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## The Tort of Seduction: Fathers and Daughters in Nineteenth Century Canada

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## I. Introduction

The tort of seduction, one of the most popular civil actions in nineteenth-century Canada, was rooted in feudal notions that suggested that certain individuals could hold property interests in others. In the traditional *actio per quod servitium amisit*, a master was entitled to sue a tort-feasor who injured his servant for the loss of his or her services. The servant was treated as a species of chattel belonging to the master. As medieval master-servant relations began to dissolve in a modernizing economy, the tort was narrowed until it related almost exclusively to fathers and daughters. Fathers continued to bring actions against the male seducers of their daughters, based upon the old *per quod* action for loss of services. This trend was reinforced and encouraged by nineteenth-century legislators who enacted statutes which extended paternal property notions past the earlier basis of loss of services. The new Seduction Acts provided fathers with direct property interests in their daughters' chastity, over and above their interest in the loss of services, which could be enforced against seducers who did not marry the young women they impregnated. The tort of seduction thus came to represent a legal extension of property rights in women.

Feudal concepts such as this did not transplant to a modern society without tension. Treating women as legal chattels of their fathers was problematic in an industrializing workplace where young women increasingly left their homes in search of waged positions in factories or as domestic servants in other households. They acted as independent and autonomous individuals, who in some cases experienced seduction and betrayal as an injury to themselves, rather than to their fathers. In other cases, they may have genuinely consented to sexual relations out of wedlock. The law was forced to struggle to reconcile these complex problems with an action that was seemingly at odds with the emerging independence of women in a modernizing world.

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Despite the legislative affirmation of the action, most nineteenth-century Canadian judges exhibited an unceasing hostility toward the tort of seduction. In the hands of the judiciary, the action was systematically narrowed through a series of cases which interpreted the legislation in a manner which greatly limited its scope. None of these judges disputed the property rationale behind the action, but neither were they prepared to ignore the fact that, in their opinion, far too many young women were behaving in wanton disregard of moral propriety. The reality of women's autonomy irked them, and caused them to suspect an action that treated women as a passive species of property. Their antagonism toward women who became pregnant out of wedlock overrode their interest in protecting paternal property rights, and they did much to erode the effectiveness of the tort.

Despite this judicial antipathy, hundreds of fathers continued to bring suit. Members of the skilled and unskilled working class, they laid claim to substantial damages for the seduction of their daughters from men who frequently represented a slightly more affluent sector of society. The success with which they pursued their cases, particularly at the trial level, indicates that juries were extremely sympathetic to a father's sense of loss upon the seduction of his daughter. The popularity of the action reveals a society in which a working class father's property interests in his daughter's chastity were perceived as an essential aspect of family life, worthy of significant legal protection. The action represented much more than a symbolic recognition of a by-gone medieval era; it evidenced an embodiment in law of patriarchal rights to control the course of young women's lives. At the very moment in which society was undergoing extensive alteration from a rural, pre-industrial mold into an urban and industrialized nation, the tort of seduction action reached the height of its popularity. It characterized a deliberate attempt to assert parental property interests in the face of a family unit undergoing dislocation, dispersement, and a crisis of authority.

## II. *Origins of the Tort of Seduction: A Proprietary Basis*

The tort of seduction appears to have grown out of the *actio per quod servitium amisit*, ("whereby he lost services"), as relating to a master's loss from the enticing away or beating of his servant. For this, the master could recover financial compensation against the aggressor.<sup>1</sup> In law the servant was treated as a chattel, as valuable property belonging to the

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1. William Blackstone, *Commentaries on the Laws of England*, (Chicago: Univ. of Chicago Press, 1979, orig. pub. 1768), vol. 3 at 142. The translation of "per quod servitium amisit" is taken from P.G. Osborn, *A Concise Law Dictionary* (London: Sweet & Maxwell, 1964) at 238.

master. The proprietary nature of employment relations originated in feudal society in which individuals were ordered by means of a hierarchical and static social structure. By the eighteenth century, as feudalism waned, the action *per quod* became confined to members of the household who rendered services to the head of it, and who had to be kept by him in sickness and in health — menial domestic servants and apprentices.<sup>2</sup> The action was of marginal importance in a modernizing economy where ideology (fictional in large measure, but nevertheless pervasive) espoused a labour situation which was predicated upon contract rather than proprietary status.

The exception to this involved the father-daughter relationship, which failed to break free from the proprietary tenor of feudalism. William Holdsworth has noted that by the mid-seventeenth century, the action *per quod* had come to be used by fathers to avenge the seduction of their daughters. In his capacity as a master entitled to the domestic services of his daughter, a father would “sue the seducer for having deprived him of the daughter’s services, just as he would have been entitled to sue a neighbour who lured away from his estate a particularly talented stable-boy to whose services he was entitled.”<sup>3</sup>

In his 1854 *Prize Essay on the Laws for the Protection of Women*, James Edward Davis outlined the constituent elements of the tort of seduction as it had evolved by the nineteenth century.<sup>4</sup> The plaintiff was required to prove that the defendant “debauched and carnally knew” the plaintiff’s servant, and that she thereby became pregnant and gave birth to a child, “by means of which the plaintiff was deprived of her services and put to expense in nursing and taking care of her.”<sup>5</sup> The action was not restricted to fathers, since a master was similarly entitled to sue for the seduction of a female servant. While there was no legal stipulation with respect to the nature or circumstances surrounding the sexual connection, it clearly had to involve intercourse outside of wedlock, since proof of “illicit intercourse” was required.<sup>6</sup>

Damages included payment for the loss of services incurred when the daughter was incapacitated from pregnancy or childbirth, as well as the

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2. *Inland Revenue Comm’rs. v. Hambrook*, [1956] 2 Q.B. 641; [1956] 3 All E.R. 338 (C.A.), per Denning L.J.

3. William Holdsworth, *A History of English Law* (London: Methuen, 1927) VIII at 428.

4. Interestingly the action had not completely evolved to the status of a nominate tort at the time Davis wrote. Although he noted that the action was commonly known as one of “seduction”, the term was not employed in pleadings nor was it given much formal legal significance. [James Edward Davis, *Prize Essay on the Laws for the Protection of Women* (London: Longman, Brown, Green & Longmans, 1854) at 140.]

5. *Id.* at 140.

6. *Id.*

costs involved in nursing the woman through her confinement.<sup>7</sup> These losses resembled the typical damages that would customarily have been awarded in any *per quod* action. However the seduction action was unique in that the injury complained of related to the chastity of a servant or daughter. Plaintiff fathers who were seeking compensation from the seducer of their daughter must surely have felt they were avenging the dishonour brought upon the family as well as the direct loss of service *per se*. The courts recognized this and began to award additional damages for “the wounded feelings of the parent and the moral injury inflicted by the defendant”.<sup>8</sup> The dishonour sustained by the woman’s family was a parasitic head of damages, however, and was initially recoverable only where underlying evidence of loss of service brought the case within the traditional form of the *per quod* action.

The essence of the action originally lay not in the injury to chastity, but in the deprivation of services. One of the earliest legal scholars to write a treatise on the law of torts, C.G. Addison, emphasized this point in 1864:

The law gives no remedy to the parent for the mere seduction of his daughter, however wrongfully it may have been accomplished. Incontinence on the part of a young woman cannot be made the foundation of an action against the person who has tempted her and deprived her of her chastity; but if she is living with her parent at the time of the seduction, and the seduction is followed by pregnancy and illness, whereby the parent is deprived of the filial services theretofore rendered to him, an action is maintainable against the seducer.<sup>9</sup>

The focus on services originated in a society which was hierarchically structured, where relations between individuals were based on status, not contract.<sup>10</sup> The service obligations that a child owed her father were a matter of birthright, not a result of the voluntary performance of daughterly affections. The father, for his part, was viewed as entitled to the economic benefits flowing from the child’s labour and his pecuniary interest was seen as paramount.<sup>11</sup>

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7. *Id.* at 144.

8. *Id.* at 144. The piggybacking of emotional damages onto the loss of services claim was recognized by both Canadian and English courts. See, for example, *Law of Seduction* (1874), vol. X, N.S. Canada Law Journal 132 at 133.

9. C.G. Addison, *Wrongs and Their Remedies: Being a Treatise on the Law of Torts* (London: V. & R. Stevens, Sons & Haynes, 1864, orig. pub. 1860) at 803-4. This particular treatise was recognized as authoritative and cited by Canadian courts during the nineteenth century.

10. A.T. Hunter, of Osgoode Hall, Barrister-at-Law, *Canadian Edition of the Law of Torts by Clerk & Lindsell* (Toronto: Carswell, 1908) at 219.

11. John Fleming, *The Law of Torts*, (5th ed Sydney: The Law Book Co. Ltd., 1977, orig. pub. 1957) at 638 and 640.

So long as society remained pre-industrial and pre-urban, these expectations of the proper master-servant, father-daughter relations were not significantly at odds with reality. Before the development of modern industry and the spread of wage labour, most productive enterprise took place in the home, and families were required to survive as economically self-sufficient units.<sup>12</sup> This was a fairly accurate portrayal of life in early Canada, which experienced little industrial development before 1820. Characterized by isolation, low population densities, and poor transportation, the Canadian economy was based primarily on self-sufficient farming, where most essential goods were produced at home.<sup>13</sup> The tort of seduction, rooted in the father's (and master's) proprietary rights over his daughter (or servant) was a logical outgrowth of the patriarchal, pre-industrial family.

### III. *Legislative Initiative: The Seduction Act of 1837*

In time the parasitic head of damages for the dishonour surrounding the seduction, initially tacked on to the *per quod* action for loss of services, came to take precedence over the original basis for the claim.<sup>14</sup> More and more plaintiffs referred to the loss of services in a peremptory manner, while highlighting the emotional distress attendant upon their daughter's loss of chastity.<sup>15</sup> In 1837 the Legislature of Upper Canada was prepared to step in to eliminate the proof of loss of services entirely. The Seduction Act of 1837<sup>16</sup> noted that parents were already entitled to bring actions for seduction on behalf of daughters who "were at the time dwelling under [their] protection". The statute was designed to extend this remedy to parents "notwithstanding such unmarried female was at the time of her seduction serving or residing with any other person, upon hire or otherwise . . ."<sup>17</sup> The act stipulated that parents would no longer be

12. See Nancy F. Cott, *The Bonds of Womanhood* (New Haven: Yale Univ. Press, 1977) ch. 1, for a discussion of the economic self-sufficiency of pre-industrial families.

13. See, for example, J. Spelt, *The Urban Development in South Central Ontario* (The Netherlands: Van Gorcum & Comp. 1955) at 39; Mary Quale Innes, *The Industrial Development of Ontario 1783-1820*, 32 Ontario Historical Society 104-112.

14. This pattern has been evidenced in other areas of torts as well. In the case of nervous shock, for example, judges initially would permit plaintiffs to recover only parasitically, where they had also suffered physical injury in addition. Eventually actions for the intentional or negligent infliction of nervous shock were permitted to stand alone and new actions were recognized in this area.

15. Davis noted that by the mid-nineteenth century in England, plaintiffs were no longer put to the proof of any specific loss of services (which he noted in many cases would be "impossible"), or payments for medical assistance with the woman's pregnancy. These damages, he noted, were "inferred". [Davis, *Prize Essay* at 141.]

16. *An Act to make the remedy in cases of seduction more effectual, and to render the Fathers of illegitimate Children liable for their support*, 7 William IV (1837), c.8 (U.C.)

