# TORTS AFFECTING DOMESTIC RELATIONS.

Members of a family group are linked by ties of affection and economic dependence. Conduct which directly affects any member of the group may. through these ties, also affect other members of the group. In the language of sociological jurisprudence, those others may suffer harm to their interests of personality and substance which depend on unimpaired relations with the member directly affected.[1] They may suffer emotional distress and pecuniary loss.

The rules of the law of tort concerned with the protection of the interests involved in domestic relations rest for the most part on foundations which, though of noble antiquity, are absurdly inappropriate when judged by the *mores* of our own time. Some of those foundations are the quasi-proprietary interest which a husband was regarded as having in his wife, and the quasi-proprietary interest which a master was regarded as having in his servant.[2] It is the purpose of this article to attempt to discover what new foundations for the rules may be achieved, in the faith that this may assist at once in making the present law intelligible and in revealing the pattern of principles in the making,.

It is the writer's submission that the following principles should form the new foundations:—

(a) The intentional causing of emotional distress by impairment of domestic relations is tortious provided the actor was under a duty to abstain.[3]

[1] It is not of course only within the family that valuable relations are to be found. So far as the law affords greater protection to the interests involved in domestic relations than to those involved in other intra-group relations, there is a recognition of the greater social importance of the family group.

Leon Green (*Relational Interests*, (1935) 29 Ill. L. Rev. 460) pioneered the use of the words "relational interests" to describe the interests involved in valuable relations, and asserted that such interests were distinct from interests of personality and substance. The writer does not object to the description of the interests as "relational" so far as this serves to draw attention to the special kind of interests of personality and substance with which we are here concerned. But no good purpose is served if the description is used, as Leon Green would use it, so as to preclude breaking down "relational interests" to the elements which are clearly contained.

[2] Holdsworth, *History of English Law*, viii, 427-30. See the discussion in the judgment of Lord Goddard in *Best v. Fox*, [1952] A.C. 716, at 731-2.

[3] The phrase "duty to abstain" is the writer's coinage. We need the phrase to delimit intentional harms which are tortious, just as we need the phrase "duty of care" to delimit the negligent harms which are tortious.

(b) The intentional causing of pecuniary loss by impairment of domestic relations is tortious provided the actor was under a duty to abstain.

(c) The negligent causing of pecuniary loss by impairment of domestic relations is tortious provided the actor was under a duty of care.

(d) The unintentional causing of emotional distress by impairment of domestic relations is not tortious.

(e) Except as in (c), the unintentional causing of pecuniary loss by impairment of domestic relations is not tortious.

No doubt objections will be raised to this formulation of principles in line with those which are commonly raised against the use of the duty of care concept in defining the tort of negligence. But the writer does not choose to become bogged down in a perennial controversy. Any general principle in the law of tort should seek to leave scope for new policies, and this is the role of the "duty to abstain" and the "duty of care."[4] Though the principles remain, new policies may be born within the duties which extend or restrict the scope of the protection which the law for the time being affords to domestic relations. The writer is concerned with the principles which govern recovery where the policy of the law is otherwise prepared to allow it. We must grant the first bite to policy and attempt to rationalize what is left.

The following pages are a study of the law which endeavours both to test the validity of the writer's suggested principles and to show the present scope of the duties of abstention and care. As one means of testing the validity of the suggested principles, English law is at all points compared with modern South African law.[5] A vital distinction is drawn in the South African law of delict between liability for *injuria* and Aquilian liability. Recovery for emotional hurt, based on the *actio injuriarum,* may only be had where the defendant's act was intentional. Recovery for pecuniary loss, based on the actio

[4] It is true that the concept of duty of care has tended to have the further function of duplicating the concept of negligence as the test of breach of the duty. It is unnecessary to give it this further function, and, in any case, it is not the function intended in the writer's principles.

[5] With a history of its own stemming from the Roman-Dutch law of Holland at the close of the eighteenth century, modern South African law offers a fruitful field for comparative study. There has been strong pressure from English law, not the least on the law of delict, and the principles that have prevailed are in a sense a critique of English law. See generally the writer's article, *Modern South African Law as a field of Comparative Study,* (1951) 2 U. of West. Aust. Ann. L. Rev. 56.

legis Aquiliae, may be had where the defendant's act was either intentional or negligent.[6] The writer's suggested principles to rationalize the law of harms to domestic relations could well be drawn out from these fundamental principles of the South African law of delict. South African law thus affords a model body of rules rationalized on the bases of the writer's suggested principles.

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Harms to domestic relations may take any of the following forms:—

Enticement of a wife causing emotional distress and pecuniary loss to a husband.

Enticement of a husband causing emotional distress and pecuniary loss to a wife.

Enticement of a child causing emotional distress and perhaps pecuniary loss to a parent.

Enticement of a parent causing emotional distress and perhaps pecuniary loss to a child.

Adultery with a wife causing emotional distress and perhaps pecuniary loss to a husband.

Adultery with a husband causing emotional distress and perhaps pecuniary loss to a wife.

Seduction[7] of a child causing emotional distress and perhaps pecuniary loss to a parent.

Adultery with a parent causing emotional distress and perhaps pecuniary loss to a child.

Defamation of one member of a family published to another causing emotional distress and perhaps pecuniary loss to the member defamed.

Defamation of one member of a family causing emotional distress to other members.

[6] See the following passage from the judgment of Lord de Villiers, C.J., in *Union Government v. Warneke*, [1911] A.D. 657, at 662: "As was said by Professor Melius de Villiers in his notes to Voet 47.10.18, in the action for injury retribution is sought for by way of a pecuniary penalty for the benefit of the sufferer, in order to satisfy his injured feelings. It is wholly different in an action founded upon negligence. Whatever may have been the practice under the Roman law, it is clear that under the Dutch law the practice was to confine the damages claimable by the Aquilian law action to cases in which a calculable pecuniary loss has been actually sustained (Voet 9.2.12)."

[7] The word is used here in the narrow sense of sexual intercourse with a female child.

Defamation of a deceased member of a family causing emotional distress to living members.

Physical injury to a wife causing emotional distress and perhaps pecuniary loss to a husband.

Physical injury to a husband causing emotional distress and perhaps pecuniary loss to a wife.

Physical injury to a child causing emotional distress and perhaps pecuniary loss to a parent.

Physical injury to a parent causing emotional distress and perhaps pecuniary loss to a child.

Infliction of death on one member of a family causing emotional distress and perhaps pecuniary loss to other members.

Each of these harms is now considered in turn.

*Enticement of a wife causing emotional distress and pecuniary loss to a husband.*

English law affords the husband a remedy for loss of consortium due to the enticement of his wife.[8] The remedy requires an intentional act,[9] and the duty to abstain is qualified by privileges, e.g., the privilege to receive the wife on grounds of humanity.[10]

The concept of *consortium* includes both the emotional pleasure which a husband has in the society of his wife and her pecuniary value in the running of his household. Enticement, since there must be a cessation of cohabitation, necessarily involves loss of both elements; the husband suffers emotional distress *and* pecuniary loss. While then the action is consistent with principles (a) and (b), it is not authority that intentional causing of emotional distress is tortious when no pecuniary loss is shown.[11] The action is equally consistent with a principle which insists that recovery for emotional distress is parasitic on recovery for pecuniary loss.

8 *Winsmore v. Greenbank*, (1745) Willes 577, 125 E.R. 1330, followed in *Place v. Searle*, [1932] 2 K.B. 497. For the historical basis see Holdsworth, *History of English Law*, viii, 429-30.

9 See the judgments of Lords Porter, Goddard and Morton in *Best v. Fox*, [1952] A.C. 716, at 726-7, 729, 735; Prosser, *Torts*, 922-3.

10 *Place v. Searle*, [1932] 2 K.B. 497, at 513-4, 517-8. The privileges were much narrower in the earlier law: Blackstone, *Commentaries*, III, 139.

11 It might appear also that it is not authority that intentional causing of pecuniary loss is tortious where no emotional distress is shown. But historically the intentional causing of pecuniary loss was the very essence of the action; the action was for loss of services.

In almost all the states of America an action for alienation of affections has been recognised which gives the husband a remedy for acts which cause an estrangement between himself and his wife, but which do not cause cohabitation to come to an end.[12] Such a remedy has not been given by English law unless the defendant's acts amount to defamation of the plaintiff husband. Probably in English law there is no duty to abstain from causing emotional distress by way of an estrangement between husband and wife without cessation of cohabitation, provided that the acts involved do not amount to defamation. And it is thought that the reasons which dictated the abolition of the old action for criminal conversation[13] would weigh against recognition of any such duty.

