

1958
*Nov. 6, 7
1959
Jan. 27

NICK FEDIUK (*Plaintiff*)APPELLANT;

AND

NICK LASTIWKA (*Defendant*)RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA,
APPELLATE DIVISION

*Husband and wife—Defendant committed adultery with plaintiff's wife—
Action for damages for adultery joined with action for loss of
consortium and enticement—Wife continued to reside with
husband—Measure of damages—The Domestic Relations Act, R.S.A.
1942, c. 300, ss. 13, 14, 32, 33—The Limitation of Actions Act, R.S.A.
1942, c. 133.*

The plaintiff brought an action against the defendant under ss. 32 and 33 of the *Domestic Relations Act* alleging that the defendant had persuaded his wife to leave him against his will whereby he was deprived of her consortium. Among the particulars of enticement, he alleged that the defendant had committed adultery with her. The action was dismissed by the trial judge on the ground that no case for loss of consortium had been proved, this having been the narrow ground on which the plaintiff had elected to sue. This judgment was affirmed by a majority in the Court of Appeal.

Held: The action should succeed and, in the circumstances, damages in the amount of \$2,000 should be awarded.

Section 13 of the Act provides for a cause of action by a husband against a person who has committed adultery with his wife. The plaintiff did not elect to limit his claim to one for loss of consortium. He was not obliged, as a matter of law, to make an election, and he was entitled to claim in the same action both for loss of consortium and the adultery committed with his wife; this fact was pleaded in the action. The plaintiff pleaded enticement by, *inter alia*, the commission of adultery. The pleadings go on to assert that by reason of these matters the consortium of the wife was lost and damage was

*PRESENT: Taschereau, Locke, Cartwright, Fauteux and Martland JJ.

suffered. These allegations, while pleading an action for enticement, were sufficient to allege a cause of action under s. 13 of the Act which, on the findings of fact made by the trial judge, was proved. The defendant was not misled. The claim was not barred by the *Limitation of Actions Act*.

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It was unnecessary to consider whether the claim for loss of consortium was also proved, as the damages sustained in respect of that cause of action would in this case be the same as those arising out of the cause of action under s. 13.

In an action of this kind, the damages are to compensate for the actual value of the wife to the husband and for the injury to his feelings, honour, and family life. Consideration must be given to the wife's ability and assistance in the home as well as to her character and abilities as a wife.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division¹, affirming a judgment of Primrose J. Appeal allowed.

J. W. K. Shortreed, for the plaintiff, appellant.

T. T. Nugent, for the defendant, respondent.

The judgment of the Court was delivered by

MARTLAND J.:—The appellant and the respondent are both farmers residing in the general vicinity of Andrew in the Province of Alberta. Both are married men. According to the evidence of the appellant's wife, the respondent committed adultery with her on a number of occasions during a period commencing in December 1950 and continuing until 1955. The respondent admitted the commission of adultery on two occasions. The learned trial judge found that there was adultery at other times.

In April 1955 the respondent's wife, in the presence of the appellant and his wife, accused the appellant's wife of having had immoral relations with the respondent. This was admitted by the appellant's wife. On the day following this accusation she went to her mother's home, but returned to the appellant's house the same day. On the following day she went to Edmonton for two days and then returned to the appellant's house.

Except for these two occasions, she remained with the appellant in his home and performed the usual household duties of a wife. After hearing the accusation made by

¹ (1958), 12 D.L.R. (2d) 421.

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the respondent's wife, the appellant ceased to have sexual intercourse with his wife, although she stated that she would not refuse to have such intercourse with him.

A number of love notes written by the appellant's wife to the respondent were entered as exhibits. These were deposited from time to time by her at an agreed place, to be picked up by him.

Action was commenced by the appellant against the respondent on January 18, 1956. The material portions of the statement of claim are as follows:

1. The plaintiff was married on the 27th day of November, 1938, to Dora Fediuk and at all times material was the husband of the said Dora Fediuk as the defendant at all times material well knew.

2. In the early part of 1951, the defendant knowingly and wilfully persuaded the said Dora Fediuk, to leave the plaintiff against the plaintiff's will, whereby the plaintiff was deprived of the society and comfort of his wife.