17. Section 1 read as follows:

required to provide any proof of “acts of service performed by the person seduced”. Service was statutorily presumed and the presumption was not rebuttable.<sup>18</sup> Chief Justice Sir John Beverley Robinson recognized in 1843 that the statute had highlighted the “real” and “substantial” injury for which the action was brought — “the wound given to parental feelings, the disgrace and injury inflicted upon the family of the person seduced.”<sup>19</sup>

The legislators dispensed with the original basis for the action, and in so doing extended the property interests to which fathers had traditionally been entitled at law. Insofar as it affected his reputation and feelings, a father was now entitled to claim damages solely for the seduction of his daughter. A father’s right to his daughter’s services had always been accepted as a matter of course, but this new statute asserted his property interests over her chastity as well. The legislation thus fundamentally extended property rights over women.

The Seduction Act froze the legal relationship between fathers and daughters into a feudal proprietary mold at precisely the moment when urbanization and industrialization were beginning to take hold in Canada. Improved transportation and the introduction of steam and coal as sources of power would soon lead to the establishment of industrial mills and manufacturing plants, the mechanization of agriculture, and the shift of population from rural areas to the cities.<sup>20</sup>

The very nature of the most basic institutions of society — work and the family — would be altered. In the sphere of employment, the shift

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That the father, or in case of his death, the mother of any unmarried female who may be seduced after the passing of this Act, and for whose seduction such father or mother could sustain an action, in case such unmarried female were at the time dwelling under his or her protection, shall be entitled to maintain an action for seduction, notwithstanding such unmarried female were at the time dwelling under his or her protection, shall be entitled to maintain an action for seduction, notwithstanding such unmarried female was at the time of her seduction serving or residing with any other person, upon hire or otherwise, any former law or statute to the contrary notwithstanding.

18. Section 2 read as follows:

[U]pon the trial of any action for seduction brought by the father or mother, it shall not be necessary to give proof of any act or acts of service performed by the person seduced, but the same shall be in all cases presumed, and no proof shall be received to the contrary: Provided always nevertheless, that in case the father or mother of such female who shall be seduced shall before the action have abandoned her, and refused to provide for or retain her as an inmate, then any other person who before the passing of this Act might have maintained an action for such seduction, shall be entitled to such action in the same manner as the father or mother would otherwise have been.

19. *Whitfield v. Todd* (1834), 1 U.C.Q.B. 223 at 224-5.

20. See, for example, Spelt, *Urban Development* at 50-171 and Innis, *Industrial Development* at 112-3, as well as Harold A. Innis, *An Introduction to the Economic History of Ontario: From Outpost to Empire* 30 Ontario Historical Society at 111-123.

was from feudalistic labour relations to a sense of private employment contracts entered into voluntarily by autonomous individuals. The family would become less self-sufficient, and would break down completely as the key economic unit of society. Daughters less often provided essential labour inside the home, and more frequently worked for wages outside the family, as domestic servants or as industrial factory employees. We were witnessing a rapid ideological shift from status to contract, from a world in which persons were viewed as hierarchically arranged souls with fixed rights and duties, to a world in which individuals were thought of as free, self-interested and autonomous human beings. Recognizing that more and more daughters were leaving the family unit to work for wages, nineteenth-century legislators insisted that their fathers should not be deprived of their status rights on this account. The elimination of the service nexus on which the seduction action had traditionally been based revealed a legislative preference for an affirmation of the lawsuit, despite modernizing labour market and family conditions.

The Seduction Act marked a legislative initiative which was unprecedented in either England or the United States at the time.<sup>21</sup> Although the legislators left no recorded Parliamentary debates which

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21. In England there was great concern expressed about the inequities of the common law action, but no legislation was forthcoming. A much-quoted comment from Serjeant Manning in 1844 lamented that “the *quasi* fiction of *servitium amisit* affords protection to the rich man, whose daughter occasionally makes his tea, but leaves without redress the poor man whose child is sent unprotected to earn her bread amongst strangers.” [*Grinnell v. Wells*, 7 Man. & G. 1044 (1844), quoted in Frederick Pollock, *The Law of Torts: A Treatise on the Principles of Obligations Arising from Civil Wrongs in the Common Law* (London: Stevens & Sons, 1887) at 201.] The “hardship and injustice” of the failure of the common law to provide a remedy in so many deserving cases was apparent to Davis also, who insisted that it merited legislative reform. Davis insisted that the legislature should be required to “remedy this most glaring inequality” by safe-guarding the “interest of a parent in the preservation of a daughter’s chastity”. He recommended an extensive set of legislative reforms which could almost have been modelled on the Upper Canadian example, and yet failed to mention the precedent and indeed was probably oblivious to its existence. He stated:

[T]he object might be attained by simply enacting that, in all actions brought for debauching the plaintiff’s daughter, it shall not be necessary to prove any relationship of master and servant, or any loss of service, and that the plaintiff’s right to recover damages shall not be defeated by proof that such relationship did not exist. [. . .] Let the Legislature declare . . . that the seduction of a daughter is a grievous injury to her parents and family, entitling her father to a civil action to recover damages from the seducer. [. . .] Where there is a father, or if no father, there is a mother, the interest is obvious. So, indeed, where, having no parents living, the girl has a home with an uncle, aunt or other relative.

[Davis, *Prize Essay* at 179, 180, 186, 190-1.]

In the United States, by comparison, common law courts had stretched their rules to accommodate situations where the daughter was absent from home with her father’s consent. This was treated as a license revokable at any time, which permitted parental recovery in more cases. [*The Law of Seduction*, (1862), Upper Canada Law Journal, 309 at 310-11.]



might have explained their motives,<sup>22</sup> some judges did attempt to outline the rationale behind the legislation. Justice John Wilson of the Upper Canada Court of Common Pleas elaborated on the specifically Canadian colonial conditions which, in his opinion, had provoked the enactment. The new colony needed youthful settlers, and yet the prospect of sexual exploitation could serve as a strong deterrent to the immigration of such individuals:

The struggles of the earlier settlers for existence, frequently compelled the younger members of a family to leave home and engage in domestic service . . . . Nor was it unusual for the younger members of families from the British Isles, both male and female, to precede their parents and settle here, betaking themselves to domestic service till they had bettered their condition and acquired experience of the country. [. . .] [T]hey were under their condition a class, where the common law was no remedy for them.<sup>23</sup>

The problem he was referring to involved situations in which a woman away from home was seduced by her master or a member of his family. In these cases, under common law principles, only the master had a right of action for loss of services, and he would obviously not care to exercise it. Justice Jonas Jones of the Upper Canada Queen's Bench offered this as the real explanation for the seduction statute. "The great mischief intended and relieved against by the statute," he noted, "was the seduction of unmarried females by their masters." The statute "afford[ed] to the father . . . a remedy against the master, and also against others, where, before the passing of the act, an action could alone be brought in the name of the master."<sup>24</sup>

Working class fathers, whose daughters were forced to work for wages outside the home, were unable to prove the requisite loss of services which would entitle them to sue their daughters' seducers under common law. In Canada, egalitarian-minded legislators were anxious to ensure that fathers of all classes would have recourse to the seduction actions. The ironic fact that egalitarian concerns were cited as the rationale for legislation which extended feudalistic property interests over women,

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22. Although there was no Hansard to preserve the legislative debates at this time, the Journals of the Upper Canada House of Assembly reveal that the statute passed its second reading by a majority of one. [*Journals*, Upper Canada House of Assembly, 13th Parliament, Session I, 1836-7, 6 Feb. 1837.] In the closing speech for the session printed in the Upper Canada *Gazette* on 9 Mar. 1837, the seduction bill was deemed not "proper particularly to advert to". The preamble of the act, "whereas in some cases the law fails in affording redress to parents whose daughters have been seduced" was not specific in outlining which shortcomings in the common law were intended to be remedied.

23. *Cromie v. Skene* (1869), 19 U.C.C.P. 328 at 335-6. The colonial rationale may have been correct, since it appears that Western Australia, New Zealand and Tasmania all enacted similar legislation at the turn of the 20th century. [Fleming, *Torts* at 640.]

24. *Biggs v. Burnham* (1843), 1 U.C.Q.B. 106 at 109.

seemed to escape everyone at the time. Indeed, legal commentators proudly acclaimed the legislative initiative and expressed great revulsion that in England, the common law continued to discriminate against poor parents. The editor of the *Upper Canada Law Journal* pointed out that “the daughter may be the chief source of support of a widowed mother or aged father; her ruin while in service may be starvation to her parents; and yet the law of England is powerless to afford redress.”<sup>25</sup> The law in Ontario, the article continued, had been placed “on a more satisfactory footing than it is either in England or the United States.” With the passage of the 1837 statute, the action of seduction had been rooted squarely “on the relationship of parent and child, [rather] than of master and servant.” Noting that the effect of the statute had been to increase the amount of litigation in Ontario significantly, the editor left no doubt that he felt the legislative reform warranted: “There is no doubt that it is more consonant with reason than the common law rule . . . . It is strange that the English legislators have not abolished the action or made it more effective than it is there at present.”<sup>26</sup>

The legislation may have been enacted out of a perceived need to encourage colonial immigration. It may have been premised on an egalitarian impulse to extend a right of action to fathers of all classes.<sup>27</sup> Indeed it may have been a combination of these factors which resulted in the 1837 statute. Once enacted, however, the legislation seemed to take hold. The statute was to remain in force throughout the nineteenth century, and in 1899 it was extended to legal guardians or persons standing *in loco parentis* to the seduced woman where both her parents were dead.<sup>28</sup> At the turn of the century, both Manitoba and the North

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25. *The Law of Seduction*, (1862), *Upper Canada Law Journal* 309 at 310.

25. *Id.* at 310-11.

26. *Id.* at 310-11.

27. Reference to the egalitarian nature of Canadian society could be found in one decision of Justice John Wilson, delivered in 1869. He noted that in Canada, those who employed domestic servants were generally “of the same class” as those they hired, and “usually treated their servants as members of the family, and in their associations held them as equals”. [*Cromie v. Skene* at 335-6.] While he did not elaborate further, presumably he meant to suggest that sexual relations between master and servant were more common given such familiarity — thus creating a need for the new statute. His analysis was much at odds with reality, however, since many historians have documented extensive sexual relations between masters and servants where class disparities existed. [See Lori Rotenberg, “The Wayward Worker: Toronto’s Prostitutes at the Turn of the Century”, in Janice Acton *et al.*, eds. *Women at Work: 1850-1930* (Toronto: Women’s Press, 1974).]

28. The only amendments made to the 1837 statute during the nineteenth century are contained in *An Act respecting the Action of Seduction*, R.S.O. 1887, c.58, which altered s. 1 to ensure that once the father died, the mother had a right of action, “whether she remains a widow or remarries”, and *An Act respecting the Action for Seduction*, 62 Vict. (2) (1899), c.13 (Ont.), which provided that where both parents were dead, the legal guardian or person standing *in loco parentis* was given the same extended right of action without proof of service.

West Territories (then including the provinces of Alberta and Saskatchewan) adopted similar statutory provisions.<sup>29</sup>

#### IV. *Feudal Concepts in a Modernizing Economy: Dissonance and Contradiction*

Treating unmarried women as chattels of their fathers was markedly inconsistent with the new economic realities in which more and more daughters were leaving their fathers' protection. Seeking waged employment, young women were increasingly accepting jobs in factories and as domestic servants in households far removed from their families. They may have continued to maintain ties with their families by sending most of their wages home, but they had broken free in one important respect. Living away from parental supervision, they enjoyed relative liberty and independence. Their autonomy starkly contradicted the legal premise that their sexuality was a matter of proprietary interest to their fathers. When the tort had focused primarily on loss of services, it was easy to understand how a father's interests were damaged by the seduction of his daughter. When the emphasis shifted to the injury to chastity, it became more difficult not to view this as an injury to the woman herself. A daughter who was forced to leave a waged position due to confinement for childbirth seemed, on the surface of things, to be the injured party rather than a father who suffered only indirectly from her loss.

