Nebraska Law Review

Volume 58 | Issue 2 Article 10

1978

The Tort of Criminal Conversation in Nebraska: *Kremer v. Black*, 201 Neb. 467, 268 N.W.2d 582 (1978)

Donald D. Schneider
University of Nebraska College of Law, donschneiderlaw@yahoo.com

Note

The Tort of Criminal Conversation in Nebraska

Kremer v. Black, 201 Neb. 467, 268 N.W.2d 582 (1978).

I. INTRODUCTION

Traditionally, criminal conversation was a husband's tort action against a man who had engaged in sexual intercourse with the husband's wife. The wife was not a party to the suit. It was considered the civil remedy for the crime of adultery,[1] although conviction of the crime was not necessary to recovery for the tort. It is a cause of action distinct from the other torts involving intentional interference with family relations.[2] The original basis of the tort was the

1. Oliver v. Oliver, 159 Neb. 218, 225, 66 N.W.2d 420, 424 (1954). The most complete history is found in Lippman, *The Breakdown of Consortium*, 30 COLUM. L. REV. 651 (1930). One author, relying upon Lippman, wrote:

> The earliest origins of tort law dealing with interference with family relations and particularly the tort of criminal conversation, may date back as far as the ancient Teutons who took such a harsh view of adultery that their social customs permitted a husband to kill or castrate his wife's lover if he came upon them in flagrante delicto; this later evolved into a right in the husband to abandon his spouse to the lover and demand monetary compensation as well as a new wife. . . . With the advent of Christianity and its disapproval of divorce, the husband's rights *vis a vis* the martial [*sic*] interloper became simply the entitlement to monetary damages.

Note, *The Tort of Criminal Conversation is Abolished in Pennsylvania*, 22 VILL. L. REV. 1253, 1253-54 n.5 (1977) (citations omitted).

2. Alienation of affection and enticement are two other torts involving intentional interference with the family relationship. Alienation of affection involves purposely depriving one spouse of the aid, comfort, assistance, and society of the other. Oliver v. Oliver, 159 Neb. 218, 66 N.W.2d 420 (1954). Enticement consists of a third person purposely inducing a married person to separate from and leave his or her spouse. RESTATEMENT (SECOND) OF TORTS § 684 (1977). Enticement, alienation of affection, and criminal conversation are separate torts, and may exist independent of each other. Despite the distinctions drawn by courts, Prosser states there is "no good reason" to distinguish the three torts, since each involves an interference with the same relational interest, *i.e.*, marriage. W. PROSSER, TORTS § 124 at 876 (4th ed. 1971). However, a significant practical difference is that alienation of affection and enticement are intentional torts requiring a showing of intent and causation; intent would include knowledge that the person was married. RESTATE-

property interest of the husband in his wife,[3] but eventually it was perceived that the cause of action was grounded in a right of consortium.[4] Under modern law a wife has the same standing to bring suit for criminal conversation as a husband.[5]

Criminal conversation has assumed the character of a strict liability tort. Plaintiff need only show marriage and an act of sexual intercourse performed without the consent of the plaintiff. Defendant cannot assert lack of intent, or lack of knowledge that the person was married.[6] Once the prima facie case is established general damages are presumed, although evidence such as the spouse's prior unfaithfulness and aggressiveness or the plaintiff's own unchaste character or cruelty can be introduced to mitigate damages.[7] In Nebraska the cause of action for criminal conversation has been routinely upheld for over seventy-eight years,[8] although elsewhere it has been under increasing attack as an anachronism riddled with abuse and injustice.[9] In the recent case

---

MENT (SECOND) OF TORTS § 683, Comments g, i at 480-81; § 684, Comments f-g at 483-84 (1977). Criminal conversation does not require such a showing. *See* notes 6-7 & accompanying text *infra*.

3. Lippman, *supra* note 1, at 655-56.
4. *Id.* at 651-52. The term consortium is widely used, but is without a precise meaning:

> **Nature of marital interests.** The legally protected marital interests of one spouse include the affections, society and companionship of the other spouse, sexual relations and the exclusive enjoyment of them, services in the home and support.
>
> The word "consortium" is frequently employed in judicial opinions to indicate any or all of those interests of the husband or wife in the marriage relation that receive legal protection by rules of law. The word is therefore ambiguous and is not used in this Restatement.

RESTATEMENT (SECOND) OF TORTS § 683, Comment c at 478 (1977).

