a whole but may create a disadvantage to particular areas or regions. This is especially true when the programme is administered centrally. An example of this is found in the practice of identifying staff as having particular teaching interests and teaching skills which can be deployed at various locations from time to time. This practice obviously is good for



- the jurisdiction as a whole in that various institutions can have access to the expertise of individual teachers to provide specific courses, etc. However this practice is always a disadvantage to the local institution from which the teacher comes. This is an example of the type of compromise required to generalize a programme like prison education across an entire jurisdiction.
- (4) Finally, it is worth noting the effect of this general situation on the students (inmates). When a programme is generalized in the way already described, the advantage to the users or clients of the institutions involved is that no matter where they are they will have some contact with the opportunities associated with the programme. The alternative would be to classify all inmates deemed appropriate for prison education to an institution set aside for that purpose. This would result in the creation of artificial criteria in order to effect such classifications. This is not desirable and is one reason why a generalized programme may be better. However, there are difficulties which emerge. Among these is that many prisoners transfer between institutions over the course of their sentences. The logistics of assuring that a programme begun in one institution will be continued or completed in another institution can be quite difficult and complex. In addition, because resources are distributed across a large number of institutions, the physical facilities available to inmates for study and association with instructors or tutors is also limited. Also, the problem of part-time education staff (particularly in country locations) means that some students will not have the support they require to realize an educational opportunity or to acquire the level of motivation necessary to stick with it under adverse circumstances.

These are all problems associated with prison education whenever a generalized or universal approach is taken. These problems are certainly exhibited in Western Australia and were the subject of discussion in every institution visited. However, these problems do lend themselves to administrative solution in most cases and where the problem can only be solved through an additional commitment of resources, this commitment need not be substantial when compared with other commitments in the overall budget. Given the propositions that one teacher may be said to be worth ten custodial personnel in the maintenance of institutional order and that constructive outcomes as measured by such factors as

recidivism rates,<sup>11</sup> it is likely that required additions to resource commitments can be fully justified. In any event, it is imperative that these problems be acknowledged in order to avoid significant declines in staff morale. Most administration and resource-based problems can be offset by staff whose morale is high and whose work provides them with a sense of self-fulfillment and recognition.

Part of the motivation for treating these matters seriously is the assumption that prison education has value. It has been proposed that prisoner education in Western Australia include five areas of adult education integrated within a single model or approach.<sup>12</sup>

These areas are:

- (1) literacy/numeracy skills;
- (2) living skills;
- (3) vocational skills;
- (4) leisure skills; and,
- (5) advanced academic study.

In the theory and practice of adult education, the value of providing opportunities in these areas of development, particularly in association with each other, is well accepted and has been sufficiently demonstrated. The degree to which social gains can result from the provision of these types of educational opportunities in prisons continues to be debated. However, the preponderance of opinion is that if anything other than custodial warehousing is to occur in prisons, the first priority should be attention to the basic skills required for self assessment, personal growth and social awareness. The ability to read, write, calculate and think critically is central to the development of these abilities within an individual human being regardless of any other types of therapeutic intervention or social welfare opportunities which may be made available.

If it is accepted that these goals of education in the prison context (as well as elsewhere) are acceptable, then it is necessary to consider what would be the structure and style of education offerings in the prison context which would most likely realize these objectives as well as any other benefits which may accrue.

The education experience proceeds best (particularly for adults)

11. See D. Glasser, "Effectiveness of Correctional Education," in A.R. Roberts (ed.), *Readings in Prison Education* (Springfield, Ill.: Charles C. Thomas Pub., 1973), 351-63.

12. Education Branch, Western Australian Prisons Department, *Curriculum Model for Prisoner Education* (1985).

in an atmosphere of free inquiry. This type of atmosphere exists to the extent that participation is not coerced or attached to benefits which are not legitimately part of the education objective (e.g. release on parole, change in security rating, transfer to another institution, etc.).