The question of who should be the plaintiff in such actions — the father or daughter — was brought to a head in 1852, when the provincial legislature of Prince Edward Island passed a landmark statute permitting actions for seduction to be brought in the name of the “woman seduced”.<sup>30</sup> Prince Edward Island was the only Canadian jurisdiction to enact such legislation in the nineteenth century, although similar

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29. See *An Act respecting the Action of Seduction*, 55 Vict. (1892), c.43 (Manitoba), which almost entirely copied the Ontario precedent, even citing Ontario legislation in the statute. See also Ord. N.W.T. 1903, c.8 (Seduction), s. 1, 2 and 3. The *Civil Code of Lower Canada*, first enacted in 1866, dealt with seduction under the more general provisions relating to tort: Article 1053: “Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill”. A full study of the judicial rulings relating to the tort of seduction in nineteenth-century Quebec would provide invaluable comparative data. [*Civil Code of Lower Canada* (Ottawa: Malcolm Cameron, 1866).]

30. *An Act to provide a Summary Remedy for Females, in certain Cases of Seduction*, 15 Vict. (1852), c.23 (P.E.I.). The statutory remedy was limited to actions claiming damages not in excess of one hundred pounds. (s.1). Section 5 also permitted a judge to appoint a trustee to whom the amount of the verdict could be paid. See also 21 Vict. (1858), c.15 (P.E.I.); 39 Vict. (1876), c.4 (P.E.I.); 40 Vict. (1877), c.6 (P.E.I.); and 58 Vict. (1895), c.5 (P.E.I.).

provisions were passed for the North West Territories in 1903.<sup>31</sup> This statute boldly shifted the nature of the action from one of loss of services and compensation for fatherly grief, to one of compensation for personal injury. The legislative initiative was largely nullified, however, by a judicial ruling issued two years after its enactment, *McInnis v. McCallum*.<sup>32</sup> In a rather astonishing judgment, Prince Edward Island Supreme Court Justice, James Horsfield Peters, concluded that before the seduced woman was permitted to sue in her own name, she would have to give evidence that at the time of the seduction, she had a parent, guardian or master who would have been entitled to maintain the action at common law!<sup>33</sup> The judiciary was deliberately reasserting the paternal claim in direct opposition to the legislative intent to transfer the right of action to the woman concerned. This apparently inaccurate interpretation of the statute was no accident. It reflected a solemn decision to reinstate the father as the central authority figure in the family. Despite the

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31. See Ord. N.W.T. 1903, c.8 (Seduction), s.4 which read:

Notwithstanding anything in this ordinance an action for seduction may be maintained by any unmarried female who has been seduced, in her own name, in the same manner as an action for any other tort, and on any such action she shall be entitled to such damages as may be awarded.

A.T. Hunter noted in his *Canadian Edition of the Law of Torts by Clerk & Lindsell* at 230e: "This last section is a bold experiment giving as it does to the person chiefly injured a right of action against her joint tort-feasor". Hunter did not appear to be aware of the Prince Edward Island precedent.

Interestingly, Scottish law had long permitted the woman herself to maintain an action for seduction under certain circumstances. Outlining this, Davis wrote in 1854:

By the laws of that country the woman herself may maintain an action for seduction . . . where the seduction was accomplished under a promise of marriage, when the seduction amounts to a *stuprum fraudulentum*; so also if the seducer allured the woman to his embraces with the hope of marriage, though without an explicit promise, he is liable in a sum to her by way of damages. The right of action in this case is in accordance with the spirit of the civil law, which required the man to marry the girl. "He who shall entice a virgin to prostitute herself on the promise of marriage, shall be bound to make good that engagement." [. . .] Considerable difference of opinion has existed as to what particular circumstances entitle the woman to the action. It seems clear that seduction accompanied by pregnancy does not of itself give the right, and that there must be some design and fraud or unfair advantage taken on the part of the seducer.

[Davis, *Prize Essay* at 110-1].

Further research would also be necessary to determine if there were any American statutes similar to the Prince Edward Island one. Initial indications are that some American jurisdictions did enact legislation providing the seduced woman with her own right of action. A legislative note, written in the (1935), 22 *Virginal Law Review* 205 at 208, noted that "most states" had "expressly given [the woman seduced] a right of action", since she was "regarded as the real party in interest". An 1886 Tennessee statute [84 Tenn. 507 (1886)] was cited as typical.

32. *McInnis v. McCallum* (1854), Peter's P.E.I. Reports 72, (S.C.)

33. *Id.* at 72-3.

disintegration of the traditional family unit, the bench was determined to use the force of law to ensure that the autonomy of young women was contained.

The contradiction between the legal situation and the economic reality continued to raise concerns, however. A number of medical and legal commentators openly questioned whether the action ought not to be transferred to the seduced woman. An 1874 editorial in the *Canada Lancet*, a prominent medical journal, complained that the law seemed “to despair of giving the wretched victim [of the detestable selfish crime of seduction] any adequate reparation.”<sup>34</sup> The article noted that these unfortunate women could sue their seducers under the breach of a promise of marriage, which in fact many of them did.<sup>35</sup> The editors felt that this was insufficient, however, because not every seduction took place under promise of marriage. While prepared to criticize the existing law of seduction as ineffective, the editors went only so far as to suggest that the legislature should examine the situation:

Under the fiction of compensating a father or master for the loss of her services, damages may perhaps be recovered; but not one dollar of them can the injured female directly claim. Whether this moral wrong should be left still without redress, civil or criminal, or what are the difficulties the legislature has to encounter in making the guilty violation of chastity amenable to human laws, is peculiarly the province of our legislators to consider.<sup>36</sup>

That same year, the *Canada Law Journal* reprinted an article from the *Law Times* in England, proposing that the “party really injured” — the woman — be permitted to sue for seduction on her own behalf. The present action was “an anomaly”, it was argued, which remained in force only because of the “aversion of the Profession from all changes . . .”<sup>37</sup> Ten years later the editors of the *Canada Law Journal* went further and stated that the relegation of the tort of seduction action to parents and masters was “absurd”. It was “high time”, the article continued, “that the form of action for seduction, as at present recognized by the law, should be abolished altogether, and instead of it, a right of action given directly

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34. *The Canada Lancet*, Toronto, October 1874, vol. VII, no. 2, 58.

35. A perusal of the archival sources mentioned in footnote 82 revealed that it was not uncommon for the woman to initiate breach of promise of marriage lawsuits at or near the time that their fathers began seduction proceedings. Further research would be required to compare the outcome of these trials with the seduction actions.

36. *The Canada Lancet*, vol. VII, no. 2, at 58.

37. (1874) vol. X, N.S. *Canada Law Journal* 132-3. The article did add however, “There are some who think that such actions should not be maintainable, the consent of the woman taking away the right of action.”[at 133.]

to the party seduced . . . .”<sup>38</sup> No legislative action was ever taken on this suggestion.

The prevailing position, then, was to retain the tort of seduction as an action that belonged by right to the father. In a brilliant study of the treatment of seduction in law and literature in eighteenth-century England, Susan Staves has remarked upon the emphasis placed upon the father’s grief, rather than on the daughter’s injury:

In both fiction and secular law, daughters are perceived as having wills of their own which may be seduced or resist seduction, yet they are not so autonomous that the sad consequences of seduction are perceived as belonging to the daughter alone or even principally to the daughter. It is the father’s grief that novelists are apt to present as most corrosive and the father’s hand into which the secular courts pressed the damages.<sup>39</sup>

The father’s grief over his daughter’s fate, and the literary and legal recognition of it, was symbolic of something far more significant than seduction. What was being mourned was the father’s loss of his daughter *per se*, and the demise of the traditional family.

The spectre of the autonomous young woman also wreaked havoc with feudal property notions in the sense that it was all too conceivable that such individuals might genuinely consent to sexual relations outside of marriage. Freed from the constricting supervision of parents, women who lived away from home had extensive opportunities to engage in sexual liaisons. Even women who still lived at home might defy parental chaperonage and take advantage of stolen moments of privacy to become physically intimate with suitors. One of the best examples of such a situation was the 1887 case of *Foster v. Sutton* in East Flamboro, Wentworth County.<sup>40</sup> Samuel Foster, a labourer, was suing George Sutton, a twenty-seven year old farmer’s son, for the seduction of his twenty-two year old daughter, Rosa. George Sutton testified that he had known Rosa for three years, and that their first sexual involvement had

38. *Seduction* (1884), vol. XX, no. 22 Canada Law Journal 413 at 414. The article offered in the alternative that the action should be made a criminal offence. For a decision of the lobbying surrounding the ultimate criminalization of seduction in Canada, see Constance Barkhouse, “Nineteenth-Century Canadian Rape Law 1800-1892”, in David Flaherty, ed., *Essays in the History of Canadian Law*, vol. 2, (Toronto: Univ. of Toronto Press, 1983) 202 at 222.

39. Susan Staves, *British Seduced Maidens* (1980), 14 *Eighteenth-Century Studies* 109 at 133. Staves also stated:

The emotional core of many of the stories does not lie in the seduction itself; in fact, in most novels the climax of the seduction is not even rendered, but simply alluded to in a perfunctory way. Instead, attention is devoted to rendering the grief of the girl’s parents, especially of her father. [ . . . ] The fathers are important and their grief, madness or death seems crucial to the effects desired. [at 120-22.]

40. *Foster v. Sutton*, Archives of Ontario, Wentworth County, 25 April 1877, High Court of Justice, Common Pleas Division.

begun in 1886. The two had been alone in a buggy one evening, and George had placed his hand on Rosa's "private parts". "This was the first time I ever tried to do anything of the kind," he told the court. The examination continued:

Q. What did you put your hand up her clothes for?

A. I just wanted to see what kind of a girl she was.

Q. Mere curiosity?

A. Yes.

George testified that Rosa was willing to engage in sexual intercourse at that time, but that he "wouldn't do it". Two weeks later, however, he visited her at her father's home. George told the court:

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Of course young women were also subjected to sexual relations in situations where they did not consent. A large proportion of seduction cases involve extensive physical violence. In the case of *Brown v. Dalby* (1850), 7 U.C.Q.B. 160, the plaintiff's daughter, a twenty-one year old woman, testified that she had been working as a live-in servant for the defendant, a tavern-keeper from Richmond Hill. She told the court that she had been scrubbing the ballroom one Friday, when the defendant came in, shut and locked the door, "threw me down on the floor and used me shamefully . . ." She swore that she "struggled with him and slapped him in the face, but it was of no use . . ." Her clothes were "torn from her" in the effort of resisting, she testified. Dalby threatened that if she screamed or raised any alarm, he would "be the ruin of [her] life". Since no one else was at home and the windows of the ballroom were closed, the young woman decided it would be futile to call for help. The judge and jury concluded that the evidence warranted a finding of seduction and awarded the plaintiff sixty-five pounds.

