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OPINION

Heart-balm statutes: Can money heal heartache?

By Vicki L. Shemin

In a 15th century poem attributed to James I of Scotland, Cupid has three arrows: gold, for a gentle "smiting" that is easily cured; the more compelling silver; and steel, for a love-wound that never heals. Indeed, romance, rancor and revenge often comprise the trilogy of arrows in the quivers of our impassioned clients as well.

In times past, if Cupid's arrow went deliberately awry, there was a cadre of heart-balm torts ("amatory torts") to help salve the truly broken-hearted, or truly vengeful, in the form of remedies levied against the alienator or adulterer: "criminal conversation" (suing a third party for adultery); "alienation of affection" (suing a third party for causing marital desertion); "breach of promise to marry" (suing for inducing a woman to engage in sexual behavior that she would not have engaged in but for her marital expectations); and "seduction" (traditionally the prerogative of an unmarried woman's father to sue for social injury damages resulting from premarital sex or unwed motherhood).

Historical context

Beginning in the 1930s, common law protections for the emotionally wounded were eroded when sweeping statutes, colloquially (and ironically) known as "heart-balm" acts, abolished amatory torts as antiquated, offensive to contemporary notions of justice, and subject to abuse by blackmail.

Following suit, Massachusetts codified an act abolishing causes of action for breach of contract to marry, alienation of affection, and criminal conversation "with a view to preserving the marriage institution and protecting the public morals."

Our law, G.L.c. 207, §§47A and 47B (1938), draws a bright line by prohibiting the formerly cognizable torts of breach of contract to marry, alienation of affection, and criminal conversation — and, by further barring any actions, suits or proceedings in connection with those amatory torts.

Antiquity meets modernity: recent Massachusetts cases

Lest one think these statutes are mere nostalgic remnants, they're alive and well in six states, most notably in North Carolina.

Even in Massachusetts, our courts have limned the statutory metes and bounds for potential recovery under these anachronistic remedies. In *Shea v. Cameron*, 92 Mass. App. Ct. 731 (2018), decided last month, the Appeals Court considered whether a wife had a right to seek justice by invoking §47A due to her husband's alleged fraudulent inducement to marry.

When Susan discovered Michael was enamored of another, she filed a complaint for annulment. At a deposition, Michael stated he was "unable to love [Susan] very early in the marriage" and he never believed she was his "one true love."

The parties entered into a joint stipulation of annulment based on Michael's fraud, and the marriage was ended ab initio. However, one day before entering into that joint stipulation, Susan filed a complaint in Probate Court related to the stipulated fraud. As soon as the judgment of annulment entered, Michael was served with the complaint as he exited the courtroom.

Susan wasn't deterred when the Probate Court dismissed her complaint for lack of subject matter jurisdiction; she filed the same claims in District Court. Her theory of recovery on all eight claims of alleged amatory torts was rooted in Michael's deceitful claims of love, which induced her to enter into a romantic relationship and marriage.

Summary judgment entered in Michael's favor as the judge concluded that he was prohibited as a matter of law from having "the court intrude into the private and personal relationship and provide remedy for the alleged harms."

Susan, still undeterred, appealed.

The Appeals Court noted that the heart-balm act should be read broadly to further what it gleaned as the legislative intent that courts not delve into the minds of consenting parties to ascertain their sincerity.

Notwithstanding, the court gave nod to Susan's "artful pleadings": whereas in the typical heart-balm action, a party sues as they're wronged because their intended wouldn't marry them, here, the wife asserted she was wronged in being fraudulently induced into marriage.

In *Alkhairy v. Ahmad*, 33 Mass. L. Rep. 260, a 2016 Superior Court case in search of an actionable remedy, the bride's father sought to recoup money damages when the groom notified the bride via email that he was backing out of the wedding six weeks before the ceremony.

The plaintiff sought recovery for almost $250,000 conferred on his future son-in-law for expenses related to his medical career, rent, citizenship fees and the wedding.

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The judge dismissed all claims as not actionable under §47A (but without prejudice, granting leave for the plaintiff to re-plead some claims if he could prove certain expenditures were valid loans).

Some courts have been willing to loosen the heart-balm act strictures if they concluded that the injury arose not from the loss of the beloved but from gifts in anticipation of marriage.