South African law gives the husband a remedy for enticement of his wife.[14] But the courts have not given a remedy where there is emotional distress due to estrangement without cessation of cohabitation and the defendant's acts do not amount to defamation of the husband. There is no reason in principle why liability for *injuria* should not be extended to such a case. The South African courts are unlikely, however, to be any readier than the English courts to recognise a duty to abstain. It is true that they allow the husband an action corresponding with the old action for criminal conversation. But the Courts are aware of the dangers of abuse.[15]

*Enticement of a husband causing emotional distress and pecuniary loss to a wife.*

It was not until 1923 that English courts recognised that a wife had an action for enticement corresponding with that given a husband in *Winsmore v. Greenbank*.[16] The decision of Darling J. in *Gray v. Gee*[17] is clearly consistent with principles (a) and (b), though

12 Prosser, *Torts*, 919-20. Privileges are admitted, e.g., the privilege of parents to advise and protect their children even after marriage: *Ramsey v. Ramsey*, (1931) 156 Atl. 354.

13 *Infra*, p. 598.

14 *Abner Major v. Makettra*, 1 E.D.C. 47; *le Roex v. van Wyk*, 1 M. 253; *Rendwaldson v. Weiss*, 5 Buch. 150: *Kramarski v. Kramarski & Others*, [1906] T.S. 937.

15 See the judgment of Wessels J.A. in *Viviers v. Kilian*, [1927] A.D. 449, at 458-9.

16 (1745) Willes 577, 125 E.R. 1330.

17 (1923) 39 T.L.R. 429. One reason why recognition of the action is so recent lies in the former procedural incapacity of a wife. She could not sue without her husband and it was unlikely that he would join in proceedings against his paramour. But the decision of Darling J. created new law. The basis of the husband's action clearly could not support an

again, it is admitted, it does not establish the validity of principle (a); it does not establish that recovery may be had for emotional distress in the absence of pecuniary loss.

English law has not yet given a remedy to a wife where the defendant's acts cause an estrangement between husband and wife without cessation of cohabitation, and the acts do not amount to defamation of the wife.[18]

South African courts have not yet been asked to give a wife a remedy for enticement of her husband. There is no reason in principle why such a remedy should not be granted, and it is very likely that a duty to abstain will be recognised.[19] The wife, we will see, has been given an action for adultery.[20] But it is unlikely that the courts will be prepared to go so far as to give the wife a remedy for emotional distress where the defendant's acts cause only an estrangement between husband and wife without cessation of cohabitation and the acts do not amount to defamation of the wife.

*Enticement of a child causing emotional distress and perhaps pecuniary loss to a parent.*

The remedy afforded by English law for enticement of a child continues to bear the brand of its origin in a master's action for interference with his quasi-proprietary interest in his servant.[21] Pecuniary loss, in the form of loss of the child's services, must be

action by the wife. The High Court of Australia refused to give the wife an action in *Wright v. Cedzich*, (1930) 43 C.L.R. 493. But *Gray v. Gee* has now been approved by dicta in the Court of Appeal in *Place v. Searle*, [1932] 2 K.B. 497, at 521, and in the House of Lords in *Best v. Fox*, [1952] A.C. 716, at 726, 729. In view of its pronouncements in *Waghorn v. Waghorn*, (1942) 65 C.L.R. 289, and *Piro v. Foster*, (1943) 68 C.L.R. 313, the High Court would probably now reverse its own previous decision and follow *Gray v. Gee*. *Wright v. Cedzich* contains a famous dissent by Isaacs J. (at 500 *et seq.*) where he showed himself as courageous as Darling J. There is an oblique recognition that the wife has an action in Western Australia in the Law Reform (Miscellaneous Provisions) Act, 1941, sec. 4 (1).

18 With some exceptions, the American states have given the wife a remedy for alienation of affections: Prosser, *Torts*, 929.

19 McKerron considers that the courts would recognise a wife's action: *Law of Delict*, 3rd edn., 195-6.

20 See p. 600, *infra*.

21 The parent was not regarded as having any quasi-proprietary interest in his child qua child, unless the child was an heir: *Barham v. Dennis*, (1600) Cro. Eliz. 770, 78 E.R. 1001. In the result, according to Holdsworth, "The law was driven to find a remedy by the application to the relation of parent and child of the writ provided to protect the relation of master and servant": *History of English Law*, viii, 427-8.

shown before any damages may be recovered. Damages as *solatium* for emotional distress are given by an award of exemplary damages.[22]

In this context, then, principle (a) must be qualified to the extent that any recovery for emotional distress is parasitic on recovery for pecuniary loss in the form of loss of services. So too, principle (b) requires qualification to the extent that loss of services must be shown before damages may be recovered for any other pecuniary loss. But may it not be that principles (a) and (b) represent the law in the making?[23] The loss of services that must be shown has been reduced to the barest minimum by the English courts. The loss of the service of making a cup of tea has been held sufficient;[24] indeed, it is enough that the child will not now be able to render services to which the parent has a right even though the parent was not receiving any services at the time of the enticement.[25] And the rule that requires loss of services to be shown is universally condemned.[26]

There is no reported South African decision giving or refusing an action for enticement of a child. There would be no difficulty in principle in giving such a remedy should it be sought, and there would seem to be no reason in policy why a duty to abstain should not be recognised. South African courts would be relieved of the embarrassment of searching for a loss of services. Actions for *injuria* and Aquilian damages do not depend on showing such loss.

*Enticement of a parent causing emotional distress and perhaps pecuniary loss to a child.*

There is no reported case of an action by a child for enticement of his parent. It might be said with some confidence that no duty to abstain is owed to the child. Within recent years in America some

22 *Lough v. Ward*, [1945] 2 All E.R. 338.

23 The principles need not involve allowing the parent an action for alienation of affections (for estrangement without cessation of cohabitation). None of the American courts has gone so far (Prosser, *Torts*, 935), and it is unlikely that English courts would recognise a duty to abstain.

24 *Carr v. Clarke*, (1818) 2 Chit. 260.

25 *Terry v. Hutchinson*, (1868) L.R. 3 Q.B. 599.

26 Pollock, *Torts*, 15th edn., 168; Winfield, *Law of Tort*, 5th edn., 237; Christian's note in Blackstone, *Commentaries*, III, 142-3; Prosser,*Torts*, 934-5; Stone, *The Province and Function of Law*, 523. In some jurisdictions, including Western Australia, an irrebuttable presumption of loss of services, in actions for seduction, has been created by statute: *Brankstone v. Cooper*, (1941) 43 West. Aust. L.R. 51. Some American courts have dispensed with the establishing of loss of services: see, e.g., the New York Court of Appeals in *Pickle v. Page*, (1930) 169 N.E. 650, where the

courts have allowed a minor child an action for enticing a parent away from the family home. The cases are discussed in *Nelson v. Richwagen,*[27] where the Supreme Judicial Court of Massachusetts refused to allow the action. Lummus J. adopted[28] the following objections on the score of policy: (1) possibility of a multiplicity of suits; (2) possibility of extortionary litigation; (3) inability to define the point at which the child's right would cease; (4) difficulty of assessing damages.

There is no reported South African case involving an action by a child for enticement of his parent. It is unlikely that a duty to abstain will be recognised.

*Adultery with a wife causing emotional distress and perhaps pecuniary loss to a husband.*

Prior to 1857 a husband had an action for criminal conversation against anyone who committed adultery with his wife.[29] According to Blackstone, the damages recovered were "usually very large and exemplary".[30] Though historically founded on interference with the husband's quasi-proprietary interest in his wife's *consortium,* the real gist of the action was recovery for emotional distress, for "the wound which is given to the husband's feelings and happiness."[31] There need not have been cessation of cohabitation. The action did not therefore depend on showing any pecuniary loss suffered by the husband.

In 1857 the action was abolished and replaced by an action for damages against the adulterer as an incident to proceedings for divorce on the ground of adultery.[32] The action for criminal con-

history is reviewed and the dissent of Glanville J. in *Barham v. Dennis,* (1600) Cro. Eliz. 770, 78 E.R. 1001, is preferred. But this is not to give the parent an action for alienation of the child's affections. There must be removal from home or seduction: Prosser, *Torts,* 931, 935.

27 (1950) 326 Mass. 485; 95 N.E. 2d 545.

28 From a note in 83 U. of Pa. L. Rev. 276, 277.

29 *Galizard v. Rigault,* (1702) 2 Salk. 552, 91 E.R. 467; Holdsworth, *History of English Law,* viii, 430.