See also *Camp v. Blows*, Archives of Ontario, Wentworth County, Winter Assizes, 11 Jan. 1888, High Court of Justice, Queen's Bench Division; *Stark v. MacDonald*, Archives of Ontario, Wentworth County, 22 Oct. 1888, High Court of Justice, Common Pleas Division; and *Urquhart v. Zavitz*, Archives of Ontario, Wentworth County, 28 Oct. 1884, High Court of Justice, Common Pleas Division. In the latter case, newspaper coverage in the London *Daily Advertiser* on 29 Oct. 1888 noted that "according to the girl's story, the case was more like one of rape than seduction." In all three cases, the plaintiff was successful.

In one very interesting case, *E. v. F.*, [1905] 10 O.L.R. 489, Mr. Justice James Vernall Teetzel handed down a novel decision that dismissed an action for seduction because the sexual connection had been accompanied by force and without the woman's consent. He wrote:

The action of seduction is predicated upon the consent of the party seduced having been given either by act or word. [. . .] Any damages resulting to her from acts which would amount to rape, although pregnancy might follow, would be personal to her and would not accrue to her father. [at 492.]

Teetzel went on to provide the most concrete judicial discussion of the actual nature of seduction yet articulated:

It has been judicially stated that "in order to constitute seduction, the defendant must use insinuating arts to overcome the opposition of the seduced, and must by wiles and persuasions without force, debauch her." Also "in order to constitute seduction it is necessary to shew that the consent of the woman was obtained by flattery, promises, or other artifices used by the defendant". Also, "the word 'seduction', when applied to the conduct of a man towards a female, is generally understood to mean the use of some promise, arts or means on his part by which he induces the woman to surrender her chastity and virtue to his embraces." For these and other similar definitions, see "Words and Phrases Judicially Defined", vol. 7, p. 6389 *et seq.* [at 492]

I went over there. All [had gone] to bed but her.<sup>41</sup> She put out the light and asked me to come over to the lounge. She put her hand down and unbuttoned my pants and then she got up and took off hers. She came to the lounge again, and said she wanted me to do it, and I told her the old folks would hear us. She said they would not — then I unbuttoned my pants.

The actual interchange between George Sutton and his counsel continued:

Q. Were you keeping company with other young ladies at the time?

A. I was going with others.

Q. What did you visit her for if not with a view to marriage?

A. I suppose I went to see her.

Q. To have sexual intercourse?

A. Yes. I suppose so, after it first began I went to attain that object.

Q. You went for that purpose?

A. She offered it and I was willing.

Q. You didn't make any advances to her?

A. No, I didn't put myself up.

Q. You didn't go there to court her?

A. No, sir.

Q. She wasn't a bad sort of girl so you went to have amusement with her?

A. Yes, sir.

Q. You seduced and took advantage of her?

A. No.

Q. She seduced you?

A. Yes.

Q. If she seduced you — after you were seduced what did you go back for?

A. I went to be seduced again!

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This publication was not specifically cited, and was presumably an American work. The passage is particularly fascinating in that seduction seems to be categorized as a mid-way point between cases where sexual relations were obtained through outright physical force, and cases where there was genuine and active volition on the part of both parties.

The plaintiff appealed from this decision and the Divisional Court reversed the holding. Sir John Alexander Boyd C. was of the opinion that the plaintiff's seduction action could be maintained whether the woman consented or was raped:

The gist of the action is the debauching of the daughter, and the consequent supposed or actual loss of her services. It is immaterial to the plaintiff's claim under what special circumstances the injury was wrought, or whether it was accompanied with force and violence or not. The action will lie, although trespass *vi et armis* might have been sustained. It would be no defence, that the crime was rape, and not seduction. [at 495]

<sup>41</sup> This statement was actually a quote from an American case, *Kennedy v. Shea* (1872), 110 Mass. 147 at 151.

41. The record indicated that Rosa's parents seem to have been aware that their daughter was alone with her suitor on the lounge. Interestingly the defence of parental negligence was not raised in this situation. This argument was raised in a series of cases in which the defendant argued that the plaintiff father had countenanced his daughter's sexual involvement, thus



Rosa's ardent behavior went completely ignored by the jury, which decided to award Samuel Foster \$1400 and costs of \$165.82. Their verdict underscored the tensions between the actions of independently-minded women and the law which granted all property rights over their chastity to their fathers. An earlier case, *Ross v. Merritt*, had attempted to come to grips with the refusal of the law to recognize the sexual autonomy of single women. "If the debauching of the plaintiff's servant is an injury to the plaintiff", the decision noted, "the servant cannot give license to the defendant to commit that injury."<sup>42</sup> The central issue was the loss of property to the woman's father. Since the woman constituted a species of property, her consent to sexual relations was irrelevant. She could not give what she did not own herself. The seduction action was an attempt to subvert the autonomy which young women in nineteenth-century Canada insisted upon displaying. If a father could no longer control the sexual behavior of his daughter, at least he was to be given financial recompense for his loss.

While the daughter's consent was irrelevant to her fathers' action, her reputation and character were not so easily dismissed. In keeping with judicial rulings that the woman's consent posed no bar to her father's claim, most judges initially held that a woman's reputation for lack of chastity could not provide an absolute bar either. James Edward Davis wrote in 1854: "The present right of civil action, by a parent for seduction of his child, is not dependent . . . on the character of the latter. She may have been previously chaste, or she may have been the reverse: still the right of action exists."<sup>43</sup> As a result of this policy, many fathers

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undermining his claim to compensation for loss of services and loss of chastity. A man who contributed to his own loss was not to be provided with a legal remedy against the individual who merely decided to take advantage of the situation. See, for example, *Beadstead v. Wyllie* (1823), U.C.Q.B. 60 (Taylor, 2nd ed.); *Hogle v. Hamm* (1825), U.C.Q.B. 248 (Taylor, 2nd ed.); *Walmsley v. Mitchell* (1884), 5 O.R. 427 and (1884), 20 Canadian Law Journal 231; *McLauchlan v. O'Leary*, Archives of Ontario, Wentworth County, Hamilton Civil/Criminal Assize Minute Books, 12 Sept. 1887.

42. *Ross v. Merritt* (1845), 2 U.C.Q.B. 421.

43. Davis seemed not adverse to making the right of action depend on the woman's character: "The temptations to do so," he admitted, "are doubtless great." To permit the woman's reputation for lack of chastity to bar her father's claim would, he noted, "take a just distinction between seduction and habitual immorality or prostitution." However in the end he conceded that it would be dangerous to make the woman's moral character the precondition to recovery:

. . . unfortunately it is a notorious fact, that the character of a woman is often attacked without any foundation, and that witnesses are called to make statements with respect to her which the subsequent verdicts of a jury frequently show to be false. It is not perjury alone that is induced. The imputations, however denied and unsupported, are injurious to the woman and her family. Even where the verdict of the jury vindicates her truthfulness, a reproach remains behind which is harder to be borne than the injury which caused her appearance in the witness-box [. . .] For the sake, therefore, of women of general good character, the distinction between them and others of a different class should not, it is

seemed unabashed about bringing actions on behalf of daughters whose sexual backgrounds seem to have been clearly less than chaste. Their applications for redress frequently met with acceptance. Thus in the 1876 decision of *Bartow v. Gillies* from Goderich, Ontario, the jury returned a verdict for the plaintiff for damages for the seduction of his daughter, despite evidence that she had been pregnant out of wedlock once before, two years ago, and had miscarried.<sup>44</sup> Although the newspaper reporter from the *Goderich Signal* who covered the case declared that his “general impression” was that the defendant should have won, the jury awarded the plaintiff \$250.<sup>45</sup> Similarly in 1891 in the case of *Zimmerman v. Headon* in Wentworth County, the plaintiff successfully obtained \$300 as compensation for the seduction of his eighteen year old daughter who had given birth to another illegitimate child prior to the seduction in question.<sup>46</sup>

In *McCreary v. Grundy*, however, the defendant, a married man with six children, swore that he had never at any time had connection with the plaintiff’s daughter.<sup>47</sup> The defence called three witnesses, all of whom testified that they had had sexual relations with the daughter, and one of whom stated that he had also been accused of fathering the child. The counsel for the defence then attempted to introduce additional evidence of the woman’s “general bad character for chastity”, and the trial judge called a halt to the proceedings. Chief Justice Sir William Buell Richards ruled that although the defence had a right to prove specific acts of immodesty, there was no parallel right to contest the woman’s general moral reputation. The jury returned a verdict for \$100, and the defendant sought to have it set aside. Chief Justice Robert Alexander Harrison agreed to authorize a new trial, holding that such evidence was properly admissible. Commenting on the “uphill nature of the defence in such an action”, Harrison C.J. intimated that the plaintiff’s daughter’s reputation for promiscuity should constitute a bar to the claim:

I cannot understand such a verdict in such an action. The man who is really guilty of seducing a woman from the path of virtue, should be well punished. If not guilty, he should be acquitted. The law ought not to allow damages to be given for mere acts of prostitution. [ . . . ] Some force must be given to the word debauched as used in the declaration, and that word

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submitted, be made the standard whereby the existence of the civil injury is established or removed.

[Davis, *Prize Essay* at 201-3]

44. *Bartow v. Gillies*, Archives of Ontario, Huron County, 25 Apr. 1876, High Court of Ontario, Common Pleas.

45. *Goderich Signal*, 26 Apr. 1876.

46. *Zimmerman v. Headon*, Archives of Ontario, Wentworth County, 15 Sept. 1891, High Court of Justice, Common Pleas Division.

47. *McCreary v. Grundy* (1876), 39 U.C.Q.B. 316.

means to corrupt with lewdness, to seduce. In this sense the man who has connection with a prostitute, or a wanton, cannot be said to debauch or seduce her. Loss of service is requisite to the maintenance of the action at common law, but it is, I think, a mistake to suppose loss of service is the only requisite.<sup>48</sup>

While Harrison's perspective was a novel one, not adopted by other Canadian judges, all legal commentators were agreed that evidence of the woman's reputation for immorality could be utilized to reduce the amount of damages owing in a seduction action. The father's claim for the injury to his daughter's chastity would undoubtedly be affected by evidence that her reputation was poor to start with. C.G. Addison summed up the state of the law in 1864:

The loss that the father sustains by the seduction of his daughter depends, to a very great extent, upon the value of her previous character. *Prima facie*, it is to be presumed that she was a moral and virtuous girl at the time of her seduction, and contributed to the domestic happiness of her parents, but it is competent to the defendant to show that this was not the case, in order to diminish the loss and reduce the damages.<sup>49</sup>

The case of *Charter v. Willis*, heard in Middlesex County in 1875, provides a good illustration of a situation where the jury decided to permit evidence of the woman's moral laxity to be used to diminish the amount of damages.<sup>50</sup> The seduced woman, seventeen year old Mary Anne Charter, lived at home with her widowed mother in London, Ontario at the time of the action. Previously she had been placed out as a live-in domestic servant, but when her mother discovered her pregnancy, she was called home. The family appears to have been upon hard times, and since Mary Anne could no longer earn her keep as a servant, her mother purchased a sewing machine so that she could continue to work for wages at home. The evidence indicated that Mary Anne had been in the habit of going out evenings with many different men, a number of whom called on her frequently at home. The *London Daily Advertiser* reported that at the trial, "a good deal of evidence, unfit

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48. *Id.* at 319 and 326.

49. Addison, *Torts* at 809.

50. *Charter v. Willis*, Archives of Ontario, Wentworth County, 10 Nov. 1875, High Court of Justice, Queen's Bench Division. The reference to the seduced victim as entering the fast life may be an indication that this was not uncommon as the result of seduction. C.S. Clark certainly speculated that this occurred frequently:

I know of many instances where girls have been employed as domestic servants and seduced by their male friends, which eventually leads them to take up [prostitution] to hide their shame in some cases, and in others to be better able to receive the guilty attentions of a lover.

