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COMMISSION DE RÉFORME DU DROIT

REPORT
ON
BREACH OF PROMISE TO MARRY

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The Manitoba Law Reform Commission was established by *"The Law Reform Commission Act"* in 1970 and began functioning in 1971.

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I. INTRODUCTION

1. If *A* and *B* agree to marry, Manitoba law recognizes a legally binding contract. Accordingly, should either *A* or *B* renege on their agreement to marry, (s)he does so at the risk of being liable to the other party to pay damages for breach of a promise to marry.

2. The subject of this Report is the desirability of the law treating a couple's engagement as a legally binding contract with remedies similar to those which arise when a business contract is broken. In particular, we study the present case law surrounding the breach of promise to marry - giving special attention to the decisions of the Manitoba courts - and examine the extent to which a cause of action should exist to allow a party legal redress for loss sustained as a result of the breach. Our study includes a review of the original reasons for the breach of promise action and a consideration of their present strength and validity. It also comprises research to determine what, if any, alternative causes of action exist, either statutorily or at common law, to allow for the recovery of damages in specific cases.

3. From as early as the nineteenth century, there has been much criticism of the action for breach of promise to marry, as well as recommendations that the action be abolished. Several jurisdictions have now studied the question, including British Columbia, Ontario and Newfoundland.[1] The action has been abolished or statutorily modified in

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[1]See Law Reform Commission of British Columbia, *Report on Breach of Promise of Marriage* (1983); Ontario Law Reform Commission, *Report on Family Law, Part II, Marriage* (1970); Newfoundland Family Law Study, *Family Law in Newfoundland* (1973); (English) Law Commission, *Breach of Promise of Marriage*, Law Com. No. 26 (1969); Report of the Torts and General Law Reform Committee of New Zealand, *Miscellaneous Actions* (1968); Eleventh Report of the Law Reform Committee of South Australia, *Law Relating to Women and Women's Rights* (1970); Scottish Law Commission, Report No. 76, *Report on Outdated Rules in the Law of Husband and Wife*, (March 1982).

Ontario, England and Wales, New Zealand, Australia, South Australia, Ireland, and in at least twenty-three American states.[2]

II. THE ACTION FOR BREACH OF PROMISE

A. Historical Background

4. In the twelfth century, the ecclesiastical courts had jurisdiction in marriage law in England. Promises to marry, however, were only enforced by admonition and spiritual censure. By the fifteenth century the courts of equity were beginning to hear cases in which there had been a breach of promise of marriage.[3] These early cases were brought to recover money paid on the faith of a promise of marriage after the promisor married another. They were decided on the equitable principle that one who had intentionally misled another to his detriment should make good the loss.[4] Once the common law had developed an action for the enforcement of a contract, actions were brought in the law courts on the theory that the promise to marry was a contract.[5] By the end of the eighteenth century, the action for breach

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[2]Ontario, *The Marriage Act*, R.S.O. 1980, c. 256, ss. 32, 33; England and Wales, *Law Reform (Miscellaneous Provisions) Act 1970*, s. 1; New Zealand, *Domestic Actions Act 1975*, s. 5; Australia, *Marriage Amendment Act 1976*, No. 209 of 1976, s. 23; South Australia, *Action for Breach of Promise of Marriage (Abolition) Act*, 1971, No. 75 of 1971; Ireland, *Family Law Act* 1981. For references to American legislation, see S. Anderson, "*Stanard* v. *Bolin*: A Reappraisal of the Breach of Promise to Marry Action" (1978), 15 Willamette Law Review 105 at 107.

[3]Ames, "The History of Assumpsit" (1888), 2 Harv. L. Rev. 1 at 15; see also, Ames, "Parol Contracts Prior to Assumpsit" (1895), 8 Harv. L.Rev. 252 at 256.

[4]Ames, "Parol Contracts Prior to Assumpsit", ibid.

[5]See for example, *Stretch* v. *Parker* (1639), 12 Car. Rot. 21, Rolle's Abridgment 22; *Baker* v. *Smith* (1651), 82 E.R. 722; *Holcroft* v. *Dickinson* (1672), Carter 233, 124 E.R. 933; *Harrison* v. *Cage* (1698), 5 Mod. 411, 87 E.R. 736.

of promise of marriage had substantially attained its present form. On July 15, 1870, the law of England was received into Manitoba.[6]

B. The Present Cause of Action

5. The contract to marry is an ordinary contract with some special features. There must be an intention to be bound by the agreement. If there is merely an unofficial engagement without an engagement ring and without publicity, then an action for breach of promise will probably fail. Reciprocal promises are consideration for each other, although any valuable consideration will support a promise of marriage. However, a promise to marry if the promisee will enter upon an illicit cohabitation has been held to be void on the ground that the consideration is illegal.[7]

6. No special form is necessary. A promise to marry need not be in writing nor need it be evidenced by writing.[8] The *Statute of Frauds* used to apply where the promise to marry was not to be performed within a year. However, the *Statute of Frauds* has been repealed insofar as it was the law in Manitoba.[9] It should be noted that section 25 of *"The Manitoba Evidence Act"*, C.C.S.M. c. E150, requires the plaintiff's testimony to be corroborated by some other material evidence before recovery will be allowed. The corroborative evidence need not by itself prove the promise, but is sufficient if it makes it appear reasonably probable that the promise was given.[10]

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[6]See *"The Queen's Bench Act"*, C.C.S.M. c. C280, s. 51(3). See also *Manitoba Supplementary Provisions Act*, R.S.C. 1927, c. 124, s. 4, in respect of the laws in force in Manitoba subject to Canada's jurisdiction.

[7]*Brownlee* v. *Partridge*, [1947] 2 W.W.R. 805 (B.C.S.C.).

[8]*Wozny* v. *Kasky* (1954), 12 W.W.R. 441 (B.C.C.A.).

[9]*"An Act to Repeal the Statute of Frauds"*, C.C.S.M. c. F158.

[10]*Waters* v. *Bellamy* (1888), 5 Man. R. 246 (C.A.); *Cockerill* v. *Harrison* (1903), 14 Man. R. 366 (C.A.).

7. A promise to marry, made in the lifetime of the spouse of the promisor, is illegal and void.[11]

8. A promise to marry can be made contingent on a condition, and breach of that condition brings the agreement to an end.[12] If the condition is "immoral" or otherwise contrary to public policy, the courts may refuse to enforce it. For example, a promise to marry on the condition that the plaintiff enter into an "immoral relationship" has been held not to give rise to a cause of action.[13] As well, a promise of marriage to be performed contingently upon a divorce being obtained has also been held to be against public policy.[14] However, a contract to marry made after the granting of a decree *nisi* but before the decree is made absolute is not contrary to public policy.[15]

9. If no time is agreed upon for the marriage ceremony, then performance must occur within a reasonable time. Mere lapse of the time fixed for the marriage is not necessarily a breach. There must be a refusal to carry out the contract.[16] It is possible to have an anticipatory breach where the time set within which the promise is to be fulfilled has not expired. For example, an action for breach of promise will lie immediately where a party makes his performance of the contract to marry impossible by marrying

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[11] *Sheehan* v. *Mercantile Co.* (1920), 46 O.L.R. 581, 52 D.L.R. 538; rev'g 45 O.L.R. 422 (C.A.).