30 Blackstone, *Commentaries,* III, 139.

31 Blackstone, *Commentaries,* III, 139, Christian's note 12; Prosser, *Torts,* 918-9.

32 The action for criminal conversation has been abolished in some of the American states, but otherwise it is still available in that country: Prosser, *Torts,* 919. On the assessment of damages for adultery, see the President's directions to the jury in *Menon v. Menon,* [1936] P. 200. Damages for enticement and adultery may overlap. The President said: "Common to both forms of action there is the loss of a wife as a wife and the loss of a wife as a mother. On the one hand the husband saves the expense of keeping his wife; on the other hand he has to put his hand into his pocket to find someone to look after the children."

versation was open to abuse; husband and wife could and did act in collusion to bring about adultery in order that the husband might recover damages from the adulterer. Since the husband's action is now incident to proceedings for divorce, the adultery will have resulted in cessation of cohabitation, and the husband will thereby have suffered pecuniary loss.[33] Thus this action, like the husband's action for enticement, though consistent with the validity of principle (a), is not claimed as authority that intentional causing of emotional distress *alone* will ground recovery. It is equally consistent with a principle that any recovery for emotional distress must be parasitic on recovery for pecuniary loss.

In South Africa the husband may maintain an action corresponding with the old action for criminal conversation. The action need not be brought as an incident to proceedings for divorce, and cessation of cohabitation is unnecessary.[34]

*Adultery with a husband causing emotional distress and perhaps pecuniary loss to a wife.*

There is no reported case in English law where a wife has been given an action against an adulteress. The historical basis of the husband's action clearly could not have supported an action by the wife.

33 There are those who would argue that a wife to-day may be a pecuniary liability rather than an asset, and there may thus be no pecuniary loss resulting from enticement or adultery. But historically the wife was regarded as an asset. In *Gray v. Gee*, (1923) 39 T.L.R. 429, at 431, Darling J. quoted from Tennyson in *Locksley Hall*:

> "He will hold thee, when his passion shall have spent its novel force,
> Something better than his dog, a little dearer than his horse."

The writer must therefore admit, as he has done, that the husband's actions for enticement and adultery are predicated on at least assumed pecuniary loss.

34 *Biccard v. Biccard and Fryer*, 9 S.C. 473; *Viviers v. Kilian*, [1927] A.D. 449. Counsel in the latter case argued that a husband could not maintain the action if he condoned the wife's misconduct and continued to live with her. This was rejected by the Appellate Division. The Court was, however, alive to the danger that the action might be abused. Wessels J.A. said: "I do not think that our present law requires the husband to set aside his wife before he brings the *actio injuriarum* against the adulterer. But the circumstance that he continues to live with her renders an action for damages highly suspicious and the Court should require a full and complete explanation" (at 58-9).

In France damages are recovered for adultery in proceedings for divorce or judicial separation: Planiol & Ripert, *Traité Pratique*, (1952) Tome VI, 769.

But might not an action now be maintained by analogy with the action given to the wife in *Gray v. Gee*[35] as approved and explained in *Best v. Fox*?[36] The writer's principle (a) would support a wife's action even where there is no cessation of cohabitation, but it is unlikely that the courts would be prepared to recognise a duty to abstain which would enable an action to be brought similar to the old action for criminal conversation. The considerations which dictated the abolition of the action for criminal conversation would probably deter the courts from recognising the duty. But is there any reason why a duty to abstain should not be recognised where, though the facts do not amount to enticement, the action of the adulteress leads to a cessation of cohabitation? Where is the difference in policy between enticement which causes cessation of cohabitation and adultery which causes the same result?

South African courts have given the wife an action of the same scope as that given the husband. In *Rosenbaum v. Margolis*[37] Blackwell J. thought that recognition of the wife's action was clearly demanded by the "conditions of modern times", though it could not be shown that the action had been conceded in express terms in the law of Holland. He asked: "Would it not be anachronistic and inequitable . . . to say that, because a remedy was not proved to exist in the Holland of yesterday, that remedy does not exist in South Africa to-day? . . . The Roman-Dutch system is a living body of

35 (1923) 39 T.L.R. 429.

36 [1952] A.C. 716, at 726, 729, per Lords Porter and Goddard. In Western Australia the wife has a right to damages in an action for divorce on the ground of adultery: Matrimonial Causes and Personal Status Code, 1948, sec. 7. A number of American states have given the wife an action for criminal conversation; see *Newson v. Fleming*, (1935) 165 Va. 89, 181 S.E. 393. In that case Chief Justice Campbell's arguments to support the wife's action for criminal conversation are similar to those used by Darling J. in giving the wife an action for enticement in *Gray v. Gee*, (1923) 39 T.L.R. 429, and to those used by Isaacs J. in his dissenting judgment in *Wright v. Cedzich*, (1930) 43 C.L.R. 439, at 500 *et seq.*; Campbell C.J. quoted from a lecture by Cardozo: "We take a false and one-sided view of history when we ignore its dynamic aspects. The Year Books can teach us how a principle or rule had its beginning. They cannot teach us that what was the beginning shall also be the end . . . Social, political, and legal reforms had changed the relations between the sexes, and put woman and man on a plane of equality. Decisions founded on the assumption of a by-gone inequality were unrelated to present day realities, and ought not to be permitted to prescribe a rule of life."

37 [1944] W.L.D. 147.

law . . ." The Appellate Division has now approved the wife's action.[38]

*Seduction of a child causing emotional distress and perhaps pecuniary loss to a parent.*[39]

As in the parent's action for enticement of a child, pecuniary loss, in the form of a loss of the services of the child, must be shown before a parent may recover for the seduction of his child. Recovery for emotional distress takes the form of an award of exemplary damages.

The rule that loss of services must be shown derives from the history of the action,[40] but no other justification for it has been suggested. Indeed it is universally condemned, and the courts have endeavoured to limit its operation.[41]

Principle (a) to be a valid rationalization of the present law needs to be qualified so as to make recovery for emotional distress parasitic on recovery for pecuniary loss in the form of loss of services.

Principle (b) must also be qualified. No damages may be recovered for pecuniary loss unless there is loss of services. But may it not be that, just as in the action for enticement of a child, principles (a) and (b) represent the law in the making?

South African law gives an action for seduction to the woman seduced.[42] The action derives from Germanic customary law and stands outside the structure of principles built on the *actio injuriarum* and the *actio legis Aquiliae*. There is no reported case where an action has been given to the parent. There is no reason in principle why the parent should not have an action for *injuria*. But, since the woman herself already has a remedy, South African courts might well be loth to find a duty to abstain.

38 *Fouldes v. Smith*, 1950 (1) South African L.R. 1 (A.D.), and see also *Valken v. Berger*, 1948 (3) South African L.R. 532 (W.L.D.).

39 Seduction is used here in the narrow sense of sexual intercourse with a female child. Theoretically a male child might be seduced but there is no reported case in English or American law where this was the basis of a parent's action: Prosser, *Torts*, 932.

40 See *supra*, p. 596.

41 See *supra*, p. 597.

42 McKerron, *Law of Delict*, 3rd edn., 187-192; Wille, *Principles of South African Law*, 3rd edn., 515; Maasdorp's *Institutes*, 5th edn., IV, 137-142; Lee & Honoré (eds.), *The South African Law of Obligations*, 222-3. Pollock seems to have considered that English law should provide such a remedy though he considered it only within the power of the

*Defamation of one member of a family published to another giving rise to emotional distress and perhaps pecuniary loss to the member defamed.*

All harms to interests by defamation arise by way of injuries to relations. We are here concerned with cases where the relations injured are family relations.[43]

Defamation takes us beyond intentional acts with which we have so far been exclusively concerned. Damages may be recovered where the defendant's act was negligent only, and indeed where the defendant has been guilty of no fault whatever.[44] Moreover the assessment of damages in defamation is an esoteric art[45]—for what does the plaintiff recover when he is awarded damages for "loss of reputation"? It would be well if one could assert with confidence that "reputation" is conceived as an asset—pecuniarily valuable—and that it is for impairment of this asset that recovery is had when damages are awarded for loss of reputation.[46]

Recovery for emotional distress would then be confined to occasions when exemplary damages are awarded against a defendant who has acted intentionally. But there can be little doubt that juries, under cover of assessing loss of reputation, do award a *solatium* for emotional distress. This much is clear, however, that *any* recovery must be based on some assumed or proved pecuniary loss. Pecuniary loss is assumed in libel and in slander actionable *per se*, but must be proved in slander not actionable *per se*.

It will be apparent that the writer is bound to admit frankly that defamation simply will not submit to the discipline of his

legislature to create it: *Torts*, 15th edn., 168. In some American states by judicial development and in others by statute a remedy has been given to the woman seduced.