It is not possible to imagine an "atmosphere of free inquiry" being fully realized in a closed institution such as a prison. However, it has been consistently demonstrated that the benefits to the institution increase to the extent that this type of free inquiry is promoted. The gains experienced by individual inmates in terms of educational attainment are likely to result in a contribution to the maintenance of good order within the institution by reducing the tendency towards violence, promoting a preoccupation on the part of inmates with matters other than the fact of their incarceration, and producing a more stable individual with an increased sense of responsibility. Even where these rather optimistic goals are not met in whole or in part, the environment of the education programme is usually regarded by inmates as a place worth being and they are likely to occupy their time with very little disruption to the general life of the institution.

However, in order for these benefits to be realized, certain conditions must prevail. The major condition is that the education programme not present itself as being established for the purpose of meeting specific institutional goals. It should be seen as the location (or one of the locations) in the institution where the inmate has the opportunity to pursue individual goals as opposed to institutional goals. For the most part, the evidence of this, for both inmates and staff, is the type of image which is projected by the way in which the education personnel relate to the inmate-management and custodial interests of the institution. If education personnel are seen as having anything to do with the direct management of institutional objectives, then their credibility will be reduced for purposes of influencing the type of atmosphere for education discussed above. It is therefore preferable for teachers not to be party to decisions with regard to security rating, institutional transfer, parole or other like matters. It is also preferable that, to the highest degree possible, participation in the education programme not be promoted as an award for good behaviour or exclusion from it a punishment for bad behaviour. The degree of neutrality that an education programme can develop within a coer-

cive environment like a prison is not only important to its own success but to its ability to make any indirect contribution to broader institutional objectives (e.g. security, control and good order).

All of the education personnel interviewed agreed that this principle of neutrality was essential to the success of the prison education programme. This was reinforced by the inmates interviewed and, with a few exceptions, administrative and custodial staff as well. It should be noted that, in no case, was this principle interpreted to mean that the education personnel or the education programme should be isolated within the institution. All education personnel indicated a willingness to co-operate wherever possible in exchanges of information concerning the progress of inmates or which might be helpful in assisting an administrative decision-making body to understand the current status of an inmate within the education programme. However, it was consistently felt that education staff ought not to have decision-making power with regard to matters related to the management of the inmate within the institution, transfers to other institutions or release from the institution.

If an understanding of appropriate atmosphere and style (role) can be achieved, there remain the questions of the content of the education experience and its structure.

## The Curriculum for Prison Education in Western Australia

As has already been pointed out, a conceptual model was devised which generally defines prison education in Western Australia as the integration of five categories or areas of adult learning. All of the education officers interviewed reflected this model in their discussions one way or another and, at every location visited, this model was clearly evidenced in the administration and organization of specific programmes. The institutions, of course, demonstrated varying capabilities to deliver in these areas of learning. The larger institutions (particularly Canning Vale) seemed to be somewhat more successful in balancing the various learning components while the smaller institutions (with part-time staff) could be generally described as providing a primary emphasis on leisure skills (arts and crafts) and the co-ordination of advanced academic study for those inmates who are qualified.

In most locations there was little opportunity for strong instruction in the literacy-numeracy area, the vocational area or even in the development of the so-called living skills. This is understandable, since upgrading in literacy-numeracy requires consistent tutoring using an individualized curriculum. Vocational skills normally involve some material resources and specialized instruction which probably are not easily accessible in the country setting. The area of living skills usually requires specialized instruction which, again, is not likely to be readily available in isolated settings. Arts and craft instructors are more easily obtained and advanced academic study is completed by correspondence using well developed curricula from other institutions.<sup>13</sup>

It should be noted, however, that the Prisons Department had recently introduced the PLATO system (computer-aided learning) in several institutions. Conceivably, the use of this system could improve instruction for inmates in a number of areas of basic adult education especially in the literacy-numeracy skill development area. This programme had only recently been introduced and was the subject of a separate review. Consequently, the policy review did not investigate the use of this system or any particular reactions to it by education staff in the prisons. It was noted that the computer terminals seemed to be in fairly constant use and that the general comments referring to this system seemed to be favourable in most respects. The exception to this generally favourable reaction was found in two types of comments. The first was from prison administrators and custodial staff who expressed a concern with regard to the security of the equipment. It was suggested that security requirements enforced a limited use of the terminals (at least more limited than might have been the case if security concerns were not present). The second type of qualified response was associated with the requirement on the part of the education staff to learn the system and become sufficiently practised to make its presence worthwhile. The development of this expertise was, of course, more a concern for part-time staff in more isolated locations.