[12] *Seiler* v. *Funk* (1914), 32 O.L.R. 99 (C.A.).

[13] *B.* v. *B.*, [1936] 4 D.L.R. 439, [1935] 3 W.W.R. 76 ("sub nom" *Baker* v. *Balderston*); rev'd without written reasons, (1937), 44 Man. R. 494, [1937] 1 D.L.R. 736, [1937] 1 W.W.R. 363 (C.A.). "Immoral relationship" meant allowing sexual intercourse before marriage.

[14] *Caulfield* v. *Arnold*, [1925] 1 D.L.R. 295, [1925] 1 W.W.R. 664, 34 B.C.R. 404 (B.C.S.C.).

[15] *Croll* v. *Edgley* (1963), 41 W.W.R. 439 (B.C.S.C.); *Fender* v. *St. John-Mildmay*, [1938] A.C. 1 (H.L.).

[16] *Grant* v. *Cornock* (1889), 16 O.R. 406; aff'd 16 O.A.R. 532 (C.A.).

another.[17]

10. A minor has the power to make a contract to marry. However, the minor can avoid the contract during his or her minority. Even though the minor is not bound, (s)he can enforce a marriage contract against an adult.[18]

C. Defences to the Cause of Action

11. The defendant has all the usual defences to an action for the enforcement of a contract, e.g., fraud, illegality, undue influence.[19] The defendant may also raise the defence that the plaintiff was not ready and willing to marry him.[20] As well, in early cases some special defences were available such as where certain facts had come to the knowledge of the defendant since entering into the contract, which justified the defendant in refusing to perform. One such ground was the unchastity of a female plaintiff.[21] The insanity of the plaintiff subsequent to the promise to marry was also a possible defence.[22] Gross behaviour was held to form a defence,[23] but the use of coarse language by the woman did not.[24] In general, defenses raising incompatibility were not favoured by the courts.

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[17]*LeBlanc* v. *Wetmore*, [1944] 2 D.L.R. 130, 17 M.P.R. 181 (N.B.C.A.).

[18]*Parks* v. *Maybee* (1852), 2 U.C.C.P. 257; *Smith* v. *Jamieson* (1889), 17 O.R. 626 (Q.B.).

[19]See Baxter, "The Contract to Marry" (1963), 23 R. du B. 44 at 49.

[20]*Lafayette* v. *Vignon*, [1928] 3 D.L.R. 613, [1928] 2 W.W.R. 506, 23 Sask. L.R. 47 (Sask. C.A.).

[21]*Young* v. *Murphy* (1836), 3 Bing N.C. 54, 132 E.R. 329. See also, *G.* v. *B. and B.*, [1926] 1 D.L.R. 855, [1926] 1 W.W.R. 324, 22 Alta. L.R. 126 (Alta. S.C. -A.D.).

[22]*Liddell* v. *Easton's Trs.*, [1907] S.C. 409.

[23]*Rose* v. *Chadwick* (1924), 55 O.L.R. 41 (C.A.).

[24]*Grant* v. *Cornock* (1889), 16 O.R. 406; aff'd (1889) 16 O.A.R. 532 (C.A.).

12. *"The Limitation of Actions Act"*, C.C.S.M. c. L150, may be set up as a defence.[25] Time begins to run from the breach unless the existence of a cause of action has been concealed by fraud, in which case the cause of action is deemed to have arisen when the fraud was first known or discovered.[26] Where there have been successive mutual promises to marry, each of them may constitute a new and independent contract. *"The Limitation of Actions Act"* would begin to run from the breach of the last contract.[27]

D. Measure of Damages

13. Specific performance would be contrary to public policy. Therefore, the remedy for breach of promise to marry is an action for damages. The basis of the assessment of damages is loss of the marriage, which involved for a woman loss of the married status and the rights pertaining thereto, including the right to financial support.[28] Damages have been allowed for the effect of the breach on feelings, mental suffering, humiliation, pain and mortification, loss of the defendant's affection and the social advantages which would have accrued.[29] Such damages have often been considered to be tort damages. They can, however, be interpreted as damages for breach of contract on the theory that the defendant's promise to marry the plaintiff carries with it other implied promises: the promise not to hurt the plaintiff's feelings, not to cause mental suffering, humiliation, pain or mortification, and the affirmative promise to assure affection and the social

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[25] *Costello* v. *Hunter* (1886), 12 O.R. 333 (C.A.); *Mott* v. *Trott*, [1943] S.C.R. 256.

[26] *"The Limitation of Actions Act"*, C.C.S.M. c. L150, s. 7.

[27] *Yuraitis (Hanslit)* v. *Hanslit (Endzelaytos)* (1944), 52 Man. R. 220, [1944] 2 D.L.R. 447, [1944] 1 W.W.R. 540; var'd without written reasons, (1944), 52 Man. R. 219, [1944] 4 D.L.R. 806, [1944] 3 W.W.R. 736 (C.A.).

[28] *Baxter supra* n. 19 at 49.

[29] See *Lafayette* v. *Vignon supra* n. 20; *Dickie* v. *Curtis* (1920), 17 O.W.N. 494; *Morris* v. *Churchward* (1913), 4 O.W.N. 1008, 10 D.L.R. 191 (Ont. S.C.); *Dunhill* v. *Wallrock* (1951), 95 S.J. 451 (C.A.).

accrue upon marriage.[30] Punitive damages can also be added after the plaintiff has been fully compensated through the other elements of recovery.

14. Damages for breach of promise can be roughly divided into two categories: pecuniary and non-pecuniary.

(i) Pecuniary

1. The plaintiff can recover damages to compensate for expenses incurred in reliance on the promise being carried out. In order to be recoverable, the expenses must flow directly from the breach of promise and must have been reasonably within the contemplation of the parties when the promise was made. For example, the plaintiff may have moved,[31] given up a job or business, or changed his or her position in some other fashion. The cost of wedding invitations and of material for a wedding gown has been held to be recoverable.[32]

2. However, damages for loss of wages and hospital and medical expenses in connection with a pregnancy resulting from the plaintiff allowing the defendant to have sexual relations with her have been held not to be recoverable since they did not flow from the breach of promise, and were not reasonably within the contemplation of the parties at the time the promise was made.[33]

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[30]Brockelbank, "The Nature of the Promise to Marry - A Study in Comparative Law" (1946), 41 Ill. L. Rev. 1 at 12.

[31]*Baxter* v. *Lear* (1975), 23 R.F.L. 342 (Man. Q.B.).