[C.S. Clark, *Of Toronto the Good* (Montreal: The Toronto Publishing Co., 1898) at 89.]

for publication” had been given about Mary Anne Charter, who was referred to as “one of the women about town.”<sup>51</sup> The jury made a mockery of the mother’s claim for \$2,000 and awarded her only \$10 in damages.<sup>52</sup>

The logic of permitting a previously immoral reputation to reduce damages when outright consent did not was ironic but clear. It stemmed directly from the proprietary basis of the action. A piece of property could neither give nor withhold consent to sexual intercourse, but property could easily be valued according to whether it had been “damaged” prior to the event in question.

### V. *Judicial Response: Hostility and Suspicion*

The majority of judges in nineteenth-century Canada viewed seduction as a repellent species of litigation, and deliberately gave the action a narrow and restrictive interpretation. The animosity they expressed had little to do with the feudal and proprietary essence of the action however. Their concerns were rooted elsewhere, in gnawing uneasiness over the liberated sexual behavior of some unmarried women. Fear that wanton women might fabricate stories and extort money from alleged seducers stood in the way of their willingness to recognize the male property interests of their fathers.

Chief Justice William Henry Draper of the Ontario Court of Queen’s Bench led the judicial attack. Disposed to give free vent to his personal opinion regarding the action, he stated in 1865:

Speaking for myself only, [. . .] I am not inclined to extend the operation of the Seduction Act by what may be deemed a large and liberal construction. My own observation as a judge has by no means led me to think that it has had a favourable influence on female morals. I think the law, treating its object to be the prevention and punishment of seduction, not very effectual in its present shape; and the hope or probable prospect of recovering large damages, operates at least as injuriously in one direction as the fear of being subjected to their operation beneficially in the other.<sup>53</sup>

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51. London *Daily Advertiser*, 11 Nov. 1875.

52. In contrast, where the evidence indicated that the seduced woman had previously had an exemplary character, damages could be upgraded. A good example of this is *Griffith v. Evans*, Archives of Ontario, Huron County, 2 Oct. 1877, High Court of Justice, Queen’s Bench Division. In this case, the *Goderich Signal* described the woman, Elizabeth Griffith, as “young, handsome, and intelligent.” The report continued:

The courtroom was crowded when the case was called and when the young lady’s counsel escorted her into the courtroom her beauty and modesty created quite a sensation. The jury seemed touched and the effect was such that the defendant immediately proposed to settle.

[*Goderich Signal*, 10 Oct. 1877].

53. *Hicks v. Ross* (1865), 25 U.C.Q.B. 50 at 53.

Draper's dislike of the action clearly had nothing to do with its preservation of the hierarchical status relationship between father and daughter. Instead he saw the lawsuit as a vehicle for female extortion, and implied that the prospect of damages had led to the sexual relations in the first place. This was an astonishing claim, in light of the nature of the action itself. It was the father, not the woman concerned, who pursued the defendant and collected the compensation. While there is no doubt that in many cases the woman may have benefited indirectly from the award, this was a rather spurious basis upon which to speculate that she might have consciously schemed to engage in illicit sexual relations and pregnancy she otherwise might have foregone. The judge's fears would have been more understandable if the action had been one for money to pay for the maintenance of the illegitimate child and to keep the mother if she failed to marry subsequently. The restricted damages tend to diminish the logic of the argument.

Nevertheless, sentiments such as these underlay a series of decisions which systematically limited the scope of the seduction action. Many of the judgments involved interpretation of the Ontario Seduction Act of 1837, which was soon depleted of much of its legal significance. The Seduction Act had statutorily removed the common law requirement to prove loss of services. Section 2 read: "Upon the trial of any action for seduction brought by the father . . . it shall not be necessary to give proof of any act or acts of service performed by the person seduced, but the same shall be in all cases presumed, and no proof shall be received to the contrary . . . ." Despite the obvious legislative intent, two of the earliest reported judgments, *Gill v. Brown* in 1840 and *McLean v. Ainslie* in 1842, concluded that the statute did not contemplate altering the fundamental basis for the action — which was still regarded as loss of service.<sup>54</sup> The courts insisted that the statute "[left] the law as it stood with regard to loss of service from the seduction as the foundation for damages."<sup>55</sup> The cases systematically refused to recognize that the loss of

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54. In *Gill v. Brown* (1840), 6 U.C.Q.B. 142, Chief Justice John Beverley Robinson was prepared to allow that the common law itself would have permitted recovery regardless of the absence of the statute. This decision was surprising in that the seduced woman, the daughter of the plaintiff, was living as a hired servant in the defendant's residence at the time of the seduction. Nevertheless, Robinson stated: "I am not sure that a careful examination of the authorities might not compel us to hold that in a case like this, where the girl seduced is a minor, and receiving wages in the service of another, an action might be maintained by the father without the aid of our statute. [at 143.]

In *McLean v. Ainslie* (1842), 6 U.C.Q.B. 456, the judgment read as follows: "The statute does not contemplate the father's recovering on any other ground than the old common law ground — loss of service, though in point of fact the service was in many, if not in most, of such cases imaginary." [at 457.]

55. *Kimball v. Smith* (1847), 5 U.C.Q.B. 32 at 34.

chastity apart from the loss of services, should be a compensable head of damages.<sup>56</sup>

Chief Justice John Beverley Robinson spelled out his understanding of the legislation in *L'Esperance v. Duchene* in 1850:

Our statute does not, in my view of it . . . [authorize any] new form of action, but deals with the action of seduction, as already well known to the law. A declaration which would not be held in England to contain a sufficient statement of a cause of action for seduction, must be held to be insufficient here. [. . . The statute] leaves the question of fact as to what would be an interruption of service, to rest on the same ground as it does in England, and as it did here before the statute was passed.<sup>57</sup>

Mr. Justice Draper was even more specific:

I cannot as yet bring myself to determine that the statute so far alters the principles on which, by the law of England, this action rests, that a suit shall be maintainable by a parent for the incontinence of his daughter, when followed by pregnancy, where no consequential *actual* damages has been caused to the parent, especially where, as in the present case, the

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56. In other respects as well the judges interpreted the legislation in an extremely narrow fashion. In *Biggs v. Burnham* (1843), 1 U.C.Q.B. 106, Chief Justice Robinson concluded that the Seduction Act applied only to fathers of legitimate children. At common law, according to Robinson, C.J., the father of an illegitimate child was not entitled to sue for seduction unless he could prove that they stood in the relation of master and servant. He was inclined to interpret the statute narrowly, as preserving this state of affairs, despite the fact that nothing was specifically stated in its provisions about the requirement for legitimacy.

This line of reasoning was extended in *Hicks v. Ross* (1865), 25 U.C.Q.B. 50, where Chief Justice Draper concluded that the mother of an illegitimate child was not entitled to the application of the Seduction Act either, noting that it would be an “anomaly” to create a distinction between the legal rights of a father and mother of an illegitimate daughter. [An earlier decision, *Muckleroy v. Burnham* (1844), 1 U.C.Q.B. 351 had implied the same result.]

In *Healey v. Crummer* (1861), 11 U.C.C.P. 527, Draper C.J. concluded that if a daughter was living in her father's home at the time of the seduction, the statute was inapplicable. This was an interpretation that was clearly not required by the wording of the statute. Section 1 of the act was designed to extend the seduction action to parents whose daughters were residing away from home, on the same basis as parents whose daughters were dwelling in the family residence. Section 2 stated that “upon the trial of *any* action for seduction brought by the father or mother, it shall not be necessary to give proof of any act or acts of service performed by the person seduced, but the same shall *in all cases* be presumed . . .” [emphasis added.] There is no doubt that this section could have been interpreted to cover cases where the daughter resided at home. Yet the Chief Justice insisted that both sections must be read as an inextricable unit, and only those parents whose daughters were living away from home were permitted to dispense with proof of service. The defendant argued that the plaintiff had sustained no loss of service in this case, and the court concluded that there should be no recovery. In a similar judgment in *Smart v. Hay* (1862), 12 U.C.C.P. 528 at 530, Draper C.J. reaffirmed his position. Where the daughter still resided at home, the “necessity of proving loss of service” remained “unaffected by our statute”.

57. *L'Esperance v. Duchene* (1850), 7 U.C.Q.B. 146 at 148-9. Chief Justice Robinson was dealing with the question of whether it was permissible to launch an action for seduction prior to the actual birth of the child. Noting that the loss of service must be complete well before the actual childbirth, he held that it was.

daughter is of full age, and has not resided in her father's family since she was an infant of fifteen months old.<sup>58</sup>

Once the initial loss of service had been proven, additional damages compensating for the dishonour sustained by the woman's family could be added onto the claim, but without some underlying evidence of loss of service, nothing was recoverable.

This view retained its dominance. In 1865 Mr. Justice John Hawkins Hagarty sitting on an appeal from the Court of Queen's Bench of Upper Canada, asserted that no action would lie unless the "ability to serve" was affected. Thus the plaintiff was required to prove pregnancy, "with consequent illness or weakness" in some "sensible degree affecting the ability of the servant to work for, or serve the master."<sup>59</sup> Of a seven man bench sitting on this decision, only two judges were prepared to offer dissents. Vice-Chancellor John Godfrey Spragge asserted that the loss of service need not be proved and that the cause of action was complete without actual "proof of sickness or of a condition entailing loss of service." Indeed, he added that to require proof of loss of service was "to nullify the provisions" of the 1837 statute.<sup>60</sup> Mr. Justice Adam Wilson agreed, noting that when the statute did away with the need to prove the service relationship between parents and daughter, it simultaneously abolished the need to prove loss of services. To retain the latter without the former was "an impossibility in law as in reason . . ." he argued.<sup>61</sup>

The majority of Canadian judges were still intent on retaining proof of loss of service even in the latter part of the nineteenth century. The 1883 case of *Evans v. Watt*, heard in Guelph, Ontario, represented one situation in which this emphasis on loss of services proved fatal for the plaintiff's case.<sup>62</sup> He had initiated the action based on the seduction of his daughter, who had been living away from home working as a domestic servant. The young woman had managed to conceal her pregnancy at the beginning, and had married a young man named J.M. Nickle when she was approximately four months pregnant, without disclosing this fact to him. Upon the birth of the child, Nickle prevailed upon his wife's father to sue the seducer for damages. Chief Justice Hagarty ruled that the plaintiff should be non-suited. Although he conceded that the subsequent marriage of the daughter would not abolish her father's right to sue for seduction, he insisted that "there ought to be shewn a state of facts from which loss of services or lessened ability to serve might be assumed in

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58. *Id.* at 156, per William Henry Draper, dissenting.

59. *Westmacott v. Powell* (1865), 2 E. & A. Rep. 525 at 533-4.

60. *Id.* at 531-2.

61. *Id.* at 536.

62. *Evans v. Watt* (1883), 2 O.R. 166.

favour of the father.”<sup>63</sup> Mr. Justice John Douglas Armour, dissenting, argued that the loss of service issue was irrelevant. The real damages, according to Armour J., were “injury to [the father’s] feelings, the disgrace brought upon him and his family, and . . . the mortification and blighted hopes which have been caused by the act of the seducer.” In this case, the family’s disgrace was increased by the subsequent marriage in that the young woman had “impos[ed]” herself “upon her husband as a virtuous woman”.<sup>64</sup> Armour J. clearly wished to emphasize the injury to chastity over the loss of service aspect of the action. However this sentiment, although increasingly vocalized by Canadian judges, was still in the minority.