3. The defendant, without lawful excuse, knowingly detained the wife of the plaintiff against the will of the plaintiff.

4. Particulars of the said enticement and detaining are as follows:—

(a) In or about the year 1950, the plaintiff and his wife moved to the area of Andrew, Alberta, to farm the lands owned by the plaintiff;

(b) The defendant resides at and has since 1950 resided upon lands neighbouring that of the plaintiff;

(c) The defendant commenced visiting the house of the plaintiff at times when the plaintiff was absent thereupon;

(d) About the month of December, 1950, the defendant committed adultery with the said Dora Fediuk;

(e) From that time, the defendant continually and continuously enticed, persuaded, procured and detained the said Dora Fediuk against the will of the plaintiff and in secrecy;

(f) The said Dora Fediuk gave birth to twins in the year 1952;

(g) Subsequent to the birth of the said children the defendant persuaded, procured and detained the said Dora Fediuk upon the premises of a neighbouring farm.

5. By reason of these said matters the plaintiff has been deprived of the consortium of his said wife and has suffered loss and damage.

The defence was a general denial, which was later amended so as to plead *The Limitation of Actions Act*, R.S.A. 1942, c. 133, and amendments thereto.

The learned trial judge in his judgment stated that the appellant would have had a good cause of action under s. 13 of *The Domestic Relations Act*, R.S.A. 1942, c. 300, unless there was connivance or collusion, neither of which he was prepared to find. However, he decided that the

appellant had elected to sue on the narrow ground for loss of consortium and that a case had not been proved under s. 31 or 32 of *The Domestic Relations Act*, which deal with actions of that kind.

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The relevant sections of *The Domestic Relations Act* provide as follows:

13. A husband may either by an action for judicial separation or in an action limited to such object only, recover damages from any person who has committed adultery with his wife, and the Court may direct in what manner such damages shall be paid or applied, and may direct that the whole or any part thereof shall be settled for the benefit of the children, if any, of the marriage, or as a provision for the maintenance of the wife.

14. (1) The Court shall dismiss any such action if it finds that,—

- (a) the plaintiff during the marriage has been accessory to or conniving at the adultery of his wife;
- (b) the plaintiff has condoned the adultery complained of;
- (c) the action has been presented or prosecuted in collusion with the wife.

(2) The Court may dismiss any such action if it finds that the plaintiff has been guilty of,—

- (a) adultery during the marriage;
- (b) unreasonable delay in presenting or prosecuting the action;
- (c) cruelty towards his wife;
- (d) having deserted or wilfully separated himself from his wife before the adultery complained of without reasonable excuse; or
- (e) wilful neglect or misconduct which has conduced to the adultery.

PART V

Loss of Consortium

31. A person who, without lawful excuse, knowingly and wilfully persuades or procures a woman to leave her husband against the latter's will, whereby the husband is deprived of the society and comfort of his wife, shall be liable to an action for damages by the husband.

32. A husband shall also have a right of action for damages against any person who, without lawful excuse, knowingly receives, harbours and detains his wife against his will.

33. No such action as that provided for in the last preceding section will lie if either,—

- (a) the plaintiff and his wife were living apart by agreement, or were judicially separated, when the act of the defendant took place; or
- (b) the plaintiff has been guilty of cruelty to his wife, and the defendant harbours the wife from motives of humanity; or
- (c) the defendant has reasonable grounds for supposing that the husband has been guilty of cruelty to his wife, and harbours the wife from motives of humanity.

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The appellant's appeal from this judgment was dismissed by the Appellate Division¹ by a majority of three to two. It is from that judgment that the present appeal is brought.

Two main points were argued by the appellant:

1. That he was entitled to succeed in a claim under s. 13 of *The Domestic Relations Act*, there having been no election by him as to his cause of action which would preclude such a claim.

2. That ss. 31 to 33 of *The Domestic Relations Act* do not constitute a code of the law regarding loss of consortium; that the rules of the common law are still applicable and that a claim for loss of consortium had been proved.