13. Some of the institutions providing advanced study programme support to the Western Australian Prison Education Programme include W.A. Education Department, Distance Education Centre; local high schools; Technical Extension Service; Western Australian College of Advanced Education, Mt Lawley Campus; Western Australian Institute of Technology (now Curtin University of Technology); South Australian College of Advanced Education; Deakin University; and Murdoch University.

Without doubt, the most problematic element of prison education in Western Australia is the attempt to provide a programme of relevance to the large number of Aboriginal prisoners. It is well known that Aborigines account for a disproportionate percentage of the prison population.<sup>14</sup> It is also well known that the standard curriculum base developed by the various educational institutions concentrating on adult education is not easily applicable to a significant proportion of incarcerated Aborigines. This, together with well-documented cultural differences including the problem for some Aborigines in responding to female instructors, create some very interesting and difficult problems for prison education staff.

There was probably no issue as consistently raised in the interviews held with prison staff than the one described in the paragraph above. In the larger institutions, some unique and innovative attempts had been made to involve Aborigines in a constructive education experience.<sup>15</sup> In all institutions visited, it was clear that there was encouragement for Aborigines to be involved in arts, crafts and music programmes. However, considerable frustration was expressed and observed with regard to any real possibility of involving the general population of Aborigines in areas of academic and vocational skill development. This problem appeared to have been compounded by the withdrawal of all direct tutorial services provided to Aboriginal prisoners by the Western Australian College of Advanced Education.<sup>16</sup> There is no doubt that this is an area requiring special attention.

## Organizing the Content of Learning

At the time of the study, the method used to develop and organize the content of the learning experience in Western Australian prisons was a system of individualized learning plans. The prison education programme was not organized around a set curriculum or even a series of set curricula through which groups of prisoners were processed.

14. See R.G. Broadhurst, *Imprisonment of the Aborigine in Western Australia 1957-1985* (Perth: W.A. Prisons Department, 1986).

15. At Fremantle Prison, for example, an interesting initiative was taken to involve Aboriginal prisoners in the development of readers for use in primary school education. The preparation of these readers involved the Aboriginal participants in story-telling, language arts, fine arts (illustrations and cover designs), and project organization.

16. As reported in *Education Branch Forward Estimates, 1986-87* (Perth: W.A. Prisons Department)

This is not to suggest that courses of various kinds for groups of prisoners were missing from the prison education programme. In fact, particularly in the larger institutions, there were a variety of courses offered which were structured for groups of prisoners over varying time frames and which, in many cases, had a form of certification or recognition attached to them. Many of these courses involved the contributions of outside agencies and individuals, particularly in the vocational skill development area.<sup>17</sup> The truth is, however, that these were primarily ad hoc activities which were not integrated into any overall curriculum structure. Therefore, any structure which existed in the prison education programme of Western Australia was to be found in the way in which individualized learning plans were devised for inmates. (This is also why such a high percentage of the education officer's time was spent in administration.) The primary work of the education officer was to administer a relatively large number of individual plans. From a time-management perspective, this is somewhat less efficient than working with a curriculum structure which processes all inmates through the same programme in relatively large groups.

The structure of developing these individual instruction plans was relatively well-ordered and involved the keeping of forms, specific methods for the referral of inmates, specific elements of counselling approach and the keeping of records for the monitoring of student progress.<sup>18</sup> Once an individualized learning plan was established, the role of the education officer was primarily to co-ordinate the availability and use of curriculum materials provided by other agencies and the deployment of tutors. (Of course, the management of the infrastructure required to make all this happen — including contacts with numerous outside agencies, the location and orientation of tutors, and follow-up on transfer from or to other institutions — is extremely demanding and time-consuming.) Given the varying lengths of sentences served in the prisons of Western Australia, the large numbers of Aboriginal

17. At Canning Vale Prison, for example, a Skill Development Programme has been devised which provides opportunities for inmate participation in eleven different practical skill courses (including city survival, motor maintenance, first aid, farm fencing and driver awareness), most of which have instructional material and equipment provided by outside educational institutions and business groups. A "certificate record" is provided to inmates which certifies their completion of the various courses.

