Left at the alter

For better or worse? Mark Pawlowski looks back on the options available to those on the end of a broken promise to marry

In her 2014 book *Breach of promise to marry: a history of how jilted brides settled scores*, Denise Bates writes:

'While Dickens's embittered spinster Miss Havisham stopped all her clocks on her wedding day and "never since looked upon the light of day", the reality was much brighter for thousands of jilted women. The real Miss Havishams didn't mope in faded wedding finery—they hired lawyers and struck the first "no win, no fee" deals to sue for breach of promise.'

Until 1970, breach of promise to marry was a common law tort under English law. There could be no action, however, unless a contract to marry had been made. No particular form of words was necessary, and the contract did not have to be evidenced in writing. Interestingly, however, the claim could not succeed unless the claimant's testimony was corroborated by some other independent evidence in support of the promise. Although most cases involved a woman whose fiancé had broken off the engagement, it was technically possible for a man to sue for breach of promise. Such actions, however, were exceedingly rare. The remedy was an award of damages which could include, in addition to any damages for direct pecuniary loss, general damages for injury to feelings, reputation and matrimonial prospects.

There were a number of defences available to the action for breach of promise. A defendant was not bound by his promise if he established a false representation, or fraudulent concealment in material particulars, of the pecuniary circumstances or previous life of the claimant. The bad character of the claimant would also excuse the defendant from performance of the contract, unless he or she was aware of the claimant's character before making the promise. In addition, physical or mental incapacity could give rise to a right to terminate the engagement in limited circumstances.

The last celebrated case was in 1969 when Eva Haraldsted sued the footballer George Best for breach of promise. The case, however, never went to trial as Haraldsted received a £500 settlement. The tort was abolished in 1971.

Jactitation of marriage

The word 'jactitation' is derived from the Latin *jacticare*, meaning to boast. In its legal context, it was a matrimonial remedy (akin to the tort of slander of title) involving a claim designed to prevent unwarrantable assertions that a marriage exists. In its 1971 working paper, 'Family Law Jactitation of Marriage', the Law Commission defined the cause of action in the following terms:

'Where the respondent falsely and without the petitioner's assent asserts that he is married to the petitioner, the petitioner can obtain a declaration that he is not, coupled with an order forbidding the respondent from repeating the assertion.'

Here again, there were a number of defences to the claim:

(1) a denial that the assertion was made;
(2) an admission that it was made, but that it was true; and
(3) the misrepresentation was acquiesced in by the petitioner.

A suit for jactitation of marriage could also be used by the parties to obtain a declaration that their marriage was valid. Prior to Lord Hardwicke's Act 1754, which first made a formal ceremony of marriage compulsory, marriage was constituted either by an exchange of vows with the intention that a marriage should come into effect immediately, or by an exchange of promises to be married at a future date followed by cohabitation. Such informality, needless to say, frequently gave rise to doubt as to whether a marriage had taken place and, therefore, until the Act of 1754, a suit for jactitation was the usual means by which questions as to the validity of a marriage were determined. With the requirement of a formal ceremony to constitute a marriage, the need for suits for jactitation largely disappeared.

In 1971, the Law Commission reviewed the law and recommended that jactitation of marriage should be abolished, with the last case being reported in 1968. The right to petition for jactitation was ultimately abolished by s 61 of the Family Law Act 1986.

Criminal conversation

The word 'conversation' is an old term for sexual intercourse no longer in use today. The tort involved an action brought by a husband for damages for breach of fidelity with his wife. Only a husband could be the claimant and only the person with whom the wife had been adulterous could be the defendant. The claim could be brought regardless of whether the wife consented to the adultery. The action could not succeed, however, if the couple were already separated, unless the separation was caused by the person the husband was suing. Interestingly, evidence of adulterous behaviour could only be presented to the court by servants or observers and not by the parties themselves.

Suits of this type were very common in the late 18th and early 19th century justifying large sums of compensation payable to the husband, as each act of adultery could give rise to a separate claim for damages. The tort was abolished in England and Wales in 1857.

Alienation of affections

This tort, which exists now in only a small number of US jurisdictions, involves an action brought by a spouse against a third party alleged to be responsible for damaging the marriage, most often resulting in divorce. The suit does not require proof of extramarital sex and can be brought against any third party (for example, a family member) who has intentionally engaged in conduct which would foreseeably contribute to, or cause loss of, affection between the married couple.

Although the tort is not recognised in this country, it may be open to a spouse to bring a tortious action against a third party for intentional infliction of emotional distress. However, in order to succeed, the claimant would need to show that the defendant intentionally or recklessly inflicted severe emotional distress by behaving in an 'extreme and outrageous' way. **NLJ**

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