In *De Cicco v. Barker*, 339 Mass. 457 (1959), the Supreme Judicial Court carved out a common law exception to §47A in an equity suit for recovery of gifts given in contemplation of marriage. When his fiancée broke off the engagement, the plaintiff sought to recover a 6-carat diamond ring given in contemplation of marriage.

The SJC reasoned that, although §47A purports to abolish any right of action, whatever its form, premised upon a breach of promise, the case at bar couldn't have been the kind of suit for which the Legislature intended no remedy.

Despite the fact that the breach of contract to marry precipitated the lawsuit, the action wasn't to recover for the breach itself. Therefore, it would have been an overly broad interpretation to find that the recovery of the ring was not actionable.

Modernity meets antiquity: a southern perspective

Alienation of affection litigation (colloquially, "homewrecker" lawsuits) have become de rigeur in North Carolina as multiple big-money cases have garnered considerable publicity.

Whereas the rest of the country has almost universally abolished these suits, there have been over 200 successful recovery cases in North Carolina — with million-dollar verdicts not uncommon.

Although monetizing heartache is a speculative endeavor, in 2010, a North Carolina jury delivered a $9 million verdict against a husband's lover — $5 million in compensatory damages and $4 million in punitive damages for criminal conversation, intentional infliction of emotional distress, and alienation of affection.

And, with more than a hint of irony, a North Carolina magistrate ruled on Valentine's Day 2017 that laws permitting the brokenhearted to win damages for adultery and alienation of affections aren't unconstitutional, reasoning that states have a "legitimate interest in permitting jilted spouses to obtain redress" and public policy should be directed to "discouraging third parties from wrongfully interfering in marriage."

Neoclassical remedies

Courts have never been at ease in hearing amatory cases and legislating matters of love from the bench. The engendered emotions are characteristically so personal, intense and bitter that courts find it problematic to style remedies within the confines of historically strict statutory interpretations.

Heart-balm statutes illustrate the tension between a judicial predilection for a laissez-faire approach to affaires de coeur and the obligations of our legal system to apply justice even in the most difficult of cases.

When an individual suffers a wrong against self, property or status, appropriate actionable remedies should be fashioned.

For worse and not for better, most heart-balm statutes are worded simply and straightforwardly. Thus, questions of interpretation remain to be answered as to whether they ought to operate as strict bars or whether they should be reasonably and creatively molded to permit actions and remedies sounding in equity, common law, tort and contract laws ("neoclassical" redress).

What's particularly vexing about these statutes, and their judicial interpretation, is that they don't just bar the heart-balm torts themselves; any related rights of action with a nexus to the tort are also eviscerated. Modern courts and legislatures are more inclined to intercede in arm's-length commercial relations or reprehensible conduct by strangers than in the emotionally laden landscape of amatory conflicts. Perhaps this reluctance deserves a second look.

All matters of public policy must consider whether a legitimate state interest is being furthered. North Carolina keeps its laws on the books because it jealously guards the state's interest in affording recourse to injured victims and protections for the sanctity of marriage by discouraging third parties from interfering in the sacred marital relationship.

Granted, attitudes about gender, egalitarianism, employment, courtship, marriage and divorce have all undergone tremendous transformation, but Massachusetts should be challenged to thoughtfully evaluate the propriety for damages available to the aggrieved whose injuries are clearly connected to broken promises.

Before abandoning altogether laws that evoke bygone social and cultural mores, we should consider their 21st century merits. Neoclassical models of jurisprudence that intermarry principles of common law, equity, contract and tort models should be fashioned to provide greater — not less — flexibility in affording restitution for those who have been defrauded (for example) into expending great sums of money, giving up employment, selling a house, incurring moving expenses, paying for a wedding, or undertaking any other expense in reliance on an otherwise unrecoverable breach.

Should tortfeasors be enabled to act with impunity? Does the state truly have no interest in providing remedies? If the aggrieved can prove detrimental reliance, lost opportunity costs, foregone economic opportunism and the like, shouldn't promissory estoppel and breach of contract remedies be available?

Certainly, doctrines of unconscionability (prenuptial agreements), fiduciary duty (trusts), and general duties of good faith and fair dealing are heightened operative duties in other areas of interpersonal relationships.

Just as Cupid has a quiver full of bows and arrows to fittingly and discriminatingly hit their mark, so, too, should our judicial system be equipped with a wide-ranging cache of amatory remedies at the ready to salve the aggrieved. MLW

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