[32]*Ibid.*

[33]*Ewart* v. *Tetzloff* (1959), 18 D.L.R. (2d) 539, 28 W.W.R. 124 (B.C.S.C.).

3. The court may award damages for loss of expected financial and social gain in order to put the plaintiff in the same position as if the contract had been performed. Therefore, evidence as to the defendant's wealth, income, social position and standard of living is relevant.

(ii) Non-pecuniary

1. The court may award damages to repair injury to the plaintiff's wounded feelings, pride and affections. However, when estimating damages, the court may not consider the feelings of the plaintiff's family and friends.[34] The court may take into account the conduct of the parties, the fact of seduction by the defendant and the plaintiff's diminished prospects of marrying another man. A woman who has married another will be entitled to only a minimal amount of damages.[35]

2. Aggravated or punitive damages may be awarded where the defendant made protestations of love and of his intentions to marry the plaintiff in order that he might more readily carry on a concubinary relationship with her.[36] As well, the transmittal of venereal disease,[37] duplicity[38] and deceit[39] may also give rise to such damages.

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[34]*Bell* v. *Giberson* (1890), 30 N.B.R. 10 (C.A.).

[35]*Pavao* v. *Vieira and Belchoir*; *Belchoir* v. *Vieira* (1978), 8 R.F.L. (2d) 173 (Man. Q.B.).

[36]*Bell* v. *Giberson*, *supra* n. 34; see also *Verhoski* v. *Hunt* (1960), 67 Man. R. 342 (Q.B.).

[37]*Millington* v. *Loring* (1880), 6 Q.B.D. 190 (C.A.).

[38]*Demitri* v. *Niemann* (1980), 3 F.L.R. 54 (B.C.S.C.). The defendant was carrying on with another woman at the same time.

[39]*Ewart* v. *Tetzloff*, *supra* n. 33.

III. AN ASSESSMENT OF THE BREACH OF PROMISE ACTION

15. Historically, there were several justifications for treating a promise to marry as a legally enforceable contract. In the seventeenth century, courtship was a formal affair with the engagement often being attended by a marriage settlement. Life interests in land and gifts of personal property were often terms of the agreement to marry, to be settled on the respective spouses upon the solemnization of the marriage. Thus an engagement was, among the governing and lawmaking classes, largely a property transaction involving extensive negotiation, which was entered into as much for material advantage as for reasons of sentiment.[40] If a promise to marry was not fulfilled, the man often stood to lose a substantial dowry. Marriage and settlement were seen by many to be the one object in a woman's life. Although the woman in those days may not have acquired any rights in property, she would have shared her husband's wealth, social position and standard of living.

16. There were other reasons historically for treating the promise to marry as legally enforceable. First, there was a belief that once a promise had been made, it should be kept, no matter how little affection there might be between the parties. Additionally, a man's termination of his engagement cast social doubts concerning his fiancee's chastity; in order to protect her reputation, it was thought necessary that he should confess publicly that he had no grounds for terminating his betrothal. Making the engagement a legally enforceable contract meant that he could be persuaded to make this public confession as a term of a settlement. Third, it was said that the legal action could protect the offender from unofficial retaliation, as in the case in 1876 when a father threatened to break the offender's neck if the law did not punish the scoundrel.[41]

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[40] See H. Clark, *The Law of Domestic Relations in The United States* (1968) 2.

[41] S. Cretney, "The Law Reform (Miscellaneous Provisions) Act 1970" (1970), 33 M.L.R. 534.

17. Although the treatment of an engagement as a legally binding contract may have been historically justified, we do not think the continuance of the action can be defended today. Even without conducting a survey of public opinion, it seems safe to say that most people would be surprised to learn that an engagement to marry creates not only social, but also legal obligations. The fact that an engagement is perceived to be a social, rather than a legal, obligation probably stems in part from the fact that people enter into marriage today for generally different reasons than they did in the past. Some commentators have argued that if the parties do not consider themselves to be entering a legal contract, the law should not imply one.[42] Because the nature of an engagement is different today, the possibility of unofficial retaliation being taken against the party who terminates the engagement is remote. Any problem that does exist can be handled by other instruments of the law.

18. There are stronger arguments against the continuance of the action. Foremost is the fact that a spouse's "breach" of a marriage itself does not give the other a cause of action in contract. Instead, parties are generally confined on separation or divorce to a division of the marital property and, where applicable, lump sum or periodic maintenance. There is no award for pain and suffering and other expenses. Moreover, the breach of promise action is generally based upon a fault concept. That is, the defences available often pertain to whether the plaintiff's conduct was such that the defendant had "just cause" for terminating the engagement. This is contrary to family law reform today whereby fault is usually considered irrelevant, or at best, a subsidiary issue for determining rights.[43]

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[42]H. Wright, "The Action for Breach of the Marriage Promise" (1924), 10 Va. L. Rev. 361 at 367; C. Vernier, 1 *American Family Laws* (1931) 23.

[43]A more recent example of the diminution of fault is seen in the federal Bill to amend the *Divorce Act*. See "An Act to Amend the Divorce Act" which was introduced in Parliament for first reading on January 19, 1984.

It seems anomalous to allow a spouse to divorce another essentially on grounds of incompatability yet refuse that right to an engaged party without the possibility of a damage suit being instituted.

19. The continuance of the cause of action also seems contrary to the value our society places upon the need for the stability of the marital union. As other commentators have previously stated,[44] the threat of legal action may induce a party to enter into an unhappy marriage rather than be subjected to an action for damages. It is surely preferable for a couple to terminate their relationship before, rather than after, marriage.[45] We believe the law should reflect that preference.

20. Finally, although an action for breach of promise may be instituted by either male or female, it has been pointed out that the action is discriminatory in practice.[46] This is because the action is rarely brought by men. The action is, in part, based upon the concept that a woman's financial security is dependent upon marriage and that her prospects for marriage and its attending financial security will be reduced by a broken engagement. Women and men stand on an equal footing today; in the breach of promise situation, there is no need to maintain an action which is protective of women.

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[44]See Clark *supra* n. 40 at 2; J. Phillips, "Breach of Promise" (1978), 13 Irish Jur. 328 at 332; S. Kopelman, "Breach of Promise to Marry: Connecticut Heartbalm Statute - *Piccininni* v. *Hajus*" (1981), 13 Conn. L. Rev. 595 at 603.

[45]The number of Canadian couples terminating their relationship after marriage has risen sharply: between 1968 and 1982, the national divorce rate rose by 520%. Nearly 40% of Canadian (first) marriages now end in divorce. There were 70,436 divorces granted by Canadian courts in 1982. This represented a rate of 2.9 divorces per 1,000 Canadians. See *Statistics Canada - Marriages and Divorces, Vital Statistics*, Volume 11, 1982.

[46]See Law Reform Commission of British Columbia, *supra* n. 1 at 22.

