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Suing for Damages in Cases of Adultery

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July 14, 2015

The divorce rate continues to climb and so does the cost of divorce litigation. Not to mention attorney fees, experts can cost thousands of dollars, particularly when valuing a business or preparing a custody evaluation. Waging war is costly.

As practitioners, we try to guide our clients to make reasoned economic decisions at an otherwise emotional and tumultuous time. As a matter of practice, we should routinely engage in cost-benefit analyses with our clients throughout the pendency of the litigation. This cathartic exercise hopefully causes them to refocus their efforts on the issues that are worth fighting for.

But how do you convince a client that a "scorched earth" litigation strategy may not be in their best interest when the client has been scorned and they are faced with the raw and painful reality that their husband or wife has participated in an adulterous affair? Throw reason out the window, and you're left with a client seeking a pound of flesh for no other reason than because he or she wants it.

Perhaps, however, a claim resulting from a spouse's adulterous affair may withstand scrutiny of a cost-benefit analysis. Certainly, the marital relationship affords each spouse with tangible financial benefits, the loss of which may be compensatory. The claim would be akin to one for tortious interference with a contract. The question is who is the defendant and under what theories of law can a plaintiff pursue a claim. While Pennsylvania cracks the door open for such claims, the burden of proof is high and the theories of culpability are limited.

Affectionately known as the "Heart Balm Torts," there used to be three theories of recovery for damages against the person who, along with the plaintiff's spouse, caused the breakdown of the marriage. Historically, in Pennsylvania, a party could seek criminal charges or prosecute a civil action for damages against a third party who caused a marriage to end. In a criminal context, the claim was for criminal conversion. The civil claim was for alienation of affection. These two claims, however, are no longer available to litigants. The only remaining cause of action is for intentional infliction of emotional distress.

The claim for criminal conversion required proof of sexual intercourse by the defendant with the plaintiff's spouse while they were married, without the plaintiff's consent, as in *Karchner v. Mumie*, 398 Pa. 13 (1959). The injured party sought compensatory damages. A claim for damages stemmed from "injury to ... social position, disgrace in the community where [the injured party] lives or was engaged in business, and dishonor to [the plaintiff] and ... family." The husband's ability to assert a claim for criminal conversion sounded more like an arcane property right. A husband's right to sue another for an adulterous relationship with his wife was "based upon personal and exclusive rights to the person of his wife and invasion by another [thus] considered such a violation of his rights and property," as in *Hawk v. Mann*, 86 Pa. D & C. 58.

In a sign of the times that were, a woman had no such independent right to sue a third party for criminal conversion as a result of engaging in adultery with her husband. However, the Married Women's Act of June 8, 1993, "emancipated" women and afforded them the right to sue for compensatory damages under the theory of criminal conversion. To its credit, the court abandoned the notion that a woman is a servant or personal property belonging to her husband.

Ultimately, the independent cause of action for criminal conversion was abolished by the judiciary, in *Fadgen v. Lenkner*, 469 Pa. 272, 365 A.2d 147 (Pa. 1976). In *Fadgen*, the plaintiff brought a civil action in trespass on the theory of criminal conversion. The complaint was against a man whom the plaintiff alleged had an affair with his wife while they were married. On review, the appellate court overturned the trial court's finding of liability, reasoning that an action for criminal conversion predicated on an adulterous relationship was an "anachronism in modern society." The appellate court explained: "It was unreasonable to impose harsh results without affording an opportunity for defendant to present valid defenses, such as the role of the plaintiff's spouse in the adulterous relationship, or the quality of the plaintiff's marriage prior to the occurrence of the acts in issue." The court also expressed its concern with the measure of damages and the claim's susceptibility to "corruption, fraud and misdealings on the part of unscrupulous persons in bringing unjustified and malicious suits." Decriminalization of adultery is also established through the Crimes Code I, 18 Pa. C.S.A. 01 et seq.

Turning to civil causes of action, the second theory of liability was an action in trespass for alienation of affection, as in *Lear v. Bristow*, 1927 Pa. Dist. & Cnty. Dec. Lexis 75. Generally, the theory is based upon the wrongful acts of one person who interferes with the affection of the plaintiff's spouse. As a result, the defendant is alleged to have caused the removal of love and companionship from the plaintiff and spouse's relationship. To sustain a claim for alienation of affection, the plaintiff was required to show that the defendant's "'malicious acts' caused the loss of love and affection in the plaintiff's marriage," as in *Long v. Ostroff*, 2004 PA Super 240, 854 A. 2d 524.

Although definitions vary from state to state, generally to establish a cause of action under a theory of alienation of affection, the plaintiff must demonstrate: (1) he or she is married; (2) there existed love and affection between the plaintiff and spouse; (3) a third party alienated the plaintiff's spouse, thus making the spouse unavailable; and (4) the third party knew or

should have known the spouse was married and his or her conduct would cause the removal of love and affection. Conspicuously absent from the requisite proof is sexual contact. None is required to sustain the claim, as in *DiSanti v. Cassidy*, 63 Pa. D. & C. 2d 6 (1973), which noted "the lack of necessity for physical debauchment distinguishes alienation of affections from criminal conversion."

Nevertheless, in Pennsylvania, a claim for alienation of affection was abolished in 1937. The abolition, however, was not without exception. The Act of June 22, 1935, P.L. 450, sec. 1, as amended by The Act of June 25, 1937, P.L. 2317, sec. 1, 48 PS sec. 170, states: "In all civil causes of action for alienation of affection, of husband or wife, except in such cases where the defendant is a parent, brother, sister or a person formerly in loco parentis to the plaintiff's spouse, are here by abolished: Provided, however, that this section shall not apply to causes of action which have heretofore accrued." Ultimately, all claims for alienation of affection, without exception, were abolished by statute in 1990.

So what are litigants left to do to right the wrong caused by a cheating spouse? Is it possible that the law does not provide the ability to vindicate oneself when experiencing the pain and suffering and financial loss as a result of a spouse's adulterous affair? Although not without its obstacles, a plaintiff can make a claim under a theory of intentional infliction of emotional distress. Affirming the lower court's finding that the claim was time-barred, the Pennsylvania courts recognize a cognizable claim for intentional infliction of emotional distress against a third party who causes the breakup of the marriage, per *Long*. In *Todd v. Powell*, 6 Pa. D. & C. 3d. 766 (1978), the court allowed the plaintiff to amend his complaint against the defendant for intentional infliction of emotional distress because he caused his wife to abandon their home and cohabit with the defendant.

A cause of action for intentional infliction of emotional distress has been described as follows: "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm," as the court held in *Bartanus v. Lis*, 332 Pa. Sup. Ct. 48 (1984). The standard is high. Outrageous conduct is explained as follows: "Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous,'" per *Bartanus*.

By the lack of reported cases, vis-a-vis divorce litigation, the Pennsylvania courts do not react favorably to claims for damages under a theory of intentional infliction of emotional harm, where the claim is fueled by an adulterous affair. Perhaps the concern expressed by the court in *Fadgen* suggests that public policy militates against claims that invite nefarious origins. A more cynical explanation for the lack of claims for intentional infliction of emotional distress in the context of divorce proceedings is that the high divorce rate resulting from adultery renders an average member of the community incapable of exclaiming the adulterous affair is "outrageous." Whatever the reason, the claim is available and should be

considered as part of any litigation strategy where adultery exists.

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