43 As in *Freeman v. Busch Jewelry Co.*, (1951) 98 F. Supp. 963 (U.S. District Court). A merchandising corporation, with the object of reminding the plaintiff of a payment due on his radio, mailed him a postcard bearing the following message: "Dear Milford. I'll be in LaGrange next week. Call me at 9693. Love Mary." The postcard was received and read by the plaintiff's wife who concluded therefrom that her husband had a clandestine love affair with another woman; she thereupon left her husband. Cf. *Perry v. Moskin Stores, Inc.*, (1953) 249 S.W. 2d 812.

44 *Hulton v. Jones*, [1910] A.C. 20, and its offspring; Pollock, *Torts*, 15th edn., 430, n. 74. But there is a retreat from strict liability in the provisions of the Defamation Act, 1952, sec. 4.

45 Pollock, *Torts*, 15th edn., 142.

46 This is the view of Spencer Bower, *Code of the Law of Actionable Defamation*, 2nd edn., 4, 240-1. Spencer Bower's view is discussed at length by Pound in (1914-15) 28 Harv. L. Rev. 445 ff.

principles. While damages may be recovered for emotional distress intentionally caused in an award of exemplary damages, that recovery is parasitic on recovery for some proved or assumed pecuniary loss. Principle (a) needs thus to be qualified. Moreover, damages may be recovered for pecuniary loss even where the defendant's acts were neither intentional nor negligent. Liability is strict. Principle (e) is invalid in this context. To the extent that a *solatium* is included in the assessment of damages for loss of reputation, principle (d) is invalid. Damages may be recovered for emotional distress, provided pecuniary loss has been proved or presumed, even though the defendant's act was neither intentional nor negligent.

It is not surprising then that the South African law has been unable to digest the rules of English law which have been imported. The writer has elsewhere[47] endeavoured to show that it is necessary for South African law to distinguish clearly between the kinds of damage which result from defamation. It is still possible to rationalize the South African case law on the bases of an action for emotional distress governed by the principles of the delict *injuria* and an action for pecuniary loss governed by the principles of Aquilian liability. But unquestionably the English law of defamation is inconsistent with the fundamental principles of the South African law of delict.[48]

*Defamation of one member of a family causing emotional distress to other members.*

The writer is not concerned here with defamation of one member which is also defamation of another member.[49] The harm in such a case does not take the form of impairment of domestic relations. Nor are we concerned with defamation of one member of a family which causes pecuniary loss to another without being defamatory of that other. A shopkeeper whose wife is defamed may suffer in his business. If he has a remedy, it is for injurious falsehood. Here again the harm does not take the form of impairment of domestic relations.

But a husband may well feel emotional distress because his wife has been defamed, and a parent feel emotional distress at the defama-

47 *The Bases of the South African Law of Defamation,* [1951] Tydskrif vir Hedendaagse Romeins-Hollandse Reg, 192.

48 Those South African lawyers who insist that much of the English law of defamation is in fact also South African admit frankly that the imported English law cannot be reconciled with the fundamental principles of the South African law. See, for example, McKerron, (1931) 48 South African Law Journal, 457.

49 I.e., where the defamation can fairly be "innuendoed" as applying to the other.

tion of his child. Principle (a) would support actions in such situations provided that the defendant intended to cause the emotional distress. But English courts have not recognised a duty to abstain. There is probably good reason in policy for not recognising the duty. When the defendant's act is intentional the award of *solatium* to the member defamed will take count of the hurt to him as a member of a family. To allow actions for emotional distress to other members might will lead to damages being recovered for the same hurt many times over.[50]

South African law gives an action to a husband who suffers emotional distress as a result of intentional defamation of his wife. In *Jacobs v. Macdonald*[51] the plaintiff successfully sued the defendant for uttering slanderous words concerning the plaintiff's wife to the effect that she was "nothing else than a prostitute from Kimberley". Innes C.J. said: "It is clear from the authorities that the Roman law recognised the principle that where persons stood in certain intimate relations towards one another an *injuria* to the one might in certain cases be an *injuria* to the other. Husband and wife, father and child, betrothed persons and others came within this category. And the same principle—though not, perhaps, to the same extent—appears to have been adopted in the Roman-Dutch law . . . Now, without going so far as to say that this doctrine ought to apply to all cases of *injuria,* I think there are cases in which an insult to a wife is also an insult to her husband, although it may not be directly levelled against him."[52] But it is doubtful how far the duty extends beyond giving an action to a husband.[53]

*Defamation of a deceased member of a family causing emotional distress to living members.*

We are not concerned here with the defamation of a deceased person which is also defamation of a living person, nor with defamation of a deceased person which causes pecuniary loss to a living person without being defamatory of the living person. Harms in such cases do not arise by impairment of domestic relations.

50 American courts do not recognise any duty to abstain: Prosser, *Torts*, 785.
51 [1909] T.S. 442.
52 *Ibid.*, 442-3.
53 In *Spendiff v. East London Daily Dispatch, Ltd.*, [1929] E.D.L. 113, at 129, van der Riet J. said: "The husband under Roman law was undoubtedly entitled to sue for insult or injury to his wife and this right is preserved in our modern law." But he added: "It is noteworthy that Voet (47.10.6) denies that conversely the wife can sue for an injury done to her husband." And see McKerron, *Law of Delict*, 3rd edn., 67.

But a widow or widower may suffer emotional distress at an attack on the reputation of the deceased spouse. So too children may suffer emotional distress as a result of an attack on the reputation of a deceased parent. The situation here is different in one important respect from the one we have considered under the last heading. Unless the surviving relative has an action, the defamer will be free from any civil action and the deceased's reputation will very likely go undefended. The deceased's estate has no right of action.[54] Principle (a) would support an action by the surviving relative, provided the act was intentional, but English law has not recognised any duty to abstain.[55] The question of liability for "defamation of the dead" was considered by the Porter Committee. The Committee recommended that no change be made in the law.[56]

The only relevant South African authority is *Spendiff v. East London Daily Dispatch, Ltd.*[57] The case was so complicated by the pleadings that it is difficult to draw any principle from it. The widow and children of a deceased man sued the defendant newspaper for a false statement that the deceased had been convicted of murder and executed. One judge, van der Riet J., expressed a clear opinion. He said: "I consider that I should adopt as the correct principle of our law that the wife and sons of a deceased party who has been slanderously aspersed, have a right of action only if the nature of the aspersion be such that they themselves are directly affected in status or patrimonial interest and that I should not hold that mere hurt to their feelings of regard for the deceased man should entitle them to such an action."[58] However, he went on to

54 Even when the defamation occurs before death, no right of action survives to the deceased's estate: Law Reform (Miscellaneous Provisions) Act, 1934, s. 1 (1). [In Western Australia: Law Reform (Miscellaneous Provisions) Act, 1941, s. 4 (1)].

55 American courts do not recognise any duty: Prosser, *Torts*, 785-6. In *Hughes v. New England Newspaper Co.*, (1942) 312 Mass. 178, 43 N.E. 2d 657, a plaintiff widow unsuccessfully sought damages for a false statement that her deceased husband had committed suicide. Roman J. recorded that "the almost unanimous trend of judicial thought" was against the proposition that defamation of a deceased person gave a cause of action to his relatives." He refused "to extend liability into a field where boundaries can hardly be defined with any fair degree of certainty."

56 "Historians and biographers should be free to set out facts as they see them and to make their comment and criticism upon the events which they have chronicled"—*Report of the Committee on the Law of Defamation*, Cmd. 7536, para. 29.

57 [1929] E.D.L. 113.

58 *Ibid.*, 129.

refer to *Jacobs v. Macdonald*,[59] and apparently he, at least, would have approved a husband's action for hurt to his feelings of regard for a deceased wife who is defamed.

*Physical injury to a wife causing emotional distress and perhaps pecuniary loss to a husband.*

Physical injury to the wife may have been caused intentionally to hurt the domestic relation with her husband, or, as in the great majority of cases, it may have been negligent only. English law provides a remedy, based historically on a quasi-proprietary right of a husband in his wife, whether the defendant's act be intentional or negligent. Though it is described as an action for loss of *consortium*, the exact limits of the husband's action cannot be stated with confidence.

In *Best v. Fox*[60] the Lords were clearly impressed with the vital difference between the action for physical injury to a spouse and actions for enticement or adultery. In the action for physical injury to a spouse the defendant's act may be negligent only. In enticement and adultery the defendant's act must be intentional. The Lords did not direct any special attention to the case of intentional hurt to domestic relations by physical injury to the wife. However, their explanation of the actions for enticement and adultery[61] justify an inference that they would approve a husband's remedy in such a case and the award of damages for emotional distress. But the remarks of some of the Lords directed to the indivisibility of *consortium* may mean that here again recovery for emotional distress intentionally caused is parasitic on proof of pecuniary loss, and principle (a) may require qualification.