The 1896 case of *Harrison v. Prentice* suggested that plaintiffs and their counsel seem to have been heartened by the apparent increase in judicial concern over the injury to chastity. In this Belleville, Ontario case, the plaintiff sued his brother for the seduction of his daughter, the defendant’s niece, while she was residing as a servant in the defendant’s home.<sup>65</sup> The novel feature of the case was that the plaintiff had not waited for his daughter to become pregnant before bringing the action. He sued solely for the injury to her chastity flowing from the sexual relations.<sup>66</sup> The seduction itself was claimed as the heart of the matter, with the loss of services being merely peripheral. The only evidence of loss of services attested to was that the plaintiff’s daughter had become “tired and less able to perform her household duties” by reason of the sexual intercourse itself. Mr. Justice John Edward Rose dismissed the action at trial, concluding that loss of services had not been adequately proven:

Where, as in this case, the connexion took place while the daughter resided at service with the defendant, and there was no evidence of any possible loss of service to the father, and there was neither birth of a child nor pregnancy, it seems to me . . . that there is no right of action either at common law or under this statute.<sup>67</sup>

On appeal from this judgment, Mr. Justice Featherstone Osler, writing for the majority, made note of the conflicting judicial pronouncements on the issue of service. While he seemed sympathetic to the difficulties of proving loss of service where it was largely “imaginary”, he sided with

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63. *Id.* at 170.

64. *Id.* at 171-2.

65. *Harrison v. Prentice* (1896), 28 O.R. 140; *Harrison v. Prentice* (1897), 24 O.A.R. 677.

66. Although the young woman had not become pregnant as a result of her sexual contact with her uncle, the trial decision noted that shortly after this alleged connection, and while still living with her uncle, she “became with child by the defendant’s son”. [at 146.]

67. *Harrison v. Prentice* (1896), 28 O.R. 140 at 146; *Harrison v. Prentice* (1897), 24 O.A.R. 677 at 677.



the trial judge and held that the plaintiff had failed to make out a sufficient case:

What has always been required to be proved is that some illness has followed the defendant's act which has affected or diminished the daughter's ability to serve. [. . .] It seems almost ludicrous to speak of the languor which the young woman says she experienced as an illness causing a disability to serve, and on this ground . . . I affirm the [trial] judgment . . .<sup>68</sup>

Thus despite legislative initiatives expressly designed to remove proof of service as a precondition to a parent's lawsuit, Canadian judges with few exceptions continued to insist that loss of services, not loss of chastity, be recognized as the foundation for the action. Indeed the majority of judges seemed opposed to recognizing the new injury which the legislation had intended to address — a father's proprietary interest in his daughter's chastity.<sup>69</sup>

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68. *Harrison v. Prentice* (1897), 24 O.A.R. 677 at 683-4. Interestingly the dissenting judge did not attack the majority requirement for proof of loss of service. "Whenever the principle of the action has been discussed, it has been held to be loss of service resulting from the act of seduction," he stated at 685. Instead MacLennan J.A. contended that although the evidence of loss of service was not substantial, "it has often been said that very slight evidence will do." He was prepared to accept the evidence of slight indisposition as sufficient here. [at 686.]

69. Not all legal figures took as restrictive a view of the tort of seduction; a number of judges were prepared to recognize the parental interests that the action was intended to redress. Mr. Justice Adam Wilson expressed concern in *Westmacott v. Powell* (1865), 2 E. & A. Rep. 525 at 539 that the law should not be rendered "defective in leaving wholly unprotected the chastity of women . . ." Admitting that the action could constitute "a dangerous power to be placed in the hand of a parent", yet he preferred to see some improper actions brought forward, "than that the most afflicting and lasting injury which can befall a family should be left unpunished . . ." Indeed, he was fully prepared to rely upon the "restraining influences of the courts, and of juries" to monitor the litigation.

Mr. Justice John Wellington Gwynne, in *Cromie v. Skene* (1869), 19 U.C.C.P. 328 at 337 and 346 argued for a broad and purposive interpretation of the Seduction Act: "We are therefore not only free to exercise but bound to exercise our judgments in putting such a construction on the Statute as shall appear to us most consistent with its terms and best calculated to attain its object, which I take to be, to provide redress to parents for the seduction of their children when not living under their protection." In this case, the defendant had argued that since the seduced woman's parents resided out of the country, they should not be permitted to utilize the beneficial provisions of the statute. Intent upon furthering the "remedial object of the Statute", Gwynne J. concluded that the legislation did indeed apply:

We cannot overlook the fact that it is part of the policy of the Government of this country to invite young persons of the female sex to leave the protection of their parents and come from abroad to make this country their home: it would be a painful thing if we should be compelled to pronounce a judgment, which would have the effect of declaring that, notwithstanding such invitation, they have not equal protection by our law with the children of parents residing among us, and that our law abandons them, without redress, to the danger to which the virtue of young females is most exposed, namely, the seductive advances of the members of the family of the persons to whose care they may be confided.

Mr. Justice John Edward Rose defended the social importance of the action in *Mulligan v.*

Perhaps the most surprising decisions involved the judicial interpretation of the phrase “unmarried female”. In *Kirk v. Long*, a case heard in Toronto in 1857, it was revealed that the plaintiff’s daughter had been married in England ten years previously. She had come to Ontario in 1853, and her husband had died on the passage out. Upon her arrival, she went to live with a widower, as his housekeeper. The widower seduced her, and her father sued for damages. Draper C.J. determined that the statute was inapplicable, (thus requiring her father to prove loss of services, a factual impossibility), because the woman concerned was not an “unmarried female”:

Then unless we can consider a widow to be an unmarried female, or, in another form of expression, that an unmarried female is synonymous with “a female who has no husband”, this action cannot be sustained under the first section of the act. It may be said that to unmarry a person is a phrase signifying to divorce them *matrimonium abrogare*, but it would be impossible to put that interpretation on the word “unmarried” in the first clause, without destroying the evident purpose of the legislature. The term “unmarried female”, obviously means, “female unwedded, or in a state of celibacy”, “*nondum matrimonio conjuncta*”; and it is inapplicable to a female who has been married and is divorced, or a widow.<sup>70</sup>

Similarly, in *Anderson v. Rannie*, a case tried in Berlin, Ontario in 1862, Draper refused to permit the father of a widow with four children to recover for her seduction.<sup>71</sup> This ruling was issued despite evidence that the widow and her children lived with the father and looked after him. The father was a man of eighty, in poor health, and Draper concluded that although his daughter was providing for him, it was not in the relation of a servant to a master. “Was the daughter living in his home, bound to obey his reasonable orders under his control? I think the evidence not only falls short of establishing this, but establishes the contrary.”<sup>72</sup>

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*Thompson* (1892), 23 O.R. 54 at 61. His support rested upon the unfairness of the double standard of sexuality:

If the defendant is the father of the illegitimate child born to the plaintiff’s daughter, they have been partners in the guilt, and in whatever of illicit pleasure there was in such forbidden connexion, and it is not fair that the woman should bear the suffering and the shame, and the defendant escape without loss. If, according to the mistaken notions which I venture to say prevail in society, the stigma of shame cannot be placed upon the man as well as the woman, let him at any rate bear his share of the financial burthen which is the result of the illicit connexion.

While none of these judges had the jurisprudential impact that Chief Justice Draper had on the action, their comments indicate that judicial attitudes were not completely uniform in this matter.

70. *Kirk v. Long* (1857), 7 U.C.C.P. 363 at 365.

71. *Anderson v. Rannie* (1862), 12 U.C.C.P. 536.

72. *Id.* at 538.

Although the judges did much to diminish the impact of the Seduction Act, one needed only to look to neighbouring jurisdictions, without similar legislation, for instances where judicial interpretation of common law rules was even less hospitable. The Manitoba case of *Hebb v. Lawrence*, decided in 1890, was one such example.<sup>73</sup> The plaintiff, a widow, was suing to recover damages for the seduction of her fourteen year old daughter, who had been subjected to sexual involvement with her employer while she was engaged as his live-in domestic servant. Despite evidence that the \$8 monthly wage the young girl received was turned over directly to her mother, the court concluded that the mother could not show proof of service. In the emerging wage labour market, the money an employed daughter sent back to her family had taken the place of the unpaid cottage labour she would traditionally have provided inside the home. The court had an opportunity here to recognize the modern working conditions and transport the concept of loss of services into the new world of a contract economy. It refused to do so and adamantly rejected the equation of payment of a daughter's wages to her family as a form of "services" rendered. Apparently the result in this case came to the attention of the Manitoba legislators, and two years later an act based upon the Ontario legislation was passed to permit parents to sue despite the fact that their daughters resided elsewhere.<sup>74</sup> Despite this, future judicial pronouncements in Manitoba followed the Ontario lead and continued to apply the law in a restrictive and narrow fashion.<sup>75</sup>

This impeditive mode of interpretation was the consequence of a deep-seated distrust of the possibilities for sexual freedom that economic independence was bringing to young women. As usual, Chief Justice

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73. *Hebb v. Lawrence* (1890), 7 Man. L.R. 222. *Simpson v. Read* (1858), 9 N.B.R. 52 provided another illustration from New Brunswick.

74. *An Act respecting the Action of Seduction*, 55 Vict. (1892), c.43 (Manitoba). A later case, *St. Germain v. Charette* (1900), 13 Man. L.R. 63 at 64 mentioned that the Seduction Act had been passed "owing to the decision in *Hebb v. Lawrence*". Interestingly, the New Brunswick decision did not spark the introduction of similar legislation, despite the statements of a number of judges about the inadequacy of the common law. Carter C.J. had noted: "It is much to be regretted that the law does not provide some redress for a parent who has sustained so great an injury as the plaintiff has, but it does not do so; and we must be governed by the decided cases." Parker J. added, "I sincerely regret the state of the law, and wish it was altered; but while the law remains as it is, we must be governed by the cases." [*Simpson v. Read* at 53.]

75. The only reported Manitoba seduction decision in the remaining years of the nineteenth century, *St. Germain v. Charette* (1900), 13 Man. L.R. 63 at 64-5, turned on the question of whether damages would lie for the seduction of an illegitimate child. The plaintiff's lawyers argued that the object of the act was to prevent the seducer escaping liability because the female was in his employ at the time of the seduction, and that "it [was] consonant with the intention of the Act that it should apply to illegitimate children." Bain J. however nonsuited the plaintiff, holding it to be "clear" that the statute did not apply to cases of illegitimate children.

Draper was most forthcoming on this point.<sup>76</sup> In an 1862 decision, he stated:

. . . it may also be observed that actions of seduction are becoming far too frequent, and, in not a few instances, shew such a total want of moral principle among the so-called victims of seduction, as to make one fear that the prospect of publicly avowing their own frailty on the trial where large damages may be recovered, does not make them sufficiently careful of exposing themselves to temptation, even if it may check them from leading others, into it. Nor is that public confession always attended with that sense of shame and disgrace which ought to attend the consciousness of yielded virtue, either in the mind of the fallen one, or of the community around her.<sup>77</sup>

Draper and his colleagues were increasingly worried about the impact of the trial of seduction actions on the community at large. They feared that public airing of this unseemly evidence would incite prurient interests and provoke more sexual misbehavior in the future. This constituted an obvious reason why they sought to limit the scope of the action to restrict the number of claims which could be maintained in law.