5. White v. Longo, 190 Neb. 703, 212 N.W.2d 84 (1973); Karchner v. Mumie, 398 Pa. 13, 156 A.2d 537 (1959).
6. RESTATEMENT (SECOND) OF TORTS § 685, Comments d, f-g at 485-86 (1977).
7. Comment, *Criminal Conversation: Civil Action for Adultery*, 25 BAYLOR L. REV. 495, 497 (1973).
8. Breiner v. Olson, 195 Neb. 120, 237 N.W.2d 118 (1975); White v. Longo, 190 Neb. 703, 212 N.W.2d 84 (1973); Oliver v. Oliver, 159 Neb. 218, 66 N.W.2d 420 (1954); Klinginsmith v. Allen, 155 Neb. 674, 53 N.W.2d 77 (1952); Cantin v. Howard, 131 Neb. 192, 267 N.W. 423 (1936); Baker v. Westing, 102 Neb. 840, 170 N.W. 168 (1918); Wheeler v. Abbott, 89 Neb. 455, 131 N.W. 942 (1911); Smith v. Meyers, 52 Neb. 70, 71 N.W. 1006 (1897).
9. *See* Fadgen v. Lenkner, 469 Pa. 272, 365 A.2d 147 (1976); Comment, *supra* note 7; Feinsinger, *Legislative Attack on "Heart Balm,"* 33 MICH. L. REV. 979 (1935). Prosser has written:

> Those actions for interference with domestic relations which carry an accusation of sexual misbehavior—that is to say, criminal conversation, seduction, and to some extent alienation of affections—have been peculiarly susceptible to abuse. Together with the action for breach of promise to marry, it is notorious that they have afforded a

of *Kremer v. Black*[10] the Nebraska Supreme Court again affirmed the cause of action for criminal conversation without modification, but only over a vigorous dissent which charged that the traditional rules governing this tort need to be changed.[11]

This note will discuss the *Kremer* decision. Although it may have been appropriate for the court to preserve a cause of action for criminal conversation in Nebraska,[12] the majority deferred to the legislature and failed to address or rebut the significant criticism of certain traditional rules governing the cause of action.[13] Not discussed in either opinion was the recently enacted Nebraska Criminal Code, which reflects important changes in public policy regarding family and sexual matters and which, while recognizing the important social interest involved, arguably supports modifications in the cause of action for criminal conversation.[14] While criminal conversation has been challenged as a violation of a constitutionally protected right to privacy,[15] and as a violation of the

---

> fertile field for blackmail and extortion by means of manufactured suits in which the threat of publicity is used to force a settlement. There is good reason to believe that even genuine actions of this type are brought more frequently than not with purely mercenary or vindictive motives; that it is impossible to compensate for such damage with what has derisively been called "heart balm;" that people of any decent instincts do not bring an action which merely adds to the family disgrace; and that no preventive purpose is served, since such torts seldom are committed with deliberate plan. Added to this is perhaps an increasing notion of personal or even sexual freedom on the part of women, and the feeling, illustrated by the current attitude toward divorce, that a home so easily broken up is not worth maintaining.

W. PROSSER, *supra* note 2, at 887 (footnotes omitted). Many of Prosser's criticisms are challenged or rebutted in Note, *The Case for Retention of Causes of Action for Intentional Interference With the Marital Relationship*, 48 NOTRE DAME LAW. 426 (1972).

10. 201 Neb. 467, 268 N.W.2d 582 (1978).
11. *Id.* at 473-79, 268 N.W.2d at 585-88 (McCown, J., dissenting).
12. *See* notes 53-57 & accompanying text *infra*; note 76 & accompanying text *infra*.
13. *See* notes 37-52 & accompanying text *infra*.
14. *See* notes 58-75 & accompanying text *infra*.
15. For a discussion of this issue, which was suggested in a concurring opinion in Fadgen v. Lenkner, 469 Pa. 272, 283-84, 365 A.2d 147, 152-53 (1976) (Manderino, J., concurring), see Note, *supra* note 1, at 1262-64. The author found little support for the proposition that a right of privacy included the right to commit adultery. Although Planned Parenthood v. Danforth, 428 U.S. 52 (1976), held that a state cannot condition an abortion in the first trimester upon the husband's consent, the Court noted in Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973): "Our Constitution establishes a broad range of conditions on the exercise of power by the States, but for us to say that our Constitution incorporates the proposition that conduct involving consenting adults only is always beyond state regulation, is a step we are unable to take." *Id.* at 68 (footnotes omitted).

Another weakness of this approach is that the right to privacy is grounded

equal protection clause,[16] these arguments will not be discussed in this note.

II. FACTS

The plaintiff was married on February 14, 1976. Both she and her husband had children from prior marriages. They had met about a year earlier, had shortly thereafter begun living together, and had engaged in a continuing sexual relationship prior to the marriage. The evidence indicated that in early 1976, plaintiff had given an ultimatum to either agree to marriage by mid-February or move out. Both their premarital and marital relationships were stormy at best, with frequent arguments and short separations followed by reconciliation.[17] Six months after their marriage, following the second major fight within a matter of days, the husband chose to leave and was told by plaintiff that if he did so he was never to come back. He left, subsequently instituting a petition for dissolution of marriage on August 16, 1976.[18]

Defendant had met plaintiff's husband five years earlier at a business lunch that defendant attended with her father, and had renewed the aquaintance at a similar business lunch in January 1976, before he and plaintiff were married. They met again at a business meeting in May or June, but apparently had never dated or been alone prior to July 20, the date plaintiff's husband had left her.[19]

Plaintiff's husband temporarily moved in with a male friend. At a meeting with defendant in early August, he advised her that he was securing a dissolution of his marriage.[20] Prior to filing the pe-

---

in the fourteenth amendment, and the cases expounding it have involved impermissible state interference with this right. Griswold v. Connecticut, 381 U.S. 479 (1965). Criminal conversation involves a private cause of action and unless providing a forum for the adjudication of private grievances constitutes sufficient "state action," it does not come within the ambit of the fourteenth amendment. There seems to be little support for such an extension of the "state action" concept. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 462 (1978).