21. The fact that the breach of promise action may now be impolitic does not mean, however, that it has not occasionally been used to allow the recovery of just claims. For example, in *Yuraitis* v. *Hanslit*[47] the parties had been engaged and cohabiting for over twelve years, and had two children. In addition to his promise to marry the female plaintiff, the defendant had also promised to give her one-half of his farm, stock, implements and money. The defendant later married another woman and the plaintiff sued for damages and other relief for breach of promise of marriage. The court gave the plaintiff judgment for an undivided one-half interest in certain land, in the defendant's horses, cattle and farm machinery, including the automobile, and in certain monies.

22. Another example of a just claim is found in the case of *Shaw* v. *Shaw*.[48] In that case, the deceased and the plaintiff had gone through a ceremony of marriage and lived together thereafter for over twelve years. However, when the deceased died intestate the plaintiff learned that she and the deceased had not been lawfully married, because the deceased had not obtained a valid divorce from his first wife. As a result, the second marriage was void *ab initio* and the plaintiff was not entitled to the rights of a widow. However, the court held that the plaintiff was entitled to damages for breach of warranty of capacity to marry or alternatively for breach of promise to marry,[49] equal to what she would have received had she been his widow.

23. In these circumstances, that is, where there has been substantial non-marital cohabitation or where a marriage has been declared to be void *ab initio*, some recovery is justified. We think it preferable, however, that the law specifically provide for redress in these situations rather than

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[47]*Supra* n. 27.

[48][1954] 2 Q.B. 429, [1954] 2 All E.R. 638 (C.A.).

[49]The promise to marry could have been implemented once the first wife died and there was a breach at that time for which damages could be recovered.

continue the breach of promise action. This would allow for the law to be more rationally based and would confine the right to bring an action to those limited situations involving just claims. We discuss the availability of alternative causes of action for these claims, as well as causes of action for the return of gifts given in contemplation of marriage, later in this Report and make recommendations for reform in this regard. For now, however, we recommend:

RECOMMENDATION 1

That legislation be enacted to provide that no action may be brought for a breach of a promise to marry or for any damages resulting therefrom.

24. The repeal of the action necessitates some consequential legislative amendment. We mentioned earlier that section 25 of *"The Manitoba Evidence Act"*, C.C.S.M. c. E150, requires there be material evidence to corroborate the testimony of a plaintiff in a breach of promise suit. That section should be repealed with the abolition of the action. As to transitional rules, we note that the Law Reform Commission of British Columbia has recommended that abolition affect all causes of action, "whether or not the promise or breach occurred before legislation which implements [the abolition] comes into force".[50] This was also the transitional provision chosen by several other jurisdictions which have abolished the action, including Ontario, England, Australia, South Australia and New Zealand.[51] We think that the approach adopted in these other jurisdictions is reasonable given the lack of need for the action. It would also avoid any ambiguity as to the application of the

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[50]*Supra* n. 1, at 34.

[51]Ontario, *The Marriage act*, R.S.O. 1980, c. 256, s. 32; England and Wales, *Law Reform (Miscellaneous Provisions) Act 1970*, s. 1(2); Australia, *Marriage Amendment Act 1976*, No. 209 of 1976, s. 23(2); South Australia, *Action for Breach of Promise of Marriage (Abolition) Act*, 1971, No. 75 of 1971, s. 2(2); New Zealand, *Domestic Actions Act 1975*, s. 5(2).

abolition to specific cases.[52] Of course, the abolition should not affect any pending litigation.[53] We recommend:

RECOMMENDATION 2

That section 25 of "The Manitoba Evidence Act", C.C.S.M. c. E150, which requires the existence of material evidence to corroborate the testimony of a plaintiff in a breach of promise to marry action, be repealed.

RECOMMENDATION 3

That the abolition proposed in recommendation 1 not affect any action for breach of promise to marry which is commenced before the date the legislation implementing the abolition comes into force.

IV. ALTERNATIVE CAUSES OF ACTION

25. As mentioned previously, there are some situations in which the action for breach of promise to marry has been used to allow the recovery of just claims. These include those situations involving substantial non-marital cohabitation and where a marriage has been found to be void *ab initio*. The action for breach of promise to marry, however, is not a suitable vehicle for providing either maintenance or property rights during the parties' joint lives or at the death of one of them. Still, if the action for breach of promise is to be abolished, then it is important that there be an alternative remedy in these situations. In the following paragraphs we review other forms of relief, both statutory and at common law, which may be available.

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[52] If the legislation was confined to prospective causes of action, the court might have to determine the exact date the promise to marry was given and accepted.

[53] See s. 10 of *"The Interpretation Act"*, C.C.S.M. c. I80 which states that "the provisions of an enactment do not affect litigation pending at the time of its enactment unless it is so expressly stated therein".

(i) Non-marital Cohabitation

1. With respect to property disputes where there has been non-marital cohabitation for a lengthy period of time, the parties do not have rights under *"The Marital Property Act"*, C.C.S.M. c. 45, but the constructive trust does provide an alternative remedy to the action for breach of promise to marry. In *Pettkus* v. *Becker*,[54] the Supreme Court of Canada stated the legal principles concerning constructive trusts. This case has been applied in Manitoba to the non-marital cohabitation situation.[55] The effect is to give a claimant an interest in property that is proportionate to his or her contribution to the joint relationship, whether the contribution is direct or indirect. The principle of unjust enrichment lies at the heart of the constructive trust, and there are three requirements that must be satisfied: an enrichment, a corresponding deprivation and absence of any juristic reason for the enrichment.

2. The resulting trust may provide a remedy if, as in *Yuraitis* v. *Hanslit*,[56] the court is able to find a common intention or agreement of the parties to share monies or property.

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[54][1980] 2 S.C.R. 834, 117 D.L.R. (3d) 257, 19 R.F.L. (2d) 165 (S.C.C.). See also, J.L. Dewar, "The Development of the Remedial Constructive Trust" (1982), 60 Can. B. Rev. 265; A.J. McClean, "Constructive and Resulting Trusts – Unjust Enrichment in a Common Law Relationship – *Pettkus* v. *Becker*" (1982), 16 U.B.C. L. Rev. 155.

[55]*Beauchamp, also known as Badali* v. *Badali Estate* (1983), 22 Man. R. (2d) 43 (Q.B.); *Smith* v. *de Carle* (1983), 22 Man. R. (2d) 159 (Q.B.).

[56]*Supra* n. 27.

3. With respect to maintenance, an application can be made under subsection 2(3) of *"The Family Maintenance Act"*, C.C.S.M. c. F20, where a man and a woman, not being married to each other, have cohabited continuously for a period of not less than five years in a relationship in which one person has been substantially dependent upon the other for support. Alternatively, an application may be brought under subsection 11(1), where a man and a woman who are not married to each other have cohabited for a period of one year or more and there is a child of the union.

4. Actions for *quantum meruit* and *quantum valebat* may lie respectively to recover reasonable remuneration for services and a reasonable price for goods supplied by the plaintiff.[57]

5. We think that these causes of action provide parties with an adequate remedy in the non-marital cohabitation situation where both parties are alive.