A year later Draper delivered another seduction decision in *Snure v. Gilchrist*, and exploded with a characteristic outburst yet again:

I cannot help saying I think the law is in an unsatisfactory state, and that if it were possible to deter parties from the commission of acts which are the foundation of these suits, it would do more for the moral tone of society than giving damages against one of the offending parties upon the evidence of the other. The trials themselves do harm, as every one who has witnessed them frequently must admit, when he calls to mind the ill-suppressed disturbance among the audience when any thing particularly flagrant is detailed in evidence, or pressed upon witnesses under examination. Verdicts for the plaintiff (verdicts for the defendant are rare) certainly fail to prevent seduction, or to operate as a warning against yielding to it; and the case leads to the conclusion that the female seduced would not have yielded her chastity if the seducer would not have been a good matrimonial connexion, or a good mark for damages if he could not be coaxed or frightened into marriage.<sup>78</sup>

76. There is little yet known about William Henry Draper's life which would explain why he might have felt so strongly about the seduction action. He must originally have been involved in the enactment of the legislation in 1837, since he sat as a member of the Executive Council and served as solicitor-general at the time of its passage. The records do not indicate what his specific views were of the statute at the time, and it was not until his judicial career began that he became so outspoken about the enactment. [George Metcalf, "William Henry Draper", *Dictionary of Canadian Biography*, vol. X, at 253-7; Wallace W. Stewart, Ed., *The Macmillan Dictionary of Canadian Biography* (4th ed. Toronto: Macmillan of Canada, 1978) at 222.]

77. *Anderson v. Rannie* (1862), 12 U.C.C.P. 536 at 538-9.

78. *Snure v. Gilchrist* (1863), 23 U.C.Q.B. 81 at 83. Nor did this sentiment diminish over time. In 1866, Draper C.J. stated: "I entertain a strong feeling of repugnance to granting new trials in cases of this description, among other reasons, from a conviction which gains strength in my mind every year, that such trials produce more harm than good." [*McIlroy v. Hall* (1866), 25 U.C.Q.B. 303 at 304.]

The Chief Justice's outspoken attacks on the action did not go unnoticed by the larger legal community. In 1866, some of his remarks were quoted by W.H. Chewett, the editor of the *Local Courts and Municipal Gazette*, which was published in Toronto. Chewett left no doubt that he sided with Draper on the issue: "The unsatisfactory state of the law on this subject has often been commented on, both by writers and by judges on the bench and there is, we think, a prevailing impression that in its present shape an action for seduction is no adequate means of preventing the immorality which it is intended to check, whilst it is in numerous cases an engine of oppression in the hands of a corrupt or designing woman."<sup>79</sup>

Similar sentiments had been voiced four years earlier in the *Upper Canada Law Journal*:

When a woman is deprived of her virtue her moral character is generally shaken. Perhaps, she has nothing left but to make as good a speculation as her altered circumstances will admit. Her real seducer it may be is a young man of buoyant expectations but no substance. Her speculation is much more likely to pay if she can only get a jury to believe that a man of property, who perhaps innocently was once or twice in her company about the time of her seduction, is her seducer. If a married man so much the better — he is the more likely to pay handsomely in order to prevent the exposure of a trial, however innocent he may be of the charge. [. . .] The temptation is great, and we fear that some women are bad enough to give way to that temptation. When chastity goes truth frequently follows. When marriage is out of the question, a good round sum of money is not to be despised.<sup>80</sup>

The real problem lay with the women, and most particularly independently-minded, autonomous young women. Wanton women who had departed from the proper sexual etiquette should be subjected to reprobation and punishment. They should not be permitted to benefit — even indirectly — from their illicit behavior. The spectre of lying, scheming, extorting women superceded, for the judges, the ability to conceive of unmarried women as the passive property of their fathers. The hostility that Chief Justice Draper and his colleagues felt toward

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79. *Actions for Seduction* (1866), 2 *Local Courts and Municipal Gazette* 35.

80. (1862), *Upper Canada Law Journal* 311. Rosemary Coombe has written an account of breach of promise of marriage actions in Ontario, entitled *The Most Disgusting, Disgraceful and Inequitous Proceeding in Our Law: The Beach of Promise of Marriage Action in Ontario 1850-1890* (unpublished manuscript, 1 Dec. 1983). Her research provides an interesting point of comparison with these findings. She discovered the same type of hostility toward the action as noted here in contemporary law journal editorials, most of which expressed fears that the action provided a vehicle for female extortion. However, with the exception of Mr. Justice John Edward Ross, the Ontario judiciary seemed to be largely sympathetic to the breach of promise suits and the interest of the women who launched them.

sexually experienced young women thwarted the extension of paternal property rights.

## VI. *The Persistence of the Action*

Despite the hostility with which most judges viewed the action of seduction, scores of fathers continued to bring suit for damages for the loss of their daughters' chastity. A survey of all reported Canadian cases and a sampling from Ontario Archival records indicates that the action was remarkably popular in the nineteenth century.<sup>81</sup> No other field has unearthed more litigation involving women.<sup>82</sup> In part, this finding was surprising. C.S. Clark, a Canadian social commentator of some note, had suggested in 1898 that the disincentives for bringing such actions outweighed the benefits: ". . . if any man discovers that his daughter has been seduced, he would prefer remaining quiet about it than instituting proceeding against a boy for doing so, knowing quite well that the exposure is simply ruination for life for the girl."<sup>83</sup> The fathers of the women in question must have been more anxious to secure financial reparation than they were to preserve their daughters from the glare of legal publicity. The amounts claimed by the plaintiffs were significant sums for the nineteenth century, ranging from \$500 to \$5,000.<sup>84</sup> The actual damages awarded, however, seem to have been relatively lower than those claimed. [See Chart No.I].<sup>85</sup>

81. The survey involved a study of all reported Canadian decisions in the nineteenth century and the following archival records: Hamilton Civil/Criminal Assize Minute Books 1853-1903, County of Wentworth Supreme Court of Ontario Action Files 1870-1895, County of Wentworth Supreme Court of Ontario Judgment Files 1870-1895, Huron County Minutes of the Assize and County Court (Civil) 1872-1884, Huron County Case Files (Cases of the Court of Common Pleas 1841-1895 and Cases of the Court of Queen's Bench 1842-1896), Middlesex County Assize Term and Cause Books 1862-1905, Middlesex County Judgment Books 1881-1902 (High Court of Justice, Chancery Division), Middlesex County Judgment Book of Queen's Bench and Common Pleas 1845-1882, Middlesex County Chancery Court Records 1838-1912, Middlesex County Cases of the Court of Common Pleas 1872-1896, Middlesex County Cases of the Court of Queen's Bench 1870-1896, and Middlesex County Records of the Queen's Bench and Common Pleas 1845-1875.

82. There were more seduction cases than cases in any one of the following areas I have researched: prostitution, rape, infanticide, abortion, alimony proceedings, or child custody litigation. Interestingly, there were almost no reported cases outside of Ontario. Apart from a few isolated actions in Nova Scotia, P.E.I., New Brunswick and Manitoba, the great bulk of the reported decisions were from Ontario. It would appear that lacking the Ontario statute, there was much less incentive to litigate this matter. Further archival research in provinces other than Ontario would be required to ensure that there were not a number of decisions that escaped the attention of the legal reporters.

83. C.S. Clark, *Toronto the Good* at 109.

84. The lowest amount, \$500, was claimed in *Shaw v. Dean*, Archives of Ontario, Wentworth County, 1880; the largest sum claimed, \$5,000, was requested in *Burkholder v. Davis*, Archives of Ontario, Wentworth County, 1876.

85. In several cases, the awards appear to have been derisory. Examples included one case

The great majority of actions were brought by fathers, although a few were brought by mothers where the fathers were deceased, and still fewer by masters.<sup>86</sup> The plaintiffs seem to have been drawn largely from the skilled and unskilled working class. Many gave their occupations as labourers, although some were listed as coming from more skilled positions such as carpenters, houseframers and caretakers. A number were listed as farmers, although presumably they were struggling, for many sent their daughters out to work as domestics to help make ends meet. The daughters were most frequently seduced while living away from home, usually working as domestic servants. The egalitarian impulses which fostered the enactment of the Seduction Act were given full vent in the lawsuits which resulted. The seducers of domestic servants were commonly listed as their masters, his friends or relatives. In other cases, the daughters were employed away from home in factories such as the Screw Works in Hamilton, Ontario. In still others, the daughters were still living at home and the seduction seems to have been the result of a courting situation which did not culminate in marriage.

The defendants seem to represent a generally more affluent group than the plaintiffs, although very few came from the upper classes. Most were listed as farmers, or farmers' sons, on farming enterprises that were established enough to have hired domestic servants to help around the house. Other defendants were noted to be employed in the following trades: merchants, printers, upholsterers, engine drivers, solderers, market gardeners, cabinet-makers, fishermen, carpenters, and blacksmiths. Presumably these men represented a relatively prosperous cross-section of the working classes, since there would have been little point in suing an impoverished individual.<sup>87</sup> On the whole, the action appears not to

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where the plaintiff claimed \$2000 and was awarded \$10, and another where the plaintiff claimed \$1000 and was awarded 25¢. [*Charter v. Willis*, Archives of Ontario, Wentworth County, High Court of Justice, Queen's Bench Division, 10 Nov., 1875; *Baldwin v. Stewart*, Archives of Ontario, Wentworth County, Assize Minutebooks, High Court of Justice, Common Pleas Division, 12 Jan. 1875.]

86. A small number of cases were also initiated by brothers (where both parents were dead) and persons standing *in loco parentis* (including grand-uncles and adoptive fathers).

87. James Edward Davis noted that the costs of litigation would bar all but the most worthy cases against the most financially secure defendants:

Actions for seduction cannot be brought with impunity. The costs of an action, and the uncertainty whether they may not fall on the plaintiff, operate as a check on their proceedings, and deter persons from appearing in court unless they have confidence that the circumstances of the case entitle them to substantial damages. Indeed, this check is probably far too extensive than otherwise, for where the defendant has no means of paying costs and damages, and the action is not brought, then there is no remedy for the plaintiff, no punishment for the defendant.

[Davis, *Prize Essay* at 189.]

However not all appear to have been completely financially secure, since there are indications

have crossed class boundaries significantly, and yet it seems fair to generalize that most defendants were relatively wealthier than the plaintiffs who brought the claims. The paucity of middle and upper class plaintiffs may indicate that their daughters were more tightly chaperoned and thus not exposed to the danger of seduction. Since few of these women would have been sent away from home to earn a living, the opportunity for sexual experience outside of marriage may have been more limited. On the other hand, it may reveal that fathers with greater financial means chose not to sully their seduced daughters' reputations further through public litigation.

The popularity of the action in the hands of the working classes poses many questions. Presumably it indicates that seduction was a common occurrence for working class women in nineteenth-century Canada. One wonders, however, how their fathers knew to seek legal recourse rather than less formal remedies. How familiar were they with the legal system and the barristers and solicitors whose expertise would have been necessary to frame the lawsuits? It is tempting to assume that some lawyers specialized in this type of litigation and informally advertised their services amongst the class that had need of them. However the records indicate that seduction litigation was not a specialty, but formed the backbone of many legal practices of the day. Lawyers from the elite of the profession and relative unknowns rubbed shoulders together in the litigation of these claims. Furthermore there appears to have been no development of a plaintiff's or defendant's bar in this field. Lawyers indiscriminately represented a plaintiff in one case, and a defendant in the next.