Their observations on the husband's action for physical injury to his wife were concerned with the case of negligent harm. Implicit in those remarks is a conviction of the inappropriateness of allowing recovery for emotional distress where the defendant's act is not intentional. There is much in the words they have used to suggest that in future the husband's action against a negligent defendant will be confined to recovery for pecuniary loss. Lord Porter said: "To-day the damages which a husband receives for injury to his

[59] [1909] T.S. 442.

[60] [1952] A.C. 716.

[61] See the passages quoted from the judgments of Lords Porter and Goddard. There is this difference, however, between enticement of a wife and intentional physical injury to her, that in the latter case the wife herself may recover exemplary damages for emotional distress.

wife are commonly measured by his expenses, whether for medical treatment of the wife or in payment for household services which her injuries prevent her from performing, and little, if any, attention is paid to a loss of *consortium* which involves other considerations beyond these two."[62] Again, Lord Goddard said: "There is this about it that is neither anomalous nor illogical, still less unjust, a husband nowadays constantly claims and recovers for medical and domestic expenses to which he has been put owing to an injury to his wife. As to the first, I think his claim really lies in his legal obligation to provide proper maintenance and comfort, including medical and surgical aid, for his wife, and the fact that a wrong does cause that obligation to be incurred is regarded as giving him a right to recover, while the latter is truly a remnant, and perhaps the last, of his right to sue for the loss of *servitium,* for, to use Lord Wensleydale's words, it is to the protection of such material interests that the law attends rather than mental pain or anxiety . . . In truth, I think the only loss that the law can recognise is the loss of that part of the *consortium* that is called *servitium,* the loss of service."[63] In the writer's view, disapproval of allowing recovery for emotional distress negligently caused is at the core of the view expressed by Lords Porter[64] and Goddard[65] that *consortium* is indivisible. The crucial point is that to admit the divisibility of *consortium* may allow recovery for emotional distress alone, though the defendant has been negligent only. To insist that *consortium* is indivisible at least prevents recovery for emotional distress negligently caused which does not accompany some pecuniary loss. Nonetheless it is a clumsy way of achieving the object. It may mean that the husband will be unable to recover for pecuniary loss negligently or even intentionally caused where the wife's injuries do not affect her capacity to render services. The husband may well have been put to expense for medical attention for his wife.

How far is the husband's action dependent on the wife being able to sue for her injuries; how far is his action derivative? *Mallett v. Dunn*[66] has determined for negligent wrongs what had long been determined for the intentional wrongs affecting family relations.[67] viz., that the wrong which arises via injury to the family relations

62 [1952] A.C. 716, at 728.
63 *Ibid.*, at 732, 734.
64 *Ibid.*, at 728.
65 *Ibid.*, at 734.
66 [1949] 2 K.B. 180.
67 *Ibid.*, at 183; *Best v. Fox,* [1952] A.C. 716, at 730, per Lord Goddard.

is quite distinct from any wrong which might be done to the member of the family who is the immediate focus of events. There is a duty on persons generally to take care to avoid harm to a husband by way of injury to his wife. That duty is not affected by the fact that the wife has not taken proper care for herself,[68] nor, presumably, by the fact that she has consented to run the risk of harm to herself. The husband's right to recover is not affected by the fact that the wife has already recovered for her injuries.[69]

South African law probably gives the husband an action for the *injuria* he suffers by physical injury to his wife which is intentionally inflicted.[70] The husband has an Aquilian action for the pecuniary loss he has suffered. The action was approved by the Appellate Division in *Abbott v. Bergman.*[71] The Court reasoned from the husband's action for fatal injuries to his wife. de Villiers J.A. said: "Our law is . . . silent whether a husband can recover from a person who has through *culpa* injured his wife, though not fatally. But no reason can be suggested why a husband should not be allowed to recover the actual pecuniary loss[72] sustained by him under the circumstances. If he is allowed to recover the loss sustained by him through the death of his wife, he must also be allowed to recover when the injuries are not fatal. For, in principle, no distinction can be drawn between the two cases."[73] The husband was allowed to recover for medical and hospital fees and loss of his wife's services. In *de Vaal v.*

68 The wife who is guilty of contributory negligence is to be regarded as a tortfeasor whose acts have combined with those of the defendant in causing the harm to the husband. "He (the husband) is entitled to succeed just as a passenger in a vehicle who claims that the defendant, the driver of the other vehicle which collided with that in which the plaintiff was riding, is entitled to succeed although the defendant shows that there was contributory negligence on the part of the driver of the vehicle in which the plaintiff was a passenger . . . In my opinion the husband's claim is likewise not defeated by the fact that his wife was guilty of wrongdoing which was also a cause of the injury to her as a consequence of which he has suffered damage": *Mallett v. Dunn*, [1949] 2 K.B. 180, at 185-186, per Hilbery J. But it does not follow that the defendant may recover contribution from the wife: *Drinkwater v. Kimber*, [1952] 2 Q.B. 281.

69 *Brockbank v. Whitehaven Ry.*, (1862) 7 H. & N. 834, 158 E.R. 706. A number of American courts regard the husband's action as derivative to the extent that he will be defeated by the wife's contributory negligence or assumption of risk. But judgment recovered by the wife does not defeat the husband's action: Prosser, *Torts*, 943-5.

70 It would seem to follow from *Jacobs v. Macdonald*, [1909] T.S. 442.

71 [1922] A.D. 53.

72 The Cour de Cassation in France is also concerned to confine recovery to pecuniary loss: Planiol & Ripert, *Traité Pratique*, (1952) Tome VI, 758.

73 [1922] A.D. 53, at 56; see also *Els v. Bruce*, [1922] E.D.L. 295.

*Messing*[74] Greenberg J. sought to explain *Abbott v. Bergman* on the ground that, the parties being married in community, the husband was suing on behalf of the joint estate. But there is nothing in the judgments of the Appellate Division to show that they would have come to any different conclusion had the parties not been married in community.[75]

*Physical injury to a husband causing emotional distress and perhaps pecuniary loss to a wife.*

It was not until 1923 that a wife sought to recover for enticement of her husband.[76] It was not until 1951 that a wife sought to recover in England for the harm she had suffered by reason of physical injury to her husband. Reference has already been made to the judgments in *Best v. Fox*.[77] The House of Lords in that case refused to give the wife an action.[78] The Lords distinguished *Gray v. Gee*.[79] Lord Porter said: "In that class of case the wrong is a deliberate action taken with the object of inducing the wife to leave her

74 [1938] T.P.D. 34.

75 *Pace* Lee & Honoré (eds.), *The South African Law of Obligations*, 218, where the "explanation" by Greenberg J. is accepted.

76 *Gray v. Gee*, (1923) 39 T.L.R. 429. For the reason why recovery had not been sought earlier, see before note 17. But the procedural incapacity of the wife does not explain why the recovery sought in *Best v. Fox* had not been sought earlier. Why should a husband have refused to join his wife in bringing an action against someone who had injured him? See the judgment of Lord Goddard in *Best v. Fox*, [1952] A.C. 716, at 730.

77 See *supra*, pp. 606-607.

78 The American courts, too, are almost unanimous in refusing the wife an action: Prosser, *Torts*, 947-8. But recently the U.S. Court of Appeals for the District of Columbia gave the wife an action on facts very similar to those in *Best v. Fox: Hitaffer v. Argonne Co. Inc.*, (1950) 183 Fed. 2d 811. The Court reasoned from the granting to the wife of remedies for enticement, adultery, and alienation of affections that she could not be denied the action for negligent injury to her husband. Circuit Judge Clark said: "There can be no doubt, therefore, that if a cause of action in the wife for loss of *consortium* from alienation of affections or criminal conversation is to be recognised it must be predicated on a legally protected interest. Now then, may we say that she has a legally protected and hence actionable interest in her *consortium* when it is injured from one of these so-called intentional invasions, and yet, when the very same interest is injured by a negligent defendant, deny her a right of action? It does not seem so to us. Such a result would be neither legal nor logical." We have seen that the House of Lords in *Best v. Fox* refused to go along with such reasoning. A recent decision in New York is contrary to *Hitaffer v. Argonne: Passalacqua v. Draper*, 279 App. Div. 660, 107 N.Y.S. 2d 812.