6. Upon the death of one cohabitee, the survivor does not have rights to property or maintenance under *"The Dower Act"*, C.C.S.M. c. D100, *"The Devolution of Estates Act"*, C.C.S.M. c. D70 *or "The Testators Family Maintenance Act"*, C.C.S.M. c. T50. The doctrines of resulting and constructive trust, however, can provide the survivor with an appropriate equitable remedy in order to seek a share in the deceased's estate.[58]

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[57]See G.H.L. Fridman and J.G. McLeod, *Restitution* (1982); G.B. Klippert, *Unjust Enrichment* (1983); 2 *Power on Divorce* (3rd ed. C. Davies 1980) 276.

[58]See for example, *Beauchamp supra* n. 56.

7. With respect to maintenance and support on death, however, present Manitoba law is inadequate. It may be that the surviving cohabitee should, under certain prescribed conditions, be brought within the class of dependants under *"The Testators Family Maintenance Act"*. It should be noted that Ontario now gives the common law spouse the right to apply for an order of support under its dependants' relief legislation.[59] The Commission intends to consider this matter more fully in the context of a study to be undertaken in the future on *"The Testators Family Maintenance Act"* and *"The Devolution of Estates Act"*.

(ii) Void Marriages

1. The action for breach of promise of marriage can arise where parties enter into a marriage that is later found to be void *ab initio* due to the deceit or incapacity of one of the parties. For example, this can happen where one party does not obtain a valid divorce from his or her first spouse, as in the *Shaw* v. *Shaw*[60] case, or where one party deceives the other into thinking that they are validly married.[61]

2. With respect to property, subsection 2(3) of *"The Marital Property Act"*, C.C.S.M. c. M45, states that the Act applies to the parties to a marriage that is void *ab initio*, but applies only so long as the parties believe the marriage to be valid; and, if either party knows or has reason to believe when the marriage is solemnized that it is void, that party is not entitled to any benefit under the Act. Therefore, there is adequate provision regarding property disputes between parties to a marriage that is found to be void *ab initio* while the parties are both alive.

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[59] *Succession Law Reform Act*, R.S.O. 1980, c. 488, ss. 57(b), 57(d), 58(1).

[60] *Supra* n. 48.

[61] *Naujokat* v. *Bratushesky*, [1942] 2 W.W.R. 97 (Sask. C.A.).

3. With respect to maintenance while both parties are alive, the same provisions of *"The Family Maintenance Act"*, C.C.S.M. c. F20, that apply to unmarried cohabitees, also apply to parties to a void marriage.[62] However, it may be preferable to treat parties to a void marriage, who married in good faith, as if they were validly married, rather than treating them as merely unmarried cohabitees.[63] At present, a party to a void marriage cannot apply under the Act if the couple has cohabited for less than 5 years and there is no child of the union. In our view, the question of maintenance as it pertains to both void and voidable marriages is one that is in need of legislative clarification. However, this is outside the terms of reference of this present study and we would therefore propose that it be considered as a whole in a review of *"The Family Maintenance Act"*.

4. As in the case of non-marital cohabitation, upon the death of a party to a void marriage, the survivor does not have any rights to property or maintenance under *"The Dower Act"*, C.C.S.M. c. D100,

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[62]It should also be noted that in an action for alimony under s. 52 of *"The Queen's Bench Act"*, C.C.S.M. c. C280, the claimant would be without relief if the other party counterclaimed for a decree of nullity. This is because the nullity action would be dealt with first and alimony cannot be granted after a nullity decree. See 2 *Power on Divorce*, *supra* n. 57 at 64.

[63]Several other jurisdictions have dealt with the issue of void and voidable marriages with respect to maintenance. See, for example, British Columbia, *Family Relations Act*, R.S.B.C. 1979, c. 121, ss. 1, 57, 61; Alberta, *The Domestic Relations Act*, R.S.A. 1980, c. D-37, ss. 22, 23; Saskatchewan, *The Queen's Bench Act*, R.S.S. 1978, c. Q-1, s. 33; Ontario, *Family Law Reform Act*, R.S.O. 1980, c. 152, ss. 1(f)(iii), 14-19; New Brunswick, *Child and Family Services and Family Relations Act*, S.N.B. 1980, c. C-2.1, s. 111; Prince Edward Island, *Family Law Reform Act*, S.P.E.I. 1978, c. 6, ss. 2(f), 16, 20(1)(a); Northwest Territories, *Domestic Relations Ordinance*, R.O.N.W.T. 1974, c. D-9, s. 22.

"The Testators Family Maintenance Act", C.C.S.M. c. T50, or *"The Devolution of Estates Act"*, C.C.S.M. c. D70, although the constructive trust could be used on death by the survivor to obtain an interest in the deceased's estate. The Commission intends to consider the issue of property and maintenance rights for the survivor of a void marriage in its study of *"The Testators Family Maintenance Act"*, C.C.S.M. c. T50 and *"The Devolution of Estates Act"*, C.C.S.M. c. D70.

V. GIFTS IN CONTEMPLATION OF MARRIAGE

26. The question of gifts often arises incidentally to the breach of promise action. Three situations can be distinguished: the engagement ring, gifts exchanged between parties to the engagement contract and gifts given to one or both of the parties from a friend or relative.

27. At common law, the engagement ring is presumed to be a conditional gift.[64] Ordinarily, the custom is for the man to give the ring to the woman. If the woman breaks off the engagement or if the engagement comes to an end through mutual consent, then the man is entitled to return of the ring.[65] However, if the man breaks off the engagement, then he is not entitled to return of the ring.[66]

28. It is a question of fact whether gifts exchanged between parties are given in contemplation of marriage and are therefore conditional on the marriage taking place, or whether they are absolute gifts. Normally birthday presents and Christmas presents are considered absolute gifts. On the other hand, property intended to become part of the matrimonial home, such as furniture, will be conditional. If a gift is conditional, then the crucial question is whether the party was at fault for breaking the engagement. A

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[64] *Jacobs* v. *Davis*, [1917] 2 K.B. 532, but cf. *Vezina* v. *Blais*, [1953] Que. S.C. 48.

[65] *Fortier* v. *Brault* (1916), 10 W.W.R. 807 (Man. Co. Ct.).

[66] *Cohen* v. *Sellar*, [1926] 1 K.B. 536.

party who is at fault is not entitled to the return of a conditional gift given to the other party, nor can the party at fault keep any conditional gifts given to him or her.[67] If the engagement is broken off by mutual consent, then conditional gifts should be returned.