How the plaintiffs and defendants decided which attorney to retain is a complex issue. In part it must have related to fees. Presumably the most famous and experienced lawyers charged the highest fees and obtained the cases with the greatest potential for significant damages. Since the working class plaintiffs would probably not have had the financial ability in a number of cases that, due to insolvency, there were problems in the execution of the judgment. It was not uncommon for the defendant to abscond before trial, and in many cases the action went undefended. Newspaper accounts in several cases mentioned that the defendant was believed to have fled the country for the United States.

Recognition of this situation was made explicit in *L'Esperance v. Duchene* (1850), 7 U.C.Q.B. 146, where Chief Justice John Beverley Robinson authorized the bringing of an action for seduction as soon as pregnancy was discovered and even before the actual birth of the child. Accounting for his decision by reference to the peculiar conditions in Canada, he stated:

And it is not an unimportant consideration in this country, whose position affords such facility for withdrawing from the jurisdiction of our courts, that if the birth of a child must be waited for before any step in an action can be taken, the author of the injury would be in many cases beyond the reach of the party, before he could take measures for preventing it. [at 148.]



to pay large retainers at the outset, some informal contingency fee arrangements may have operated. Nevertheless, a prospective plaintiff would have had to make some financial outlay, even if only for disbursements, in order to initiate the proceedings. The prospect of a significant award may have enticed many to do so, but the vast number of working class fathers who resorted to legal claims in response to the seduction of their daughters remains striking.

In fact the large number of fathers who took advantage of the legal system to launch seduction actions reveals that they clearly perceived of their daughters' seduction as an economic injury to themselves. Their sense of legal injury may have been representative, in a much broader sense, of the feeling that working class fathers generally were losing their daughters to a more modern world. Freed from day to day supervision within the family unit, young working class women were able to live autonomously and to depart wilfully from parental values and aspirations. The popular seduction action gave expression to what appears to have been widespread anxiety about the dissolution of the idealized and traditional form of the family. It constituted an overt attempt by fathers to reassert patriarchal control over their errant daughters.

While the judges may have let their antagonism toward women pregnant out of wedlock get in the way of such paternal interests, juries were more than eager to provide restitution to grieving fathers. Particularly at the trial level, where jurors had greater control over the outcome, the plaintiffs were remarkably successful. [See Chart No. 2]. Of the cases surveyed, 90% of the verdicts at trial went to the plaintiff. Where cases turned on questions of law (on motions concerning legal matters and on appeal), where the judges had more opportunity to diminish the scope of the action, the plaintiffs still continued to win in the majority of cases. The success ratio in seduction actions did not go unnoticed by legal commentators of the day, who offered their own explanations for the results. The *Upper Canada Law Journal* editors opined in 1862:

The defence of such an action . . . is peculiarly difficult. The action is easily brought, easily proved, and most difficult to meet. [. . .] Should the seduced be a person of doubtful character, the defendant, with a view to impeach her credibility or lessen damages, may be tempted to put witnesses in the box. This, however, as the law stands, is an experiment fraught with danger. The jury perhaps, more influenced by the tears of the young woman or the eloquence of her counsel than by the evidence of her accusers, may disbelieve the testimony of the latter, and, because of the supposed attempt to 'blacken her character', swell the damages.<sup>88</sup>

88. (1862), *Upper Canada Law Journal* 311.

Similarly, Chief Justice Robert Alexander Harrison, of the Court of Queen's Bench of Upper Canada, offered the following sentiments in 1876:

Jurors sometimes out of false sympathy for the weaker vessel (woman) are too prone to believe her testimony, no matter how or by whom contradicted; and when the defendant presumes himself by oath to contradict it he is often looked upon by jurors not only as a seducer but as a perjurer, and made in consequence to pay smart damages.<sup>89</sup>

The aspersions commonly cast upon jurors' false sympathies for seduced women seem to be more of a smokescreen than an accurate analysis. Similar sentiments were frequently voiced over the prosecution of rape charges, and yet in sharp distinction to the high success rates in seduction trials, convictions rates for rape were exceedingly low. Recent research has unearthed a low rate of no convictions in the 1840s and a high of 32% in the 1880s.<sup>90</sup> In both cases juries were faced with a woman who had been subjected to sexual relations outside of marriage, and yet the misplaced chivalry that allegedly attached to such women seemingly did little to move the triers-of-fact in rape prosecutions. The stark differences relate to the visible presence of the woman's father in the seduction trial, a factor which turned the competition into one between two males. In rape cases, by contrast, the issue was seen more directly as a contest between the woman's version of the sexual attack as opposed to that of the accused.<sup>91</sup> When the trial pitted the claim of a grieving father against the explanations of an alleged seducer, the jury was prepared to make short work of the outcome. They were consistently sympathetic toward the father's sense of loss and repeatedly attempted to avenge his dishonour with the only recompense they could give — financial reparation.

## VII. Conclusion

The tort of seduction began its legal career in Canada as a vestige from

90. See, for comparison, the low rate of conviction in rape trials in nineteenth-century Canada, as reported in Constance Backhouse, *Rape Law* at 222.

91. The significance attached to the women's sexual background and the facts surrounding the sexual intercourse in rape trials, as opposed to the relative lack of interest these matters held for civil seduction suits, indicates that the courts were treating the two actions quite differently.

Similar success ratios have also been reported by Anna K. Clark, in "Rape or Seduction: A controversy over sexual violence in the nineteenth century" in *London Feminist History Group, The Sexual Dynamics of History* (London: Pluto Press, 1983) 13 at 18. Noting that she had reviewed all of the English actions for seduction reported in the newspapers between 1815 and 1845, she contrasts the "heavy damages" awarded to fathers in seduction actions — usually between ten and one hundred pounds — with the low rate of conviction in rape. "If a daughter prosecuted for rape on her own behalf, she had very little chance of gaining justice. Between 1815 and 1819, only 22% of the men tried for rape were convicted." [at 18.]

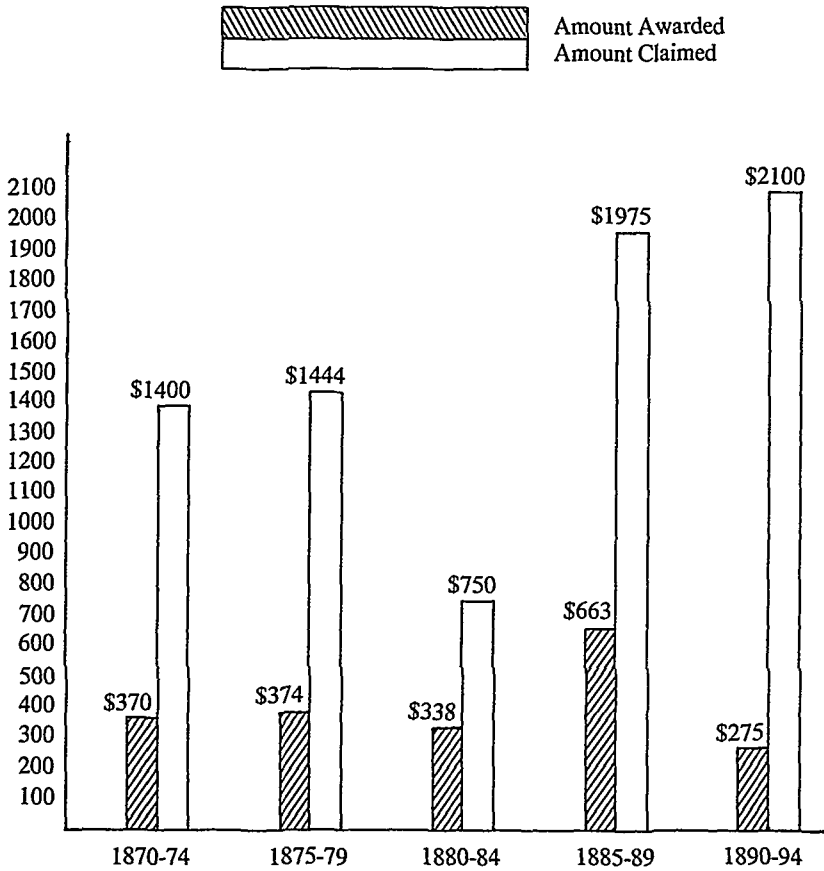
feudal times when it was believed that individuals could hold property rights in other individuals. During the nineteenth century, it came to focus almost exclusively on the relationship between daughters and fathers. In an era when modernizing labour conditions and the phenomena of increased transportation and urbanization were literally breaking apart the traditional working class family, the tort came to represent a deep-rooted desire to turn back the clock. The legal system actively intervened to shore up fathers' property interests in their daughters and to preserve traditional notions of family life, where paternal control over sexual conduct of offspring was more firmly entrenched. Daughters may have had more liberty to participate in sexual encounters, but the law was going to force their seducers to recompense their fathers for the privilege.

This extension of paternal property rights was not without problems in a modernizing society. On the one hand, the increasing independence of young unmarried women contradicted their depiction as a species of paternal property. In cases where women were forcibly or deviously tricked into sexual relations, it was difficult to tell which party was more injured — the father or the woman herself. This provoked concerns that the action should by right belong to the daughter, rather than the family patriarch. Similarly there was some anxiety about penalizing defendants where the evidence indicated that the woman had freely consented to sexual encounters. The nature of the action, however, did permit most courts to override these issues and sustain a father's claim regardless of the inconsistencies that erupted when a feudal concept was grafted upon a modern environment.

Nevertheless, the judges' uneasiness over these difficulties caused them to suspect the evidence of the women involved, and to use various methods to narrow the scope of the action. Despite their rulings, the action remained a healthy and vigorous one, and indeed it came to represent the backbone of many busy nineteenth-century legal practices. Countless fathers brought claims against countless defendants for financial damages to assuage the loss of their daughters' chastity; juries were only too happy to comply with their requests. Although seemingly out of synchronization with modernizing forces, the action was not entirely dysfunctional. Despite the fact that capitalism was offering greater liberty to unmarried working class women, the modernizing culture had no intention of undercutting the patriarchal family. The tort of seduction functioned to reassert feudal power relations inside the family at precisely the moment when the crisis-ridden working class home most needed it. It served as an essential bulwark for the preservation of patriarchal power.

**CHART NO.1: Damages Claimed and Awarded in nineteenth century Canadian Seduction Actions\***

Amounts are listed in Dollars, Calculated as an Average of Amounts Claimed and Awarded in Each Five Year Period.



\*This table has been compiled from the following records: all reported cases in nineteenth century Canada and Ontario Archive records as listed in note 82. Not all cases listed the amount claimed and awarded.

CHART NO. 2: Outcome of Seduction Actions in nineteenth century Canada\*

	Total: 152 cases		52 of 152 cases appealed		Total
	Verdict for plaintiff at trial	Verdict for defendant at trial	Verdict for plaintiff on appeal**	Verdict for defendant on appeal**	
1820-1830	2	0	0	2	2
1831-1840	0	2	1	1	2
1841-1850	8	2	7	3	10
1851-1860	7	0	1	5	6
1861-1870	13	0	7	6	13
1871-1880	63	5	5	2	7
1881-1890	34	3	4	5	9
1891-1900	10	3	2	1	3
TOTAL	137 (90.13%)	15 (9.87%)	27 (51.92%)	25 (48.08%)	52 (100%)

\*This table has been compiled from the following records: all reported cases in nineteenth century Canada and Ontario archival records as listed in fn. 82. Not all cases indicated the outcome.

\*\*"On appeal" includes motions for non-suit on points reserved at trial, motions to set aside non-suits, motions to set aside verdict and motions for new trial.