16. In dictum the Pennsylvania Supreme Court suggested that the action for criminal conversation might be a denial of equal protection in that only one of two persons engaged in the same act was liable to the plaintiff. Fadgen v. Lenkner, 469 Pa. at 280-81 n.7, 365 A.2d at 151 n.7. Equal protection also comes within the ambit of the fourteenth amendment, and concerns impermissible state action. *See* note 15 *supra*.
17. 201 Neb. at 468-69, 268 N.W.2d at 583.
18. *Id.* at 468-69, 268 N.W.2d at 583; Brief for Appellant at 6-21.
19. 201 Neb. at 468, 268 N.W.2d at 583; Brief for Appellant at 6-21.
20. Although it was clear that defendant was aware of his marital situation, there was disputed testimony regarding the nature of his representations to her. Defendant's brief states: "She had been advised . . . that Mr. Kremer *was securing* a dissolution of marriage . . . ." Brief for Appellant at 11 (emphasis

tition for dissolution of marriage on August 16, he moved in with defendant. It was admitted by defendant that they engaged in sexual relations.[21] The dissolution of marriage decree for plaintiff and her husband was entered by the district court on March 1, 1977.[22]

Plaintiff brought suit in the District Court for Douglas County on November 3, 1976, alleging causes of action for alienation of affection and criminal conversation.[23] The jury found for defendant on the first count, which was not appealed. The jury returned a verdict for plaintiff on the second count and assessed $10,000 damages. Following denial of motion for new trial, defendant appealed to the Nebraska Supreme Court.[24]

III. DECISION

A. Majority Opinion

The first assignment of error was that the trial court failed to instruct the jury that malice, intent, and causation are elements that must be proved to sustain a recovery for criminal conversation.[25] The Supreme Court reasoned that defendant's argument was in effect an attack on the existence of a common law cause of action for criminal conversation, and was a plea for its abolition by the court.[26] Noting that "[t]he sexual relation of marriage is one

---

added). Plaintiff's brief contends she was informed, "rather that he *was going to* do so . . . ." Brief for Appellee at 6 (emphasis added).

21. 201 Neb. at 469, 268 N.W.2d at 583.
22. *Id.*
23. Brief for Appellant at 6. *See* note 2 *supra*.
24. 201 Neb. at 468-69, 268 N.W.2d at 583-84.
25. 201 Neb. at 469, 268 N.W.2d at 583. The court noted: "The defendant concedes that these are not elements of the action, and cites no authority to support this precise contention." *Id.* *See* notes 6-7 & accompanying text *supra*. Defendant alleged that due to the presumption of damages, jury awards result from emotional and moral indignation and tend to be punitive in nature rather than reflecting actual pecuniary loss. Under traditional tort theory, malice and intent must be established in order to recover punitive damages. W. PROSSER, *supra* note 2, § 2, at 9-10. Apparently defendant reasoned that since criminal conversation awards are punitive in nature, plaintiff should have this additional burden. This argument seems particularly weak since Nebraska does not allow punitive damages. Wilfong v. Omaha & Council Bluffs St. R. Co., 129 Neb. 600, 262 N.W. 537 (1935); Boyer v. Barr, 8 Neb. 68, 74-75 (1878).

    Others have suggested that intent or causation should be elements of an action for criminal conversation. *See* Note, *supra* note 9. However, the attempt to require proof of malice as a necessary element of plaintiff's case is a novel approach, and is without support from the cases or commentators. The Iowa Supreme Court has held that legal malice, which is necessary for punitive awards in Iowa, is presumed in an action for criminal conversation. Giltner v. Stark, 219 N.W.2d 700, 708 (Ia. 1974).
26. "The defendant, in effect, asks this court to judicially legislate the cause of

that must be maintained inviolate for the well-being of society,"[27] the court cited secondary authority to establish that engaging in sexual intercourse with a married person is a tortious invasion of the other spouse's rights.[28] It refused to abolish the action for criminal conversation "as it presently exists,"[29] stating that such a decision is for the legislature, since it involves a social policy-making area.[30]

Defendant also contended that a new trial should be granted because of the excessiveness of the award. She cited a prior Nebraska case, *Breiner v. Olson*,[31] which stated: "Jury verdicts . . . [in a criminal conversation action] should be set aside . . . as excessive only where it clearly appears that the award was the result of passion and prejudice on the part of the jury."[32] However, the court observed that *Breiner* involved facts similar to the case at bar, and in it a $25,000 award was upheld.[33] It apparently did not find it significant that *Breiner* involved a marriage that had lasted ten years and had produced four children, with substantial evidence that defendant, who was plaintiff's employer, had engaged in adulterous relations with plaintiff's spouse for nearly two years. In addition, defendant fired plaintiff after being caught with plaintiff's wife, refusing to pay him back wages that were owed.[34]

In *Kremer*, the court noted that plaintiff's marriage had lasted several months; that there had been extended periods of harmony; that despite certain difficulties the couple had always reconciled their disputes; that plaintiff had attempted to convince her husband to return home; and that the criminal conversation occurred before the petition for dissolution of marriage was filed.[35] The court then cited the Nebraska rule governing damages in a criminal conversation action: "Courts will seldom interfere with the

---

action for criminal conversation out of existence." 201 Neb. at 471, 268 N.W.2d at 584. The majority opinion did not consider whether the court could retain the cause of action while allowing modification of the traditional rules.