79 (1923) 39 T.L.R. 429.

husband or the husband to leave his wife—malicious because it is their mutual duty to give *consortium* to one another, and the defendant has persuaded the errant spouse not to fulfil that duty."[80] Lord Goddard said: "A wife is entitled to enjoy the society, comfort, and protection of her husband and to be maintained by him, and if another entices him from her so that she is bereft of those benefits she is as much entitled to claim damages as is a husband whose wife is for any reason, save humanity, abducted or persuaded to leave his home. *There has been a conscious and wilful invasion of her right.*"[81] The Lords did not look kindly on the husband's action for loss of consortium arising by negligent injury to his wife, and refused to accept it as a reason why the wife should have a similar action; two bads do not make a good. The writer has already suggested[82] that the Lords' disapproval of the husband's action was directed to the fact that it allowed recovery for emotional distress where the defendant's act was negligent only. If the husband's action is confined to pecuniary loss, as the Lords thought it should be,[83] there would seem to be no objection to the recognition of a duty of care in his favour.[84] But the Lords were certainly not prepared to give the wife a remedy expressed, as the husband's action is, in terms of loss of *consortium*. And, the Lords asked, would any purpose be served by recognising a duty of care not to cause pecuniary loss to a wife by injury to her husband; what pecuniary loss could she suffer? Lord Porter said: "The expenses . . . recovered by the husband fall on *him* whereas his wife does not incur any similar liability and therefore it is natural that he should recover and she should not."[85] The Lords did not refer to the argument that the husband might be precluded by contributory negligence or the fact that he was *volens* from recovering all or some of his loss, and the wife suffer because of the husband's decreased ability to maintain her. If the wife were given an action these

80 [1952] A.C. 716, at 726-7.

81 *Ibid.*, at 729-30 (writer's italics).

82 See *supra*, p. 606.

83 See *supra*, pp. 606-607.

84 Once confine the husband's action to pecuniary loss and the argument for recognition of the wife's action based on equality of the sexes loses its sting. The husband will have had to meet medical and hospital expenses and have had to pay for domestic help. It is true that the husband's action has an inappropriate historical basis and that this did not dispose the Lords to look kindly on it. But it does not follow that the action may not in part have a proper function in our time. It would be as sensible to object at large to the modern law of agency because it might be shown to have its origins in the Roman law of slavery.

85 [1952] A.C. 716, at 728.

defences would probably not avail against her.[86] But the reply to this is no doubt that in these circumstances she does not suffer pecuniary loss directly because of the defendant's act, but because her husband's acts preclude him from recovering. Such pecuniary loss is too remote.[87]

There is no reported case where a South African court has given a wife an action for *injuria* due to intentional injury to her husband. There is no reason in principle why she should not have such an action. But the courts may not be ready to recognise a duty to abstain.[88] In *de Vaal v. Messing*[89] it was held that the wife did not have an Aquilian action. The basis of the decision is very simply that the court was unable to see what pecuniary loss a wife could suffer. There is thus an interesting anticipation of the reasoning of the House of Lords in *Best v. Fox*. Greenberg J. said: "His (the husband's) claim against the wrongdoer would fully compensate for his diminished earning capacity, . . . and in relation to his dependants' claim for maintenance there would be no difference between his position before and after the injury. It is clear that the breadwinner would be entitled as against the wrongdoer to compensation to the full extent of the diminution in his earning capacity and that any claim by his dependants against the wrongdoer would be met by the simple answer that they had suffered no damage."[90]

*Physical injury to a child causing emotional distress and perhaps pecuniary loss to a parent.*

The parent's action for the harm he suffers by physical injury to a child requires proof of pecuniary loss in the form of loss of services. To this extent the action is like those for enticement and seduction.[91] But while enticement and seduction are intentional acts, physical injury to the child may have been negligently caused. Where the defendant's act is intentional the parent may possibly recover

86 *Mallett v. Dunn*, [1949] 2 K.B. 180.

87 Compare the conclusion reached by the South African court in *de Vaal v. Messing*, [1938] T.P.D. 34; *infra* note 90.

88 See McKerron, *Law of Delict*, 3rd edn., 67.

89 [1938] T.P.D. 34.

90 *Ibid.*, at 38. Maritz and Schreiner JJ. concurred. It was argued that the husband might not be able to recover because of his contributory negligence and thus the dependants might suffer pecuniary loss. Greenberg J. dismissed this argument on the ground that it would mean that a husband "could by his own contributory negligence create in favour of his dependants a cause of action that would not exist in the absence of such negligence" (at 42).

91 The action has the same historical basis.

for emotional distress by an award of exemplary damages.[92] Recovery, if allowed, would be parasitic on recovery for pecuniary loss and to this extent principle (a) would need to be qualified. Where the defendant's act is negligent only, recovery is confined to the pecuniary loss the parent has suffered by the physical injury to his child.[93] Damages may not be recovered for emotional distress negligently caused. This action thus supports the validity of principles (c) and (d).

In South African law there is no reason in principle why a parent should not have an action for emotional distress due to injury to his child where the defendant's act is intentional. But it cannot be said with confidence that the South African courts would recognise a duty to abstain.[94] South African law gives the parent an Aquilian action for the pecuniary loss he has suffered owing to physical injury to his child.[95]

*Physical injury to a parent causing emotional distress and perhaps pecuniary loss to a child.*

There is no reported case in English law of an action by a child for physical injury to his parent. Where the defendant's act is intentional, principle (a) would support an action for emotional distress, but it is unlikely that the courts would recognise any duty to abstain in favour of the child. Where recovery is sought for pecuniary loss, principles (b) and (c) would support actions. But it is hard to see what pecuniary loss the child could suffer, since the parent has his action against the defendant and, as a result of that action, the parent should be placed in as good a position to maintain the child as he would have been in had he not suffered the injuries.

92 But the fact that the child has an action and may recover exemplary damages may make the Courts reluctant to allow the parent to recover for emotional distress.

93 *Flemington v. Smithers*, (1826) 2 C. & P. 292, 172 E.R. 131. Most American courts allow recovery for pecuniary loss *and* emotional distress: Prosser, *Torts*, 940. A number of courts regard the parent's action as derivative to the extent that it is defeated by contributory negligence or assumption of risk by the child: Prosser, *op. cit.*, 943-5.

94 McKerron, *Law of Delict*, 3rd edn., 67.

95 *Joyce v. Arlosoroff*, 17 C.T.R. 91. In *Abbott v. Bergman*, [1922] A.D. 53 at 56, de Villiers J.A. pointed out that the Romans allowed a father to recover for medical expenses and the loss of services of a son who was wounded, and their extension of the *lex Aquilia* was recognised by South African law in respect of sons as long as they are minors. de Villiers J.A. relied on Voet, 9.2.11, and Grotius, *Introd.*, 3.34.3.

There is no reported case in South African law where an action has been allowed a child in respect of physical injury suffered by his parent. The principles relating to liability for *injuria* would support an action by a child for emotional distress, but it is doubtful whether the South African courts would recognise a duty to abstain in favour of the child. There is no reason in principle why an Aquilian action should not be granted for pecuniary loss caused intentionally or negligently. The difficulty, as in English law, is to see what pecuniary loss the child could suffer.

*Infliction of death on one member of a family causing emotional distress and perhaps pecuniary loss to other members.*

Until Lord Campbell's Act[96] damages could not be recovered in tort by one member of a family for the harm he had suffered by reason of the intentional or negligent infliction of death on another member of the family. The law did not recognise any duty to abstain or any duty to take care in such circumstances. Lord Campbell's Act created duties of abstention and care in favour of those members of the deceased's family expressly mentioned in the Act. The action is strictly confined to pecuniary loss[97] and is, to some extent, derivative from the action which the deceased might have maintained had he lived. The Act expressly provides that the relatives cannot recover unless the injuries were "such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof." It will be remembered that the husband's action for the loss he suffers by reason of injuries to his wife which do not result in death is not affected by the fact that the wife is precluded from recovering by her contributory negligence, or by the principle *volenti non fit injuria.* And it matters not that she has already recovered damages in an action, or by settlement.[98] Why then, one might ask, should the husband be denied recovery where the injuries result in his wife's death merely because she would have been precluded from recovering if she had lived or because she had already recovered damages before she died. It was said of the law

[96] Fatal Accidents Act, 1846, adopted in Western Australia by 12 Vict. No. 21.

[97] *Blake v. Midland Ry.*, (1852) 18 Q.B. 93, 118 E.R. 35. With very few exceptions the American statutes have also been construed so as to limit recovery to pecuniary loss: Prosser, *Torts*, 963-5.

[98] See *supra*, pp. 607-608. So too, it has been assumed, the parent's action is not affected by contributory negligence of the child, by the fact that the child was *volens*, or by the fact that the child had already recovered.

before Lord Campbell's Act that it made it "cheaper to kill than to maim." Indeed, so far as the law of torts was concerned, it cost nothing to kill. Though it went some distance towards correcting the law, Lord Campbell's Act seems to have been concerned to avoid making it "dearer to kill than to maim." Yet the real question is not "cheaper" or "dearer" but whether those who have suffered loss by the defendant's wrongful act shall be adequately compensated. Is there any good reason in policy why a wholly distinct duty in favour of the relatives should not be recognised? Is it at all relevant that in the result in some cases it may be more expensive to kill than to maim?