29. Where gifts are given by a third person, the court will look for evidence of intention on the part of the donor to give the gifts to one party or the other or to both. Where no intention is clear, the court may draw the inference that money and gifts originating from the man's family and friends were intended for the man and that those from the woman's family and friends were intended for the woman.[68] Gifts that are clearly given in contemplation of marriage, such as wedding gifts, should be presumed conditional and therefore must be returned if the marriage does not take place.[69]

30. Assuming that the action for breach of promise of marriage is abolished, this would not change the fact that fault, that is, responsibility for termination of the engagement, is a factor in gift law. It would appear desirable to remove the consideration of fault in questions relating to gifts that are conditional on a marriage taking place. Such provisions have been enacted in New Zealand, England and Ontario.[70] No other changes should be

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[67] *Ibid.* See generally, E.L.G. Tyler and N.E. Palmer, *Crossley Vaines on Personal Property*, (5th ed. 1973) 305.

[68] *Samson* v. *Samson*, [1960] 1 W.L.R. 190, [1960] 1 All E.R. 653 (C.A.).

[69] *Jeffreys* v. *Luck* (1922), 153 L.T. Jo. 139 (K.B.).

[70] New Zealand, *Domestic Actions Act* 1975, s. 8; England and Wales, *Law Reform (Miscellaneous Provisions) Act 1970*, s. 3(1); Ontario, *The Marriage Act*, R.S.O. 1980, c. 256, s. 33. However, Australia and South Australia have not changed the common law relating to gifts. See Australia, *Marriage Amendment Act 1976* No. 109 of 1976, s. 23(1); South Australia, *Action for Breach of Promise of Marriage (Abolition) Act*, 1971, No. 75 of 1971, s. 2(3). It should be noted that the wording of the English provision is unfortunate in that if the donor behaved in such a way as to justify the donee in breaking off the engagement, the donor cannot recover conditional gifts, since strictly speaking the donee broke off the engagement. See Hopkins, *Formation and Annulment of Marriage* (1976) 3; Bromley, *Family Law* (1981) 20; S. Cretney *supra* n. 41 at 536. In other words, the English provision fails to completely remove consideration of fault. Therefore, it is submitted that the wording of the Ontario provision is preferable.

made in the gift law. We recommend:

RECOMMENDATION 4

That legislation be enacted to provide that where one person makes a gift to another in contemplation of or conditional upon their marriage to each other and the marriage fails to take place or is abandoned, the question of whether or not the failure or abandonment was caused by or was the fault of the donor not be considered in determining the right of the donor to recover the gift.

31. England has also changed the common law of gifts by providing that there shall be a rebuttable presumption that the engagement ring is an absolute gift. This provision has been criticized as being contrary to current social convention.[71] We do not recommend that this change be made in Manitoba.

VI. PROPERTY RIGHTS AND THE ALLOCATION OF EXPENSES ON THE TERMINATION OF AN ENGAGEMENT TO MARRY

A. Introduction

32. During an engagement, there are often items of property purchased by one or both of the engaged parties. For example, a house, various household items and wedding clothes may have been purchased. As well, various expenses may have been incurred such as the cost of having wedding invitations printed, the cost of catering arrangements that must be cancelled, or travel expenses that would not have been incurred but for the engagement. Another possibility is the situation where one party has given up a job and relocated in contemplation of marriage. In all of these situations the action for breach of promise of marriage may at present provide a remedy. Therefore it is necessary to examine whether or not the current law provides adequate alternative remedies, and if not, whether legislation is desirable. The

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[71]Bromley *supra* n. 70 at 20.

Commission has considered recommending enactment of a statutory scheme to deal specifically with property disputes and disputes arising over expenses incurred in reliance on the promise to marry.[72]

B. Options for Reform

32. There are two possible statutory schemes for dealing with disputes over property and expenses: (i) a scheme of adjustment of gains and losses, or simply losses; and (ii) a narrower remedy, that of establishing a procedure for settling property disputes.

(i) Adjustment of gains and losses, or simply losses[73]

What is contemplated here is a statutory scheme which would allow the court to distribute fairly gains and losses, or possibly just losses, between the parties. The court would consider all items of property purchased and all expenses incurred in contemplation of marriage, whether for the benefit of one party or for both. The goal would be to restore the parties to the position they would have been in had they not become engaged to marry. Any net gain or loss would be shared equally as long as it did not lead to an inequity. For example, it may not be fair to have parties share a loss equally where one party is in a substantially better financial position than the other. The system would operate where the engagement was broken off by one of the parties, or by mutual agreement.

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[72]The New Zealand *Domestic Actions Act 1975* No. 53 and the Irish *Family Law Act 1981* both provide a complex scheme for settling disputes respecting property and expenses. It should be noted, however, that Ontario and British Columbia have rejected such a scheme.

[73]The English Law Commission Report, *supra* n. 1 at 9, discusses such a statutory scheme in greater detail.

(ii) Procedure for settling property disputes

What is contemplated here is a statutory scheme which would allow the court to settle disputes regarding ownership of property where both parties have contributed to the acquisition or improvement of the property by money spent or work done. The goal would be to give each party an interest in the property proportionate to his or her contribution. It is to be pointed out that such a scheme is not designed to include the situation where, for example, one party purchased a house in his or her own name and the other party has made no contribution to its acquisition or improvement. In that situation, there would be no dispute as to ownership. It would also not include the purchase of household items still in the purchaser's possession, nor, for example, the purchase of wedding clothes.

C. Assessment of a Statutory Scheme for Adjustment of Gains and Losses, or Simply Losses

34. After careful consideration, the Commission has decided not to recommend enactment of a statutory scheme for adjustment of gains and losses, or simply losses. As the English Law Commission has pointed out, there are grave practical objections to such a system.[74] For example, a prolonged enquiry would be necessary to dissect the expenditures of the parties during the engagement. The engagement might have lasted years and the court would have to unravel all of the financial dealings of the parties.

35. We are of the view that it would be difficult to determine which expenditures should be subject to adjustment. In many cases, the party who has incurred an expense will have derived a benefit. For example, a party who has incurred expenses on consumable items, such as his or her own travel expenses, will have derived a benefit. Expenses may also be offset by the

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[74] *Id.* at 10.

value of absolute gifts or other benefits received as a result of the engagement. In addition, property purchased in contemplation of marriage may have some value for other purposes.

36. The English Law Commission was of the view that recommending a procedure for the adjustment of gains and losses between the parties, or simply losses, was "using a very large hammer to crack a very small nut. . . . [and] would be comparable with a form of community of property between engaged couples".[75] Of necessity, the scheme would mean the exercize of a wide judicial discretion which would involve the court in a consideration of the parties' ability to bear losses, and their respective conduct.

37. We are not persuaded that in most cases the losses incurred by the parties to an engagement are sufficient to warrant the court's involvement in a complicated examination of "gains and losses". We agree with the following statement of the Law Reform Commission of British Columbia: "The lack of case law on disputes between formerly engaged couples over expenses suggests that usually the loss is insignificant or the parties are able to settle the disputes themselves."[76] We believe that parties to a broken engagement should be encouraged to settle the dispute between themselves and that a statutory scheme which might well exacerbate the situation between the parties cannot be recommended.