27. *Id.* at 470, 268 N.W.2d at 584.
28. The citation was to 41 AM. JUR. *Husband and Wife* § 476, at 402 (1968).
29. 201 Neb. at 470, 268 N.W.2d at 584.
30. "Defendant, in effect, calls on this court to define and strike the balance on the volatile moral issues involved. Even a minimum of judicial restraint would indicate that the Legislature is the proper forum for relief, if such relief is advisable." *Id.* at 471, 268 N.W.2d at 584. For an analysis of the failure of legislatures generally to respond to such invitations, see note 49 *infra*.
31. 195 Neb. 120, 237 N.W.2d 118 (1975).
32. *Id.* at 131, 237 N.W.2d at 126.
33. The court noted the following similarities: "proof of only one act of intercourse, and no direct evidence of pecuniary damage, and as here, the jury returned a verdict for the defendant in the accompanying action for alienation of affection." 201 Neb. at 472, 268 N.W.2d at 585.
34. 195 Neb. at 122-24, 237 N.W.2d at 122-23
35. 201 Neb. at 468-69, 268 N.W.2d at 583.

finding of the jury in such actions, for the reason that there is no method of determining exactly the proper pecuniary compensation which should be awarded."[36] Under these facts the jury verdict apparently could not be found excessive, and the judgment was affirmed.

B. Dissenting Opinion

Although the dissent did not seek abolition of the cause of action for criminal conversation, it did propose significant modifications in the traditional rules governing the tort. The customary lack of defenses was severely criticized.[37]

> A cause of action for criminal conversation ought to be treated in the same fashion as the other common law causes of action for intentional interference with the marital relationship. An intention to interfere with a marital relationship should not be presumed where the defendant does not know, or have reason to know, that the other individual is married, or has been actively misled into believing the other individual was unmarried. Such facts should constitute a complete defense to an action for the intentional tort of criminal conversation.[38]

The conventional presumption of general damages upon the mere showing of a valid marriage and a single act of sexual intercourse[39] was also criticized. Justice McCown noted that in the other common law torts for interference with the marital relation a defendant generally cannot be held liable for damages where the acts complained of occur after a complete or permanent breach of the marriage, such as separation.[40]

---

36. 201 Neb. at 473, 268 N.W.2d at 585. Other courts have limited the recovery under criminal conversation through more liberal approaches to review of damage awards. In Roach v. Keane, 73 Wis. 2d 524, 243 N.W.2d 508 (1976), a total award of $30,000 was reduced to $5,100, on the grounds that plaintiff's extramarital affairs and abuse of his wife throughout the marriage indicated his low estimation of the value of the marriage. Both the punitive portion and the compensatory portion were reduced. *Id.* at 538-42, 243 N.W.2d at 516-18.
37. The dissent quoted a Pennsylvania case to show the severity of the no-defense rule: "A man who has sexual relations with a woman, not his wife, assumes the risk that she is married. Even her misrepresentation that she is single affords the offender no defense to liability for criminal conversation." 201 Neb. at 474-75, 268 N.W.2d at 586 (McCown, J., dissenting) (quoting Antonelli v. Xenakis, 363 Pa. 375, 378, 69 A.2d 102, 103 (1949)).
38. 201 Neb. at 475-76, 268 N.W.2d at 586. For discussion of the other torts involving intentional interference with the family relationship, and their requirement of a showing of knowledge and intent, see note 2 *supra*. Of course it is not entirely certain that Justice McCown's proposal to allow the defense of ignorance concerning the marital state of one's sexual partner would have helped defendant, given her general knowledge of the marriage. Had Justice McCown prevailed it would have been necessary to remand to allow a jury to decide this issue under the new rule.
39. *See* notes 6-7 & accompanying text *supra*.
40. 201 Neb. at 476-77, 268 N.W.2d at 586-87.