18. For an explanation of this system see *Curriculum Model for Prison Education*, *op cit.*, n. 12.

prisoners and the range of levels of educational attainment, it is not surprising that the prison education programme evolved the way it did. It is also probably true that, overall, this is a preferred model of operation under the circumstances.

## RECOMMENDATIONS

The circumstances of the review did not allow for an in-depth analysis and, consequently, it was not possible to determine the precise adjustments to present practice which might provide for a more effective and manageable prison education programme. In addition, there was important information with regard to the organizational review and emerging management policies (mentioned previously) which were not available and which would have conceivably made recommendations, even from an in-depth review, outdated and irrelevant at the time of writing. Consequently, it was decided to make recommendations which would move farthest toward preserving the integrity of prison education programmes in Western Australia in terms of the style, purpose and value of formal education in prison settings outlined earlier in this article.

In the recommendations it was acknowledged that there are no ideal circumstances for providing education in prison settings. There was also a recognition that problems of resource management are continuing in every area of government service and that prison education programmes are likely to be suffering from lack of minimal resource commitment for some time to come. Given these limitations, a summary of the recommendations resulting from this review is as follows:

1. That the prison education programme in Western Australia continue to be managed on a centralized basis either for the State as a whole or within the two geographical regions.

In order for prison education programmes to be the most effective, they must be seen as separate from the normal requirements of institutional management. Therefore, the perception that they are administered from the outside is very important to their success. In addition, an independent budget planning process for prison education is still required in Western Australia. While there are some good arguments for integrating the budget of prison education into the budget of the individual prisons, the programmes in Western Australia were not strong enough to accommodate the competition that this implies; and there was too much variance in



the experience and stability of the staff group to allow for a consistent development across the State under local administration.

2. It is further recommended that a management model be put in place which, among other things, would assure that the budget planning process would be initiated between the education officers and superintendents of the local institution and proceed from the bottom up to inclusion in the final budget presentation of the Prisons Department. While it is true that this would seem to add another onerous administrative responsibility on the backs of the education staff, it is conceivable that this process would make the education staff much more efficient in their administration and that they would be able to devise ways to share administrative responsibilities within the local institution which would be beneficial. There is no reason why both time-saving and cost-saving arrangements could not be made in local institutions which would be to the benefit of both the prison education programme and the managers of the larger institution. These have to be worked out locally, however, and it is the budget process which forces attention to these kinds of arrangements.
3. It is recommended that the prison education officer not be officially assigned to any inmate management committees. However, it was also recommended that some formal and consistent method be developed for education progress reports to be attached to inmate files. Further, it is suggested that prison education staff be represented at some regular meeting of programme heads within the institutions for information sharing and budget planning and that the regional head of prison education be similarly associated with a management committee at the regional level.
4. It is recommended that, at the regional level, a separate budget item be established for professional development. This was identified as the most consistent and pressing need within the prison education programme of Western Australia. Well trained and motivated staff who feel supported can overcome almost any inadequacy associated with facilities or materials.
5. It is recommended that a prison-specific curriculum be developed in the literacy numeracy skill development area and with particular attention to the high percentage of Aboriginal prisoners.

While it is agreed by most authorities that the development of a prison-specific curriculum should be avoided, it is also the case that basic literacy requirements are best met by associating the development of those skills with other elements of the environment within which the student exists and with particular attention to the social and psychological dynamics of the setting. Therefore it is probably necessary to develop a specific curriculum, at least for basic education in the development of literacy-numeracy skills, which acknowledges the dynamics of the prison environment and the peculiar backgrounds of its inhabitants.