Dealing with the first point, s. 13 of *The Domestic Relations Act* provides for a cause of action by a husband against a person who has committed adultery with his wife. This replaced the earlier action for criminal conversation, which latter action had existed previously in Alberta by virtue of s. 18 of the *Supreme Court Act*, 1907 (Alta.), c. 3, which provided as follows:

The Court shall have jurisdiction to entertain an action for criminal conversation. The law applicable to such actions shall be as the same was in England prior to the abolition of such action in England, and the practice shall be the same as in other actions in the Court so far as the same are applicable.

This section was repealed by *The Domestic Relations Act*, 1927 (Alta.), c. 5, which statute enacted the provisions of s. 13, which has been cited previously.

Did the appellant elect to limit his claim to one for a loss of consortium? It seems clear that he was not obligated as a matter of law to make an election and that he was entitled to claim in the same action both for loss of consortium and for the adultery committed with his wife. The possibility of joining both claims was recognized implicitly by Ford J.A., who delivered the judgment of the Appellate Division of the Supreme Court of Alberta in *Williamson v. Werner*². There are a number of cases in Ontario in which

¹ (1958), 12 D.L.R. (2d) 421.

² [1946] 2 D.L.R. 603.

both claims have been embodied in the one action. The two causes of action are not the same and they are not mutually exclusive.

The question then arises as to whether the appellant did, in fact, plead a claim under s. 13 of *The Domestic Relations Act*. The respondent argues that he did not and points out that paras. 2 and 3 of the statement of claim are in the terms of ss. 31 and 32 of *The Domestic Relations Act* governing claims for loss of consortium and that the only allegation as to adultery is contained in subpara. (d) of para. 4 as one of the particulars of "enticement and detaining".

I do not think that the phraseology of paras. 2 and 3 of the statement of claim, although they follow the wording of the sections of the Act dealing with loss of consortium, necessarily preclude a claim under s. 13. In *King v. Bailey*¹, which was an action for criminal conversation, Gwynne J., who delivered the judgment of the Court, at p. 339 refers to the pleadings in that action as follows:

The cause of action first set out in the statement of claim in this case is the old action on the case for criminal conversation expressed in the language of the modern formula of pleading, and, as so stated, is in substance simply that in the year 1885 (it should have been 1886), upon the request of the defendant, the plaintiff's wife left the home of the plaintiff with the defendant, and that they went together to the City of Toronto, in the province of Ontario, where ever since their arrival they have lived, and still, at the time of the commencement of this action, do live together in adulterous intercourse, whereby the plaintiff has been deprived of the comfort and enjoyment of the society of his wife, and her affections have been alienated from the plaintiff, and he has been deprived of the assistance which he formerly derived from her and to which he was entitled.

To this is added a paragraph asserting a cause of action for wrongfully enticing the plaintiff's wife from the plaintiff and procuring her to absent herself from him for some time from the year 1885 (should be 1886), to the time of the commencement of this action.

The appellant here has pleaded enticement by the respondent of the appellant's wife to leave him against his will by, *inter alia*, the commission of adultery with her in December 1950, thereby depriving him of his wife's society and comfort. Paragraph 5 of the statement of claim goes on to assert that by reason of these matters the plaintiff has been deprived of the consortium of his said

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¹ (1901), 31 S.C.R. 333.

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wife and has suffered loss and damage. These allegations, while pleading an action for enticement, are, I think, sufficient also to allege a cause of action under s. 13 of *The Domestic Relations Act*.

But then it may be contended that there are specific defences to a claim under s. 13 of the Act, which are set out in s. 14 of the Act, and that the respondent may have been misled into thinking that he had only to meet a claim for loss of consortium and was thus prevented from raising these defences at the trial. This, however, does not appear to have been the case. At the conclusion of the evidence for the appellant at the trial, counsel for the respondent moved for a nonsuit. While his argument dealt mainly with the claim for loss of consortium, he also submitted argument in respect of a claim for adultery under s. 13. He claimed that collusion had been proved, which was a defence to such an action by virtue of s. 14.

Following the argument the learned trial judge expressly stated that he did not find that there was any collusion between the parties.

I have concluded that the appellant has pleaded matters sufficient to found a claim against the respondent, under s. 13 of *The Domestic Relations Act*, for the adultery committed with his wife.