> Meanwhile juries in criminal conversation cases continue to return very large verdicts reflecting exemplary and punitive awards. It should be the rule that when the conduct which forms the basis for an action for criminal conversation occurs after a permanent separation of the plaintiff and his or her spouse, and a decree of divorce follows, damages for criminal conversation, at most, should be restricted to nominal damages, in the absence of proof of special damages.[41]

The dissent also attacked the majority opinion for holding that only the legislature could change or abolish the cause of action for criminal conversation. Justice McCown noted that the tort was of judicial origin, and that the rules governing it were court-made rules. He cited a prior Nebraska case holding that the supreme court could modify the common law as necessary to keep its principles relevant,[42] and another case in which the court had specifically altered the rights of the parties in a cause of action arising in tort.[43] Arguing that under the traditional rules criminal conversation has become an anachronism, he added: "[I]t's injustices should not be continued . . . simply because our previous decisions have followed the traditional rules for a very long time. Justice should not be so readily sacrificed on the altar of stare decisis."[44] He concluded that the verdict was punitive, directed toward the wrong person, and should be reduced to a nominal amount.[45]

IV. ANALYSIS

A. Altering the Rules

One defect in the majority opinion is its failure to address whether the court could have retained a cause of action for crimi-

41. *Id.* The dissent then stressed the shortness and sexual casualness of the marriage, and that the couple had permanently separated before the beginning of the relationship between plaintiff's husband and defendant. However, the dissent seems to be assuming after the fact that indeed the couple had permanently separated. The majority opinion reasoned that a jury could reasonably conclude that "but for" the acts of defendant, the couple might have reconciled. The court noted: "[T]he evidence supports the conclusion that during the whole period of the marriage and the courtship . . . the plaintiff and Kremer had numerous difficulties and fights, and temporary separations, *but would become reconciled and continue their relationship.*" *Id.* at 469, 268 N.W.2d at 583 (emphasis added). Thus, the proposed rule on damages would also have required a remand for a jury determination of whether the separation was in fact permanent at the time the act of criminal conversation occurred.

42. Johnson v. Tautges, Rerat & Welch, 146 Neb. 439, 445-50, 20 N.W.2d 232, 235-37 (1945) (altering personal jurisdiction and service of process rules).

43. Brown v. City of Omaha, 183 Neb. 430, 434-35, 160 N.W.2d 805, 808 (1968) (limiting governmental immunity from tort liability).

44. 201 Neb. at 479, 268 N.W.2d at 588.

45. *Id.*

nal conversation while modifying the existing rules.[46] It would seem that the court could have made such changes had it chosen to do so. Although no precedent from other jurisdictions exists for modifying the criminal conversation rules, such a result has been urged.[47] Neither opinion in *Kremer* discussed whether the modifications suggested by Justice McCown would so alter the character of the traditional cause of action that it would be abolished except in name.[48]

The argument that only the legislature should make such changes seems particularly weak, since it would seem that the courts are far better suited to such a task.[49] It is undisputed that

46. It would appear that the Pennsylvania Supreme Court made the same assumption in the recent case of Fadgen v. Lenkner, 469 Pa. 272, 365 A.2d 147 (1976), although with the opposite result. The court examined the common law origins and development of the tort and decided that the rationale underlying denial of any defense except consent of plaintiff is unacceptable in today's society. Its origin was the near chattel relation between husband and wife at common law, with the wife deemed incapable of giving her consent to sexual intercourse with another man. *Id.* at 277-78, 365 A.2d at 150. The court also criticized the presumption of general damages. However, instead of considering modification of the rules, the court abolished the cause of action altogether, stating that it was an anachronism because "under our new Crimes Code, the Pennsylvania legislature has seen fit to abolish the crime of adultery, serving to decriminalize the very behavior upon which an action in criminal conversation rests." *Id.* at 280 n.7, 365 A.2d at 151 n.7. A dissenting opinion held that the rules should be modified, and that with modification the cause of action should be retained. *Id.* at 284-87, 365 A.2d at 153-55 (Roberts, J., dissenting). Justice Roberts believed that as a result of abolition of the crime of adultery, the civil action of criminal conversation should be retained as the only remaining remedy for the wrong.

47. *See* Note, *supra* note 9.

48. The blurring suggested by Prosser would seem complete under the proposed changes. *See* note 2 *supra*.

49. It has been persuasively argued by others that reform of tort law is an area particularly ill-suited for action by legislatures, but well suited to reform by an informed judiciary. *See* Peck, *The Role of the Courts and Legislatures in the Reform of Tort Law*, 48 MINN. L. REV. 265 (1963). Professor Peck did not question the role of legislatures in law-making, but concluded that in tort reform legislatures generally have inherent weaknesses. These include the general indifference of legislators to tort law-making, reluctance to involve themselves in an issue that is irrelevant to most of their constituents, inadequate committee hearings and public hearings on such subjects, tendency of legislatures to act only on bills pushed by outside interests, and nonexistence of organized pressure groups to lobby for specific tort reforms. He suggested that courts should always evaluate the comparative ability of a court or legislature to make the proposed alteration given the context of the case before them. *Id.* at 312.