The courts have made some attempt to restrict the operation of the provision that the deceased must have been able to maintain an action had he lived. It is sufficient that the deceased could, at the time of his death, have maintained an action and recovered *some* damages. The fact that the damages he might have recovered were limited by a clause in a contract with the defendant does not limit the damages recoverable by the relatives.[99] And perhaps a change of heart on the part of the legislature is reflected in the provisions of the Law Reform (Miscellaneous Provisions) Act, 1934.[100] With some exceptions actions which the deceased might have maintained at the date of his death survive to his personal representative. The Act expressly provides that recovery by the personal representative for bodily injury suffered by the deceased does not preclude action by the relatives under Lord Campbell's Act.[101] It is true that so far as the relatives will benefit, on distribution of the deceased's estate, by the action brought by the executor on behalf of the estate, the benefit will be set off against the damages recoverable by the relatives under Lord Campbell's Act.[102] But there would be no difficulty in

99 *Nunan v. Southern Railway*, [1924] 1 K.B. 223.

100 In Western Australia, the Law Reform (Miscellaneous Provisions) Act 1941. On the other hand the Law Reform (Contributory Negligence) Act 1945, sec. 1 (4) [in Western Australia the Law Reform (Contributory Negligence and Tortfeasors Contribution) Act 1947, sec. 4 (2)] provides for scaling down the damages recoverable by the relatives under Lord Campbell's Act by the percentage in which the deceased was at fault.

101 Law Reform (Miscellaneous Provisions) Act 1934, sec. 1 (5). In Western Australia, the Law Reform (Miscellaneous Provisions) Act, 1941, sec. 4 (5).

102 *Davies v. Powell Duffryn Collieries*, [1942] A.C. 601; *Bishop v. Cunard White Star Co. Ltd.*, [1950] P. 240. So far as the estate has been enriched by the action brought by the personal representative, and the relatives on distribution receive some of that enrichment, the loss resulting to them from the death is lessened. It seems appropriate enough

applying the same rule to damages recovered by the deceased in an action brought before his death.

There is no reported case in South African law where damages have been sought by one member of a family for *injuria* arising from the intentional infliction of death on another member. There is no reason in principle why such an action should not be maintained.[103] It is probable that a duty to abstain would be recognised in favour of the husband in respect of injuries resulting in the death of his wife, but it is hard to say what, if any, other duties would be recognised.[104].

South African law has always given an action[105] to certain members of a family[106] for pecuniary loss they have suffered by reason of the intentional or negligent infliction of death on another member. The action, which probably derives from Germanic customary law,[107] is strictly confined to pecuniary loss. In *Union Government*

therefore to set off *Rose v. Ford* damages; the estate is greater by the amount of those damages than it would have been had the death not been caused by the act of the defendant. But why should the special damages recoverable, i.e., loss of wages, medical and hospital expenses, be set off? The estate is not enriched by recovery of these damages. In Western Australia, by the Law Reform (Miscellaneous Provisions) Act 1941, sec. 4 (2) (d), *Rose v. Ford* damages may not be recovered by the personal representative in his action on behalf of the estate. The personal representative may however recover for loss of wages, medical and hospital expenses. The writer has not been able to discover whether such damages are in fact set off, following *Davies v. Powell*, against damages recovered under Lord Campbell's Act.

103 See the judgment of Innes C.J. in *Waring & Gillow v. Sherbourne*, [1904] T.S. 340, at 348; McKerron, *Law of Delict*, 3rd edn., 176, n. 23.

104 McKerron, *Law of Delict*, 3rd edn., 67.

105 See generally on the action: Pollak, (1930) XII Journal of Comparative Legislation (3rd Series), 203; McKerron, *Law of Delict*, 3rd edn., 173-177; Lee & Honoré (eds.), *The South African Law of Obligations*, 217-8.

106 Actions have been successfully maintained by husband, wife, parent, and child of a deceased: *Union Government v. Warneke*, [1911] A.D. 657; *Union Government v. Lee*, [1927] A.D. 202; *Jacobs v. Cape Town Municipality*, [1935] C.P.D. 474; *Jameson's Minors v. C.S.A.R.*, [1908] T.S. 575; *Young v. Hulton*, [1918] W.L.D. 90. The action can be maintained by anyone who has suffered pecuniary loss as a result of the death, provided the deceased was under a duty to support him: "I can find no authority for the proposition that the law of Holland would have given an action of this nature to any relation not damnified by being deprived of benefits supplied by the deceased under a legal duty to do so": *Union Government v. Warneke*, [1911] A.D. 657, at 666 per Innes J.

107 "The remedy was unknown to the civil law, and there is much to be said for the view that it has its roots in early Germanic custom. But whatever its origin, its existence was well recognised by Dutch writers, who treated it as a species of *utilis actio* under the *lex Aquilia*. In that

*v. Warneke,*[108] in considering whether a husband might recover in respect of his wife's death, Innes J. said: "We are faced with the fact that it was essential to a claim under the *lex Aquilia* that there should have been actual *damnum* in the sense of loss to the property of the injured person by the act complained of . . . The loss of a wife's comfort and society (as distinguished from her support and assistance) is a loss which only affects the feelings, and not the property of the husband. It is not a material loss, however deeply felt, and affords no ground for patrimonial damages . . . If in any instance the shock done to the feelings of a claimant were allowed to influence the award of damages in an action founded on negligence, it is difficult to see where the line could be drawn."[109] South African courts have found no difficulty in regarding the relatives' action as wholly distinct from any action which the deceased might have brought had he lived. In *Union Government v. Lee*[110] action

shape we have received it, and we must consider it from that standpoint'': *Union Government v. Warneke,* [1911] A.D. 657, at 664 per Innes J.

108 [1911] A.D. 657, at 665, 667. See also *Waring & Gillow v. Sherbourne,* [1904] T.S. 340; *Steenkamp v. Juriaanse,* [1907] T.S. 980; *Roberts v. London Assurance Co. Ltd.,* 1948 (2) South African L.R. 841 (W.L.D.).

109 Compare Scots law, where historical associations with assythment have resulted in giving the relatives an action for pecuniary loss *and* emotional distress, though the defendant's act was negligent only: *Glegg on Reparation* (3rd edn., by J. L. Duncan, 1939), 113-4; *Elliott v. Glasgow Corporation,* [1922] S.C. 146; *Inglis v. London Midland & Scottish Ry. Co.,* [1930] S.C. 596; *Paterson v. London Midland & Scottish Ry. Co.* [1942] S.C. 146; *Kinnaird v. McLean,* [1942] S.C. 448. The problem of the assessment of damages for solatium is discussed at length by Lord President Cooper in *McGinley v. Pacitti,* [1950] S.C. 364, 368 *et seq.* There is an interesting parallel with French law. Due to the historical origins of the relatives' action in ''une sorte d'indemnité forfaitaire'', courts still allow recovery for emotional distress (préjudice moral) as well as pecuniary loss (préjudice pécuniaire): Planiol & Ripert, *Traité Pratique,* (1952) Tome VI, 758-9. But the Conseil d'Etat refuses recovery for emotional distress: Planiol & Ripert, *op. cit.,* 758.

110 [1927] A.D. 202. The decisions in this case, in *Jameson's Minors v.* C.S.A.R. [1908] T.S. 575, and in *ex parte Oliphant,* [1940] C.P.D. 537, are in sharp contrast with the decisions of the Scottish Courts on the Scots common law action for wrongful death. Despite verbal insistence on the non-derivative nature of the Scots action (e.g., in *Davidson v. Sprengel,* [1909] S.C. 566, at 570, per Lord President Dunedin), it has nevertheless been held that contributory negligence of the deceased is a defence to the relatives' action (*McNaughton v. Caledonian Ry. Co.,* (1858) 21 Dunlop 160), that the relatives are bound by ticket conditions binding on the deceased (*McNamara v. Laird Line Ltd.,* 26th June 1924, not reported; *Glegg on Reparation,* 3rd edn., 81), and that the relatives are precluded from suing if the deceased has raised an action in his lifetime (*Darling v. Gray & Sons,* (1829) 19 Rettie 31).

was brought by the widow to recover damages in respect of the death of her husband killed in a level crossing accident. The husband had been guilty of contributory negligence. It was held that this could not be set up against her.[111] In another case, where the deceased by the terms of his railway ticket agreed to take all risk of injury on himself, and he was killed in an accident, it was held that the agreement could not be set up against the relatives.[112] Recovery by the deceased in his own lifetime is no bar to an action by the relatives.[113]

* * * * *

How far, then, is it possible to rationalize the English law on the bases of the writer's suggested principles?