## CONCLUSION

This brief description of a policy analysis associated with the operation of prison education programmes in Western Australia partially illustrates the distinction between policies and decisions. A decision, in the sense of decision theory, is a choice or judgment made on the basis of available data, among well-defined courses of actions, whose consequences are reasonably well understood. But, as Majone points out: "Policies are far more complex than mere choices; they cannot be identified with single decisions, nor even with sets of inter-related decisions."<sup>19</sup>

The prison education study makes clear that it is possible to have a policy with regard to some emphasis in the provision of dispositions for offenders which is a matter quite separate from the specific decisions which are taken to implement and maintain that policy. It is useful for the policy maker to understand this and not become confused by identifying the requirement to decide what to do about prison education with the policy to assure that educational opportunities are made available in all correctional institutions. In an important sense, policies stand apart from the vagaries of economy, organizational structure, varying forms of political competition, etc. The ability to implement policy is certainly affected by all of these things but knowing how to adjust to changing circumstances depends on policies that are not attempts to deal with the circumstances themselves. In other words, prison education as a programme emphasis ought to stand as a policy matter altogether apart

19. G. Majone, "Uses of Policy Analysis" (1980), 4 *Policy Studies Rev.* Annual 165.

from the degree to which the organization can administer, or budget for, such programmes.

The role of the policy analyst and the exercise of policy reviews is intended to clarify these distinctions and make it possible for policy makers to truly affirm or deny the importance of a policy in the face of a need for new or modified decisions related to the implementation of policy. The policy analyst will, therefore, attempt to create a rational picture of the sequence of events, philosophies, theories and social phenomena which have influenced and given direction to a course of action. It is quite probable that the policies with regard to a phenomenon like prison education have been made over time without real awareness of the factors influencing the drive to create and maintain such a programme. The policy analyst can assist to clarify and rationalize the policy issue. This makes it much easier for a policy maker to affirm a useful policy and make decisions in the face of new circumstances which can continue to promote that policy.

Using the exemplar of prison education programmes in Western Australia, it can be seen how a review of those factors influencing the development of a particular policy can make judgments about what to do in the face of changing circumstances more apparent. Thus, the real usefulness of a policy analysis is not so much in the recommendations which result but in the creation of a motivation through proper argumentation which can be assimilated by the policy maker in the course of determining the next step to take. Again, this notion is addressed by Majone:

“To decide, even to decide rationally, is not enough. Decisions must be accepted and carried out; in addition to the organizational process for implementation, there must be a parallel intellectual process of elaboration on and development of the original policy idea. Since a policy exists for some time, new arguments are constantly needed to give its different components the greatest possible internal coherence in the closest possible fit to changing external conditions.”<sup>20</sup>

Finally, if these comments reflect the essential nature of a policy analysis, then the method of communicating the results of the analysis becomes important. Since a policy analysis is based on

20. *Ibid*, 168.

evidence and argumentation as well as empirical data and information, the method of presenting the argument in association with the information is critical. In other words, a policy analysis is an interpretation of the relevance of facts with opinions about relevant social goals, political motivations and institutional ideals.

In the case of the present Western Australia study, the findings were presented to a gathering of the prison education staff and senior administrative personnel by the analyst in person. This provided an opportunity for the arguments which had been construed in the analysis to be stated and debated and clarified with those persons who would have the most stake in the policy review both from the positions of decision maker and implementer.

Policy analysis continues to evolve as a means of assessing the activity of public institutions. There are a number of activities associated with the administration of justice and, more specifically, sentence administration, which, could well benefit from policy analysis. Among other things, such analysis could assist in clarifying the meaning of the myriad research initiatives attempting empirical review of programmes emerging out of policy. To associate policy more directly with its programme results in a rational way will likely provide for better decisions in times of continuing uncertainty.

APPENDIX A  
PRISONS VISITED AND PERSONNEL  
INTERVIEWED

DATE	PRISON	INTERVIEWS
13 Aug. 1986	Canning Vale	Education Staff (3) Administrators (3) Custodial Staff (2) Inmates (2)
14 Aug. 1986	Fremantle	Education Staff (3) Inmates (2)
Aug 18. 1986	Eastern Goldfields Regional Prison	Education Staff (1) Administrator (1) Social Welfare Officer (1) Custodial Staff (2) Inmates (3)
25 Aug. 1986	Bunbury	Education Staff (1) Administrator (1) Inmates (3)
2 Sept. 1986	Barton's Mill	Education Staff (2) Administrator (1) Custodial Staff (1) Inmates (1)
15 Sept. 1986	Greenough Regional Prison	Education Staff (1) Administrator (1) Custodial Staff (4) Inmates (3)