With respect to such a claim the learned trial judge said:

I am satisfied also that there was adultery at other times and the plaintiff would have a good cause of action under Section 13 of The Domestic Relations Act, Chap. 300 R.S.A. 1942, the old action for criminal conversation, unless, of course, there was connivance or collusion, neither of which I am prepared to find.

He dismissed the appellant's action against the respondent only because he reached the conclusion that the appellant had elected to sue only on the narrow ground for loss of consortium.

In the Appellate Division, Johnson J.A., who delivered one of the two majority judgments and with whom Macdonald J.A. concurred, said:

Section 14 of The Domestic Relations Act (R.S.A. 1955 Chap. 89) gives to the husband a right of action for damages against a person who commits adultery with his wife and on the evidence of this case, there would appear to be no doubt that if the action had been brought under that section, the plaintiff would have succeeded.

The reference made in this quotation is to the relevant section of *The Domestic Relations Act* in the 1955 revision, which is in the same terms as s. 13 of the Act in the 1942 revision. Johnson J.A. goes on to say, however, that the action was brought under ss. 32 and 33 under a Part of the Act headed "Loss of Consortium". The two dissenting judges in the Appellate Division would have allowed the appellant's appeal from the trial judgment.

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I agree that a cause of action under s. 13 of *The Domestic Relations Act* was, on the findings of fact made by the learned trial judge, proved and for the reasons previously expressed I think that the appellant was entitled to succeed in such an action in this case as against the respondent.

It has been noted that the respondent raised a defence under *The Limitation of Actions Act*, R.S.A. 1942, c. 133. This claim, however, does not fall within any of the specific claims described in paras. (a) to (i) inclusive of subs. (1) of s. 5 of that Act and must, therefore, fall within para. (j), which covers any other type of action not specifically provided for in the Act. Accordingly the limitation period is six years after the cause of action arose. The adultery alleged in the statement of claim is stated to have occurred in December 1950. The appellant's wife testified to adultery in that month and continuing thereafter. Action was commenced on January 18, 1956, which is within the six year limitation period.

Having reached the conclusion that an action was established under s. 13 of *The Domestic Relations Act*, it is not necessary to go on to consider whether the claim for loss of consortium was proved, since the essence of the damage for which the appellant claims is in relation to the adultery committed by the respondent with the appellant's wife. Practically the whole of the evidence at the trial related to that subject. Even if an action for loss of consortium could be held to lie, the damages recoverable by the appellant would necessarily be damages flowing from the commission of the adultery. In other words, the damages sustained in respect of that cause of action would, in this particular case, be the same as those arising out of the cause of action under s. 13.

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This brings me to the question of damages. At the conclusion of the argument before this Court, counsel were asked whether, in the event that the appeal were successful, they were agreeable to an assessment of damages being made in this Court instead of sending the matter back for the assessment of damages. Both have agreed to this course.

No finding was made as to damages by the learned trial judge. The minority judgment in the Appellate Division would have awarded damages in the amount of \$5,000, the full amount which the appellant had claimed in his statement of claim.

In an action of this kind the damages awarded are not to be exemplary or punitive, but are to compensate for the actual value of the wife to the husband and for the injury to his feelings, honour and family life. The value of a wife has a pecuniary aspect and a consortive aspect. In connection with the pecuniary aspect, consideration must be given to her ability and assistance in the home. In connection with the consortive aspect, consideration must be given to her character and abilities as a wife.

In this case the circumstances are somewhat peculiar in that the appellant's wife has continued to live in the same house with him and to perform her usual household duties. With regard to her character as a wife, while she testifies that her relations with the respondent initially were reluctantly accepted by her, it is clear from the notes which she wrote to him that at least later during the course of their relationship she became a willing partner.

Taking into account all the circumstances of this case, I would assess the damages at \$2,000 and would direct, pursuant to s. 13 of *The Domestic Relations Act*, that these be paid to the appellant. I would allow this appeal with costs in this Court and in the Courts below and direct that judgment be entered against the respondent for damages in the amount of \$2,000.

Appeal allowed with costs.

Solicitors for the plaintiff, appellant: Shortreed, Shortreed & Stainton, Edmonton.

Solicitors for the defendant, respondent: Main, Nugent & Forbes, Edmonton.