D. Assessment of a Statutory Scheme for Settling Property Disputes

38. A statutory scheme that does not attempt to deal with expenditures on consumable items, but is restricted to disputes respecting ownership of property where both parties have contributed to the cost of acquisition or to improvements, might not be open to the same criticism as a scheme designed to adjust all gains and losses during the engagement. The English Law

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[75] *Ibid.*

[76] Law Reform Commission of British Columbia, *supra* n. 1 at 25.

Commission[77] and the New Zealand Torts and General Law Reform Committee[78] both recommended such a statutory scheme.

39. The Commission is of the view, however, that in Manitoba the general law of property is able to deal adequately with this type of dispute respecting ownership of property. The resulting and constructive trust, as well as the actions for *quantum meruit* and *quantum valebat*, were discussed earlier in the context of non-marital cohabitation. In light of recent developments in the doctrines of the resulting and constructive trust, the Commission does not think it necessary to recommend the enactment of a statutory scheme respecting property disputes of formerly engaged couples.

VII. SCOPE OF ABOLITION

40. It is intended in this part to discuss and make some recommendations regarding the scope of the abolition. That is, it must be decided whether the abolition should be confined to the contractual cause of action for breach of promise or whether other causes of action which may arise when an engagement to marry is terminated should be included in the abolition. These include the tort action of deceit based upon a fraudulent promise to marry and the action for breach of warranty of capacity to marry. It would seem that the question regarding the scope of the abolition can be decided once it is determined whether adequate relief is available by using alternative causes of action for those fact situations where an action in deceit based upon a fraudulent promise to marry or an action for breach of warranty would now apply.

A. Deceit Based Upon a Fraudulent Promise to Marry

41. The tort of deceit consists in recklessly or wilfully causing another

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[77] *Id.* at 14.

[78] Report of the Torts and General Law Reform Committee of New Zealand, *supra* n. 1.

person to believe and act on a falsehood.[79] There are four main elements in this tort: (1) there must be a false representation of fact; (2) the representation must be made with knowledge of its falsity; (3) it must be made with the intention that it should be acted on by the plaintiff, or by a class of persons which includes the plaintiff, in the manner which resulted in damage to him; (4) it must be proved that the plaintiff has acted upon the false statement, and has sustained damage by so doing.[80]

42. The action in deceit can arise in a number of fact situations. For example, if *A* promises to marry *B*, but has never entertained an intention of fulfilling the promise, then *A* commits a fraud by falsifying his or her present intention.[81] An action for deceit based merely on a fraudulent promise to marry should be abolished for the same reasons that the contract action should be abolished.

43. More commonly, an action in deceit arises where *A* fraudulently induces *B* to enter into a bigamous marriage[82] or where *A* fraudulently induces *B* to believe they are lawfully married,[83] as through a pretended

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[79]*Graham* v. *Saville*, [1945] 2 D.L.R. 489 (Ont. C.A.).

[80]*Salmond, Heuston on the Law of Torts* (18th ed. Heuston and Chambers 1981) 365.

[81]J. Fleming, *The Law of Torts* (6th ed. 1983) 596; see also "The Legal Effect of Promises Made with Intent Not to Perform" (1938), 38 Col. L. Rev. 1461.

[82]*Beyers* v. *Green*, [1936] 1 All E.R. 613 (K.B.).; *Garnaut* v. *Rowse* (1941), 43 W.A.L.R. 29; *Smythe* v. *Reardon*, [1949] Q.S.R. 74 (Circuit Ct., Toowoomba); *Baran* v. *Wilensky* (1959), 20 D.L.R. (2d) 440 (Ont. H.C.); *Beaulne* v. *Ricketts*, [1979] 3 W.W.R. 270 (Alta. S.C.T.D.); *Graham* v. *Saville*, *supra* n. 79. See also *Poloz* v. *Lewicki*, [1958] O.W.N. 94 (Ont. C.A.), where the tort action failed because both parties went through the ceremony of marriage in good faith, unaware that the marriage was bigamous.

[83]*Naujokat* v. *Bratushesky*, [1942] 2 W.W.R. 97 (Sask. C.A.), although this case was decided on the basis of the contract action for breach of promise to marry.

ceremony. An argument can be made that in these situations the real injury is the supposed change of status on the part of the person deceived.[84] There is not merely a breach of promise to marry, but also fraudulent representations of the *bona fides* of the entire marital relationship in reliance upon which the plaintiff cohabits with the defendant as if lawfully married. As was stated in a case from the State of New York, "It is not the public policy to enable the utilization and exploitation of the marriage ceremony for a fraudulent purpose, be it in the form of a bigamous or sham marriage".[85] Therefore, it may not be desirable to abolish the deceit action in these circumstances.

44. *Although a party to a void marriage may have rights under "The Family Maintenance Act"*, C.C.S.M. c. F20, and *"The Marital Property Act"*, C.C.S.M. c. M45, the action for deceit may provide a broader remedy. In actions for deceit based upon seduction consequent upon a fraudulent marriage, both general and special damages have been allowed,[86] including damages for loss resulting from the disposition of a business in contemplation of marriage,[87] and wasted expenditure for wedding clothes and incidentals.[88] Damages have been awarded to compensate for the plaintiff's physical injury, pain and suffering, in consequence of her pregnancy and the birth of a child, and the financial burden of maintaining the child.[89] As

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[84]R.N.W., "Domestic Relations - Anti-Heart Balm Act - Effect of Sham Ceremony" (1964-65), 31 Brooklyn L.Rev. 170.

[85]*Tuck* v. *Tuck* (1964), 14 N.Y. 2d 341 at 346, 200 N.E. 2d 554 at 557, 251 N.Y.S. 2d 653 at 657 (N.Y.C.A.). See also R.N.W. *supra* n. 84 at 172.

[86]See *Beaulne* v. *Ricketts supra* n. 82, where the court awarded special damages in the sum of $650 for monies given to the defendant and general damages in the sum of $10,000. It should be noted that *Smythe* v. *Reardon supra* n. 82 held that general damages are not recoverable in a deceit action.

[87]*Supra* n. 79 at 496.

[88]*Ibid.*

[89]*Ibid.*

well, damages have been awarded for "mental and moral damage suffered"[90] and for violation of the plaintiff's person.[91]

45. One commentator has stated that there ought to be an action for assault available to a woman who consents to intercourse with a man who inveigled her into a bigamous marriage without disclosing that he already had a wife.[92] Such an action may in fact be available,[93] in which case exemplary damages could be given.

46. We do share, therefore, some of the concerns of the Law Reform Commission of British Columbia regarding the need for a remedy in circumstances of fraud.[94] While we shall be recommending abolition of the action for deceit, which is based solely on a fraudulent promise to marry, we do believe that an action for deceit is necessary where there has been a bigamous or a sham marriage of any kind.