Using this test it would seem that reform of the cause of action for criminal conversation should be expected to come from the judicial branch and not the legislature, since few legislators would want to involve themselves with the reform of an isolated cause of action involving marital infidelity, and certainly organized pressure groups are not likely to lobby for its reform or abo-

the Nebraska Supreme Court has previously modified common law rules governing other tort areas.[50] In *Brown v. City of Omaha*,[51] the court stated, "We are convinced that the rule . . . is of judicial or common law origin, and that this court has power to modify it in the absence of legislative action to the contrary."[52]

Arguably the best explanation of the majority opinion's rejection of any changes is that the *Kremer* facts and the posture of the litigation[53] simply were not sufficient to overcome the Nebraska Supreme Court's predisposition toward stare decisis:

> The doctrine of stare decisis is grounded on public policy and, as such, is entitled to great weight and must be adhered to, unless the reasons therefor have ceased to exist, are clearly erroneous, or are manifestly wrong and mischievous or unless more harm than good will result from doing so.
>
> . . . .
>
> . . . Before overruling a former decision deliberately made, the court should be convinced, not merely that the case was wrongly decided, but that less injury will result from overruling than from following it.[54]

Defendant had not pointed to any statutory or decisional trends in Nebraska which would justify the court in making any changes in a long established tort.[55] Neither had she presented any empirical data to suggest a change in public attitude toward sexually permissive conduct that would justify a change in the rules.[56] The

---

lition. Whether the facts and posture of *Kremer* justified making significant changes in the cause of action for criminal conversation is debatable. *See* notes 53-57 & accompanying text *infra*. However, it is clear that simply saying such reform lies with the legislature begs the question. If changes are needed in the rules governing criminal conversation the courts are in a comparatively better position to make such changes than the legislature.

50. Brown v. City of Omaha, 183 Neb. 430, 434-35, 160 N.W.2d 805, 808 (1968) (limiting governmental immunity from tort liability).
51. *Id.* at 430, 160 N.W.2d at 805.
52. *Id.* at 434, 160 N.W.2d at 808.
53. *See* notes 25, 38 & 41 *supra*.
54. Muller v. Nebraska Methodist Hosp., 160 Neb. 279, 282-83, 70 N.W.2d 86, 88-89 (1955) (citations omitted). *But see* Spiker v. John Day Co., 201 Neb. 503, 512-13, 270 N.W.2d 300, 305-07 (1978) (explicitly overruling prior case law interpreting permissible workmen's compensation claims). *Spiker* is noted in Note, *Expanding Liability Under the Nebraska Workmen's Compensation Act*, 58 NEB. L. REV. 565 (1979).
55. The Nebraska situation in mid-1978, where no new criminal code was in effect, is sharply distinguishable from the situation in *Fadgen*, where Pennsylvania had statutorily abolished the crime of adultery. *See* note 46 *supra*.
56. *See* Ewoldt v. Yentes, Doc. 713 No. 174 (District Court of Douglas County, Nebraska, March 3, 1977) (order overruling demurrer). A demurrer to a cause of action for criminal conversation had been filed which asserted that the action was unconstitutional, citing Fadgen v. Lenkner, 469 Pa. 272, 365 A.2d 147 (1976). In overruling the demurrer, Judge John C. Burke commented:

majority could have buttressed its decision with recent decisions from other jurisdictions which have shown a marked reluctance to interfere with traditional tort areas involving interference with family relations.[57]

B. Impact of the New Criminal Code

1. Impact on Damages

When the Pennsylvania Supreme Court abolished the cause of action for criminal conversation, one of the reasons stated was that it was an anachronism since the Pennsylvania legislature had abolished the crime of adultery,[58] thus eliminating the criminal element of the tort of criminal conversation. Although the Nebraska legislature made a complete revision of the Nebraska Criminal Code in its 1977 session, the changes were not effective until January 1, 1979, and had no effect on the *Kremer* case. The new Criminal Code retains adultery as a crime but with a greatly narrowed definition.[59] Now only a married person who deserts his or her marriage partner, actually cohabits with another person, and under those circumstances has sexual intercourse is guilty of adultery.[60] Under the old law, in effect at the time of the events in *Kremer*, both the spouse and the cooperating partner were guilty of adultery, and desertion of family and cohabitation were not necessary requirements.[61] A single act of sexual intercourse was ade-

---

> While it may be true that today's society places greater inviolability around a high school football player's intentions in his selection of a university than it does around the marriage contract, yet, this court is not aware of any "new conditions" today that were not in existence prior to the statehood of Pennsylvania.

Ewoldt v. Yentes, slip op. at 1.

57. In a recent case involving alienation of affection, the Minnesota Supreme Court stated: "Until the legislature declares that individuals are free to intrude themselves upon the special relationship which exists between a husband and wife, we feel no compelling sense of urgency to do so." Gorder v. Sims, 306 Minn. 275, 282, 237 N.W.2d 67, 71 (1975). The Supreme Court of Oregon showed even more restraint in refusing to alter a $100,000 damage award or abolish the cause of action for criminal conversation, considering that in the time period between the trial court decision and review by the Supreme Court the Oregon legislature had abolished the cause of action for criminal conversation. Brown v. Vogt, 272 Or. 482, 538 P.2d 362 (1975). The new law was not yet effective at the time of the court's decision.