The first principle was: *The intentional causing of emotional distress by impairment of domestic relations is tortious provided the actor was under a duty to abstain.* There are duties to abstain from causing emotional distress to a husband by enticement of his wife, to a wife by enticement of her husband, to a parent by enticement of his child, to a husband by adultery with his wife, to a parent by seduction of his daughter, to any member of a family by defamation of that member published to any other member and to a husband by physical injury to his wife.[114]

111 The Court regarded the deceased and the defendant as joint tortfeasors. Compare the reasoning of Hilbery J. in *Mallett v. Dunn*, [1949] 2 K.B. 180, at 185-186. See also *Martindale v. Wolfaardt*, [1940] A.D. 235; *Wilson v. S.A.R. & H.*, [1940] N.P.D. 509; *Roberts v. London Assurance Co. Ltd.*, 1948 (2) South African L.R. 841 (W.L.D.).

112 *Jameson's Minors v. C.S.A.R.*, [1908] T.S. 575.

113 *Ex parte Oliphant*, [1940] C.P.D. 537. McKerron thinks that if *volenti non fit injuria* could have been successfully pleaded against the deceased, this will bar the relatives' action for, he says, "it negatives the existence of the duty of care, and consequently, if the defence would have availed against the injured party had he lived, it will equally avail against his dependants if he is killed": *Law of Delict*, 3rd edn., 98. See also Lee & Honoré (eds.), *The South African Law of Obligations*, 218. But is this a correct explanation of the defence *volenti non fit injuria?* And, in any case, why should the negativing of a duty owed to the deceased have any effect on distinct duties to the relatives?

114 There *may* be duties to abstain from causing emotional distress to a wife by adultery with her husband, to a wife by physical injury to her husband, and to a parent by physical injury to his child. There is *no* duty to abstain from causing emotional distress to one member of a family by defamation of another published to a stranger, to a member of a family by defamation of a deceased member, to a child by enticement of its parent, to a child by adultery with its parent, to a child by physical injury to its parent, to one member of a family by infliction of death on another.

Where these duties exist damages may be recovered for emotional distress intentionally caused. But in most, probably in all, of these cases the law for the time being requires the qualification of the suggested principle so as to make recovery for emotional distress parasitic on recovery for pecuniary loss either proved or presumed from the nature of the hurt. Pecuniary loss may be presumed from the nature of the hurt in enticement of a husband or wife, in libel, and in slander actionable *per se*. Pecuniary loss in the form of loss of services must be shown in enticement or seduction of a child. Pecuniary loss, or "special damage", must be shown in slander not actionable *per se*. In adultery a rule requiring pecuniary loss to be shown is implicit in the provision that the damages may only be recovered in proceedings for divorce. The views expressed by some members of the Court of Appeal and House of Lords in *Best v. Fox*[115] that consortium is indivisible involve a requirement of pecuniary loss in an action by a husband for physical injury to his wife.

But so far as they can the courts have endeavoured to minimise the requirement of proof of pecuniary loss in actions for enticement or seduction of a child, and the decisions of the courts, at least those prior to the Slander of Women Act, show a readiness to minimise the requirement of "special damage" in slander not actionable *per se*. The writer has suggested that the view expressed in *Best v. Fox* that *consortium* is indivisible was dictated by the fact that most actions for physical injury to a wife involve a defendant who is negligent only. If consortium is indivisible at least recovery for emotional distress negligently caused will be confined to occasions where some pecuniary loss has been suffered. The way out of the difficulty of course was to distinguish between intentional harms and negligent harms, and, in fact, much of the importance of *Best v. Fox* is in the dawning awareness of the importance of that distinction.

The suggested principle may therefore represent the pattern of the law in the making. There is no doubt a need to preserve a healthy scepticism in our attitude to "heart balm" actions.[116] But cannot this scepticism find its legitimate expression in forming the policies which determine the limits of the duty to abstain? The insistence that recovery for emotional distress shall be parasitic is to say the least a clumsy device. It denies recovery in some cases where clearly

115 [1952] A.C. 716.

116 The blackmail and extortion to which "heart balm" actions may lead have moved some American states to abolish actions for enticement, adultery, seduction, and alienation of affections: Prosser, *Torts*, 937-8; Feinsinger, (1935) 33 Mich. L. Rev. 979.

recovery should be allowed and at the same time inhibits awareness of the distinction between intentional and negligent hurts. The device is unknown in South African law. There is comfort in Street's observation: "The treatment of any element of damage as a parasitic factor belongs essentially to a transitory stage of legal evolution. A factor which is to-day recognised as parasitic will, forsooth, to-morrow be recognised as an independent basis of liability."[117]

The second principle was: *The intentional causing of pecuniary loss by impairment of domestic relations is tortious provided the actor was under a duty to abstain.* There are duties to abstain from causing pecuniary loss to a husband by enticement of his wife, to a wife by enticement of her husband, to a parent by enticement of his child, to a husband by adultery with his wife, to a parent by seduction of his child, to one member of a family by defamation published to another, to a husband by physical injury to his wife, to a parent by physical injury to his child, and to certain members of a family by infliction of death on a member of the family.[118]

In some of these situations the principle requires qualification. A parent's action for pecuniary loss due to enticement or seduction of, or physical injury to, his child requires proof of loss of services. The rule is universally condemned. It is no part of South African law. The tendency, we have seen, is to minimise the loss of services that must be shown. Where an action is brought by one member of a family for pecuniary loss he has suffered by the infliction of death on another, he must show the deceased could have maintained an action at the time of his death. This qualification, we have seen, is difficult to justify. It is no part of South African law. The courts have endeavoured, so far as they can, to escape the qualification, and it may be that it does not represent the final declaration of the policy of the legislature.

The third principle was: *The negligent causing of pecuniary loss by impairment of domestic relations is tortious provided the actor was under a duty of care.* There are duties of care to avoid pecuniary loss to one member of a family by defamation of that member published to another member, to avoid pecuniary loss to a husband by physical injury to his wife, to a parent by physical injury

[117] *Foundations of Legal Liability* (1906), 470.

[118] There *may* be a duty to abstain from causing pecuniary loss to a wife by physical injury to her husband, or to a wife by adultery with her husband. There is probably no duty to abstain from causing pecuniary loss to a child by enticement of, or adultery with, or physical injury to, his parent.

to his child, and to certain members of a family by infliction of death on another member.[119]

In two of these cases the suggested principle requires qualification. The parent's action for physical injury to his child requires proof of loss of services. Action brought by one member of a family for pecuniary loss he has suffered by the infliction of death on another requires proof that the deceased could have maintained an action at the time of his death. Comment on these qualifications made in dealing with the second principle applies equally here.

The fourth principle was: *The unintentional causing of emotional distress by impairment of domestic relations is not tortious.* Two doubtful exceptions to the principle have been noticed. It may be that damages may be recovered for emotional distress to one member of a family resulting from defamation of that member published to another member, even though the defendant's act was unintentional, and it may be that a husband may recover for emotional distress due to an unintentional physical injury to his wife provided the defendant's act was negligent.

To the extent that juries under cover of assessing loss of reputation do award a solatium for emotional distress, unintentional defamation is an exception to the fourth suggested principle.

*Best v. Fox*[120] may well be taken as re-defining the husband's action for loss of *consortium* where the defendant's act was not intentional. The husband's recovery may in future be confined to pecuniary loss negligently caused. It is so confined in South African law.

The fifth principle was: *Except as in the third principle, the unintentional causing of pecuniary loss by impairment of domestic relations is not tortious.* This principle requires qualification to the extent that damages may be recovered for pecuniary loss to one member of a family resulting from defamation of that member published to another member, even though the defendant's act was unintentional and was not negligent.

It is not open to the writer to claim that the suggested principles are valid inductions from the present rules. But there are, it is submitted, sufficient indications to warrant the claim that, save in one respect, they state the pattern of the law that is becoming. Only the

119 There is no duty of care to avoid pecuniary loss to a wife by physical injury to her husband, nor, probably, to a child by physical injury to his parent.

120 [1952] A.C. 716.

rules relating to harms by defamation show no sign of submitting, and it is probable that in this field there are peculiar policy considerations which demand distinct principles.

The writer asks for a critical consideration by courts and legislatures both of the scope of the duties of abstention and care and of the principles governing recovery in admitted duty situations. There is no merit in continuing to look upon the law of torts affecting domestic relations with the eyes of the antiquarian, and in cherishing a motley collection of historical curiosities.

R. W. PARSONS*

* *B.A., LL.B. (Sydney); Lecturer in Law, University of Tasmania, 1947; senior lecturer in Law, University of Western Australia, 1948—; awarded an Australian National University research scholarship for 1951 and 1952.*