B. Breach of Warranty of Capacity to Marry

47. The case of *Shaw* v. *Shaw*,[95] which has been applied in Canada,[96] clearly established that the action for breach of warranty of capacity to marry provides a remedy where *A* innocently goes through a ceremony of marriage with *B*, who unknown to *A*, is already married. However, there is some dispute as to whether or not abolition of the contractual action for breach of promise also necessarily abolishes the action

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[90]*Garnaut* v. *Rowse supra* n. 82 at 31.

[91]*Supra* n. 79 at 496.

[92]See Fleming *supra* n. 81 at 75.

[93]See *Smythe* v. *Reardon supra* n. 82 at 78.

[94]Law Reform Commission of British Columbia, *supra* n. 1 at 27.

[95]Supra n. 48.

[96]*Tschcheidse* v. *Tschcheidse* (1963), 41 D.L.R. (2d) 138 (Sask. Q.B.); *Kaminski* v. *Kaminski* (1982), 26 R.F.L. (2d) 292 (Alta. Q.B.).

for breach of warranty.[97] On the one hand, the implied warranty may be based on the assumption that, if the promisor had been single, the promise would have been actionable.[98] In this case, if the contract action is abolished, then the substratum of the implied warranty would be removed and no action could be brought on it. On the other hand, the action for breach of warranty of capacity to marry, which is analogous to the action for breach of implied warranty of authority,[99] may actually be divorced from the promise to marry and have become a warranty that there is a marriage.[100] In this case, the action for breach of warranty would exist unless specifically abolished.

48. Even if the action for breach of warranty exists after abolition of the contractual action for breach of promise, it is unlikely that many cases would arise in Manitoba. This is especially so because, as we have already indicated, a party to a void marriage may have rights under *"The Family Maintenance Act"*, C.C.S.M. c. F20, and *"The Marital Property Act"*, C.C.S.M. c. M45. Since fraud is not an element of an action in breach of warranty, a plaintiff could succeed against a defendant who entered into a void marriage in good faith, believing that he or she had capacity to marry. We believe that the action for breach of warranty of capacity to marry is, in general, open to the same criticisms as the contractual action for breach of promise to marry, and should be abolished.

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[97]See Thomson, "The End of Actions for Breach of Promise?" (1971), 87 L.Q.R. 158 and Reply by Gower at 314. See also E.W. Hope, "Ignorance of Impossibility as Affecting Consideration" (1918-19), 32 Harv. L. Rev. 679.

[98]Treitel, *The Law of Contract* (5th ed. 1979) 327.

[99]It can be argued that the principle behind the action for an agent's breach of implied warranty of authority is either quasi-contract, quasi-tort, or quasi-assumpsit as opposed to contract. See P.H. Winfield, *The Law of Quasi-Contracts* (1952) 104.

[100]See Gower *supra* n. 97.

49. It is submitted that the action for breach of warranty of capacity, and all actions based solely on a promise to marry, including the action of deceit based upon fraudulent promise to marry and the contractual action for breach of promise of marriage, should be abolished. This would, however, leave intact the action for deceit based upon a bigamous or a sham marriage. Therefore, we recommend:

RECOMMENDATION 5

That the legislation abolishing the contractual action for breach of promise of marriage be drafted so as to abolish all actions based solely on a promise to marry, (including the action for breach of warranty of capacity to marry and the action of deceit based upon a fraudulent promise to marry) but not any action in deceit where there has been a bigamous or sham marriage of any kind.

VIII. SUMMARY OF RECOMMENDATIONS

1. That legislation be enacted to provide that no action may be brought for a breach of a promise to marry or for any damages resulting therefrom.

2. That section 25 of "The Manitoba Evidence Act", C.C.S.M. c. E150, which requires the existence of material evidence to corroborate the testimony of a plaintiff in a breach of promise to marry action, be repealed.

3. That the abolition proposed in recommendation 1 not affect any action for breach of promise to marry which is commenced before the date the legislation implementing the abolition comes into force.

4. That legislation be enacted to provide that where one person makes a gift to another in contemplation of or conditional upon their marriage to each other and the marriage fails to take place or is abandoned, the question of whether or not the failure or abandonment was caused by or was the fault of the donor not be considered in determining the right of the donor to recover the gift.

5. That the legislation abolishing the contractual action for breach of promise of marriage be drafted so as to abolish all actions based solely on a promise to marry, (including the action for breach of warranty of capacity to marry and the action of deceit based upon a fraudulent promise to marry), but not any action in deceit where there has been a bigamous or sham marriage of any kind.

This is a Report pursuant to section 5(2) of *"The Law Reform Commission Act"*, signed this 1st day of October 1984.

Clifford H.C. Edwards, Chairman

Knox B. Foster, Commissioner

George H. Lockwood, Commissioner

Lee Gibson, Commissioner

John Irvine, Commissioner

RESERVATION OF JOHN IRVINE

It appears that people nowadays do not expect, when giving or exchanging promises to marry, that such promises will be attended by legal consequences. That proposition without more seems to me to furnish ample reason for the central proposal of the report, that damages should not be recoverable for breach of the promise to marry, nor for emotional distress or humiliation attendant upon such breach. I agree too that if the contract to marry is to this extent to be deprived of legal effect, it makes no sense to preserve the alternative avenues of recovery sometimes furnished by actions for breach of warranty of capacity to marry, or the tort action for deceit. Since I agree with the central proposals of the report, I have appended my name to it; my reservations, being collateral to its main thrust, do not seem to call for a statement of dissent, or anything so grand as a minority report.

My first reservation concerns the final sentence of Paragraph 43 of the report, which advocates retention of the deceit acton where the defendant's deception has been carried to the point of a bogus ceremony of marriage. While such reprehensible behaviour undoubtedly requires the attention of the criminal law, it seems to me that the disappointed expectations, the humiliations, the injured feelings and perhaps the injured reputation of the victim are the same interests as are involved in the ordinary breach of promise action. Accordingly, if it is proper to deny compensation in the latter context, it is proper to deny civil redress in the "phoney wedding" scenario also. Punitive considerations alone warrant a distinction; and punitive considerations have no legitimate place in debates upon the proper ambit of civil remedies.

My second reservation is more fundamental, and concerns Section VI of the Report. While I feel the force of many of the arguments there raised, I cannot agree that it would be just or politic to erase the liability for "reliance losses" presently afforded by the law of contract. It seems to me that where a party, relying upon another's promise to marry, has incurred material losses - which may be very significant - redress should continue to be available. The present law of restitution will not ordinarily grant such relief, the "breach of promise" action being presently the only basis for recovery. I believe it would be easy to draft a provision, denying relief for the "lost marriage" itself, for injured feelings and other such metaphysical losses, while preserving the existing remedy for material "reliance losses". I cannot conceive of such claims being advanced for merely vindictive reasons, nor giving occasion for "gold-digging" exercises. Rather, they would be brought only in cases of substantial pecuniary loss. However exceptional such cases might be, I consider that the erasure of the existing remedy in such cases is uncalled for and potentially unjust.

John C. Irvine