58. Fadgen v. Lenkner, 469 Pa. 272, 280-81 n.7, 365 A.2d 147, 151 n.7 (1976).

59. NEB. REV. STAT. §§ 28-101 to -1475 (Cum. Supp. 1978) (effective Jan. 1, 1979).

60. "Any married person who deserts his or her spouse and lives, cohabits, and engages in sexual . . . [intercourse] with another person . . . commits adultery." NEB. REV. STAT. § 28-704 (Cum. Supp. 1978) (effective Jan. 1, 1979).

61. NEB. REV. STAT. § 28-902 (Reissue 1975) (repealed Jan. 1, 1979). The statute was cumbersomely drawn, but managed to draw in any combination of married or unmarried person, whether in isolated incidents or by desertion and cohabitation. Both participants were guilty of adultery.

quate for conviction for adultery[62] and to sustain damages for criminal conversation.[63]

In changing the law the Nebraska legislature expressed a change in public policy toward sexual conduct.[64] Although retention of a crime of adultery indicates that the Nebraska legislature feels that the public interest demands protection of the marriage relationship through sanctions against adultery, the significant difference is that this interest has been much more narrowly defined. Only a particular kind of sexual misconduct outside the marriage relation is defined as an intrusion sufficient to warrant condemnation by the state. It would seem that the narrow definition of adultery in the new Criminal Code, plus the failure to include other types of sexual activity previously classified criminal,[65] supports a conclusion that in future decisions the Nebraska Supreme Court should narrow the scope of the cause of action for criminal conversation.

Now that the crime of adultery has been redefined, isolated incidents of marital infidelity, unaccompanied by desertion of family or cohabitation with the sexual partner, should either no longer be grounds for a judicially imposed civil remedy against the partner or should not be the basis for an award of more than nominal damages absent a showing of intent and actual damages. This would tend to put the civil penalties for extramarital sexual activities in line with the criminal sanctions. However, whether or not the offense of adultery has been committed should be determined with reference to the plaintiff's spouse rather than with reference to the defendant since, under the new Criminal Code definition, it is possible for one participant in a sexual activity to commit adultery, but not the other. For example, in *Kremer*, plaintiff's husband would have met the statutory definition since he had deserted his spouse and cohabited with defendant, but defendant would not have met the statutory definition since she was not married. In the

62. State v. Byrum, 60 Neb. 384, 83 N.W. 207 (1900).
63. Breiner v. Olson, 195 Neb. 120, 237 N.W.2d 118 (1975).
64. The preamble to the new Criminal Code states:

> The general purposes of the provisions . . . are:
> (1) To forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm *to individual or public interests*;
> . . . .
> (3) To safeguard conduct that is without fault and which is *essentially victimless* in its effect from condemnation as criminal;
> (4) To give *fair warning* of the nature of the *conduct* declared to constitute an offense.

NEB. REV. STAT. § 28-102 (Cum. Supp. 1978) (effective Jan. 1, 1979) (emphasis added).
65. *See* note 69 *infra*.

future, in order to state a cause of action for criminal conversation, plaintiff should be required to establish that his or her spouse's activities were within the statutory definition of adultery and that, as a result, plaintiff suffered actual damages. It should not be necessary for plaintiff to establish that defendant had also committed adultery, for that would deny plaintiff recovery if defendant were unmarried.

2. Impact on Defenses

A further consideration is the impact of the new Criminal Code definition of adultery on the issue of whether defenses should be allowed in an action for criminal conversation. Under the old Code, cohabitation and sexual intercourse between unmarried adults was a crime.[66] In addition, a defendant in a suit for criminal conversation could not raise as a defense his or her lack of knowledge that plaintiff's spouse was married or had represented himself or herself to be unmarried.[67] One possible basis for denying a defense of lack of knowledge was that, by definition, defendant was engaged in a criminal act, and one wrong should not be allowed as a defense against another.[68] Now, with certain clearly defined exceptions, sexual intercourse between consenting adults, married or unmarried, is no longer a criminal act in Nebraska.[69] In these situations, in which it is no longer a criminal act for a person to engage in sexual relations with a person to whom he or she is not married, lack of knowledge of the sexual partner's marital status should now be permitted as a defense in a criminal conversation tort action. Such a defense would prevent the imposition of

66. NEB. REV. STAT. § 28-928 (Reissue 1975) (repealed Jan. 1, 1979).

67. *See* notes 6-7 & accompanying text *supra*. By this feature, the tort becomes one of strict liability once the prima facie case of a marriage and an act of sexual intercourse is established. General damages are presumed, and the only defenses are that plaintiff consented, or that no act of sexual intercourse occurred.

68. Only the husband's consent worked as a defense at common law since the wife had no legal status and was, therefore, incapable of giving consent. Fadgen v. Lenkner, 469 Pa. at 277, 365 A.2d at 150. However, this narrow explanation of the rule should not obscure the great moral indignation that has always surrounded the cause of action. This factor became increasingly important as the protected interest shifted from a property right to the more abstract concept of injury to the right of consortium. Lippman, *supra*, note 1, at 655-60.

69. Criminal Code, L.B. 38, § 328, 1977 Neb. Laws 141, repealed all prior sections of the Criminal Code except those reassigned to title 14 of the new Code. Under the new Code the only situations in which consenting adult sexual activity is made criminal are incest, adultery (as narrowly defined, *see* notes 60-61 & accompanying text *supra*), prostitution, publicly displayed sexual activity, or sexual activity between a human and an animal. NEB. REV. STAT. §§ 28-703, 704, 801, 806, 1003 (Cum. Supp. 1978) (effective Jan. 1, 1979).

harsh economic penalties upon a person who participated in a sexual activity that is no longer a crime, and who was not aware of his or her partner's marital status.

Allowing the defense of lack of knowledge makes even more sense in light of the fact that the strict liability rule evolved when only husbands had a cause of action for criminal conversation. The wife, having no legal status, was incompetent to make representations about anything affecting her husband's legal rights.[70] The shift from a husband's strict property right in his wife as a basis for criminal conversation to the more abstract concept of consortium[71] reinforces the logic of modifying rules arising in an earlier period.

C. A Socially Cognizable Interest

Between the extremes of the isolated sexual encounter with a person who does not know of his or her partner's marital status and the clearly proscribed desertion and cohabitation lies the more difficult issue whether rules on damages and defenses should be modified in the case of the spouse who continues his or her marital relationship while engaging in a continuing sexual relationship with a partner who is aware of the marriage. Such activity is not classified criminal under the new Nebraska Criminal Code. However, "[i]f . . . the basis of the tort of criminal conversation is perceived as the protection of conjugal rights—meaning simply the protection of the reasonable expectations of spouses surrounding the marital relationship—it becomes more difficult to deny the existence of a socially cognizable interest."[72] One author has stated: "A more relevant question is whether a family member's interest in the continued harmony of his home is of sufficient magnitude to warrant judicial protection from those who would *intentionally interfere* with it."[73] A cause of action for criminal conversation should exist to deter extramarital relationships and prevent knowing interference with a marriage.[74] But, by permit-

70. Fadgen v. Lenkner, 469 Pa. at 277, 365 A.2d at 150.
71. *See* notes 3-4 & accompanying text *supra*.
72. Note, *supra* note 1, at 1260.
73. Note, *supra* note 9, at 426 (emphasis added). The author concluded that the interest in the "harmony of his home" did warrant judicial protection, but through a cause of action for criminal conversation permitted only when intentional interference occurred.
74. Breiner v. Olson, 195 Neb. 120, 237 N.W.2d 118 (1975). *See* notes 33-34 & accompanying text *supra*. The potential injustice resulting from having no cause of action for criminal conversation is shown by a case in which the plaintiff's wife, while undergoing treatment by her psychiatrist, was persuaded to have sexual relations. Nicholson v. Han, 12 Mich. App. 35, 162 N.W.2d 313 (1968). The husband's complaint was dismissed on the grounds it amounted to a

ting the raising of lack of knowledge or intent as a defense, the cause of action would no longer have the characteristics of a strict liability tort. This is highly desirable because it retains the cause of action while removing the feature that can too easily lead to harsh results. Such a change brings criminal conversation into line with the other tort actions governing intentional interference with the marital relationship.[75]

V. CONCLUSION

In today's more sexually permissive society, many are no doubt shocked that one party to a willing sexual encounter was sued for $10,000 by her partner's spouse. They would argue that sexual activity between consenting adults is their own business, and that in this case the only person who injured the plaintiff was her husband. They would, therefore, conclude that the Nebraska Supreme Court was wrong in *Kremer*. Although such an argument is philosophically consistent, it ignores the established law in this area. It is an unfair condemnation of a court whose fundamental purpose is to interpret and construe the law, not create it. Despite the inherent potential for abuse which has led several states to statutorily abolish the cause of action, there has been no clear abuse of criminal conversation in Nebraska such as to prompt the legislature to abolish it.[76] Although the decision in *Kremer* may have been justified by the facts, the court should have dealt with the issue whether the cause of action should be modified. The impact of the new Nebraska Criminal Code may allow the court to distinguish prior cases, and with the right factual situation before it, to make significant changes in the cause of action for criminal conversation in Nebraska.

Donald D. Schneider '80

---

charge of criminal conversation or alienation of affections, and both actions were abolished by statute in Michigan. *Id.* at 43-44, 162 N.W.2d at 317. Also, the action should continue to exist as a possible civil remedy for the family of a rape victim. Jacobson v. Siddal, 12 Or. 280, 284-85, 7 P. 108, 110 (1885).

75. Alienation of affection and enticement have always required a showing of intent and knowledge that the person was married. *See* note 2 *supra*.

76. Compare the $10,000 award in *Kremer* to the $100,000 in Brown v. Vogt, 272 Or. 482, 538 P.2d 362 (1975), or the $60,000 in Giltner v. Stark, 219 N.W.2d 700 (Ia. 1974). Solicitation of sexual intercourse by plaintiff's spouse did not deter a New York jury from awarding $50,000 in a case which eventually went to the United States Supreme Court when defendant tried to avoid his liability through a declaration of bankruptcy. Tinker v. Colwell, 193 U.S. 473 (1904).