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Is the Tort of Wrongful Seduction Still Viable? A North Carolina Court Will Get the Chance to Decide

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A North Carolina Court Will Get the Chance to Decide

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Nora Kantor, a young woman in North Carolina, has sued her ex-boyfriend for "wrongful seduction" - a little known tort that dates back several centuries. Many jurisdictions have abolished the tort, but in North Carolina, it may still exist.

Kantor seeks to employ this age-old tort to address a more modern wrong: an alleged act of "date rape."

Kantor's Allegations Against Thompson

Kantor alleges that, after a fraternity Christmas party at Duke University, her then-boyfriend James Thompson forced sex upon her after she engaged in consensual kissing and petting. She claims she was "paralyzed with fear," was a virgin at the time, and did not want to have sexual intercourse. Thompson claims the sexual act began consensually, but stopped when she expressed ambivalence about continuing.

Kantor has sued both Thompson and his fraternity, Sigma Alpha Epsilon (SAE), which has since been disbanded. (Kantor claims SAE was widely referred to by Duke students as "Sexual Assault Expected.")

In her complaint, Kantor asserts, among other claims, that Thompson "wrongfully seduced and debauched" her through "persuasion, deception, enticement, and artifice." Those terms describe a common-law tort known as "wrongful seduction."

The Tort of Wrongful Seduction

The tort of seduction emerged centuries ago. Initially, it was a remedy for fathers who lost the working services of a daughter because she was "seduced and debauched" and became pregnant as a result of nonmarital sexual activity.

The damages were meant to compensate the father for his loss of his daughter's services, much as a master could sue if a third-party caused injury to his servant that rendered the servant unable to work. As Professor Jane Larson reports in an article about the history of seduction laws, the tort of seduction was one of the most common civil actions toward the end of the nineteenth century, and fathers were often successful before juries.

By the turn of the twentieth century, the tort evolved - as Larson also explains - to recognize personal injury, rather than solely deprivation of a property right. Most states therefore granted the victim the right to sue in her own name. (Fathers could still sue as well, on the ground that they had a moral interest in their daughters' chastity).

In addition, consent became an issue. To prevail, a woman had to show either that she did not consent, or that her consent was given under duress, fraud, or coercion. She also had to show that she was previously "innocent" - that is, a virgin. Otherwise, courts reasoned, what damages could she show?

Why Most States Abolished Wrongful Seduction and Other Similar Torts

In the modern era, most jurisdictions abolished the claim of wrongful seduction. Similarly, they also abolished actions for "criminal conversation" (the commission of adultery with another's spouse), "alienation of affections" (diversion by a third party of a person's affections from someone who has rights to them), and breach of promise to marry.

All of these torts had been based on the idea of someone holding a property interest in another's chastity or affections. Thus, early forms of these torts made them actionable only by those who society saw as having an interest in that property--fathers, spouses, or even employers.

Were the torts abolished because society took the more enlightened view that a woman's personal injury should be vindicated in a criminal prosecution for rape, and no other person had an interest in a woman's body but the woman herself? Professor Janice Villiers has argued that the answer, perhaps surprisingly, is actually no.

In most states, she contends, the causes of action were abolished, instead, due to a concern that plaintiffs would use them to wrongfully extort money from defendants - in other words, a concern that unchaste women would lie to cover up their sexual indulgences.

North Carolina's Law of Seduction

What about North Carolina, the jurisdiction in which Kantor's suit has been filed? There, the tort of wrongful seduction has not been expressly abolished.

Indeed, on the contrary, a 1922 North Carolina Supreme Court opinion, in the case of *Hardin v. Davis*, expressly recognizes the tort. And more recent appellate cases in North Carolina have seemingly recognized the validity of the wrongful seduction claim, although they did so in cases that themselves failed on the merits.

Thus, North Carolina may still recognize the tort. If it does, it is not alone. About a third of the states today still recognize this sort of claim.

Hardin acknowledged the viability of a civil seduction claim when "intercourse was induced by deception, enticement, or other artifice," and when the plaintiff was, at the time of the seduction, an "innocent" and virtuous woman.

Kantor, according to her complaint, fits the bill: She alleges herself to be "chaste, innocent, and virtuous," and alleges the sexual act to have been the product of deception, coercion, or artifice.

What if Kantor had been unchaste? She still might have been able to sue. Under *Hardin*, a woman who had been unchaste, but had reformed herself could become "an innocent woman in the eyes of the law." Hence, she could sue for wrongful seduction although, the court noted, she might have her damages reduced because of her prior unchastity.

Should Feminists Favor the Tort of Seduction?

Is the tort of seduction a good thing? Thompson's attorney argues it is not. According to the *National Law Journal*, he has characterized the civil seduction claim his client must confront as "rooted in outdated presumptions of male dominance and female vulnerability."

To assess his claim, it's useful to set out a few background legal propositions. First of all, if Kantor's allegations are true, she was raped. As the California Supreme Court held recently in *In re John Z.*, a man who continues to have intercourse with a woman who initially consented to intercourse but subsequently changed her mind has committed rape. Moreover, Kantor alleges that she did not consent to intercourse at all, but only to sexual touching.

Second, there is currently no such thing as a civil claim for rape: A prosecutor decides whether a rape claim can be pursued. But where rape has been committed, other civil claims besides the wrongful seduction tort will almost certainly also have occurred. Kantor has listed three of them in her complaint: assault, battery, and intentional infliction of emotional distress. (Although "assault and battery" is a familiar criminal charge, assault and battery, unlike rape, can also be the basis for civil claims.)

There probably should be a civil tort claim, however, that is simply for rape (like the civil wrongful death suit that can be applied in cases of murder), and that does not require the elements of assault, battery, or intentional infliction of emotional distress. (The last is notoriously difficult to prove.) The federal Violence Against Women Act tried to grant women a civil action against men who committed violent sexual acts against them, but the Supreme Court struck down that aspect of the statute a few years ago.

Having a civil claim for rape would mean that even a woman who could not convince prosecutors to take her case, or whose proof was strong, but not beyond a reasonable doubt, could still recover damages. (Think, by comparison, of the claim Nicole Brown Simpson's family successfully brought against O.J. Simpson after he was acquitted for her murder.)

The problem, though, is that the claim for wrongful seduction is not exactly a civil tort claim for rape. Even putting its plainly sexist history aside, its modern elements continue to mean that it falls short of a civil claim for rape. Worse, it does so in disturbingly sexist ways - ways that will hurt many genuine rape claims.

First, it does not focus on consent, but trickery - requiring that "intercourse was induced by deception, enticement, or other artifice." But if a man forces a woman to have sex, he should be liable for damages such as her hospital and psychiatrist bills, whether or not he also tricked her into it.

Second, it requires chastity. But any woman - even a prostitute - can be raped or otherwise violated. To make a cause of action depend on virginity is archaic indeed. If Kantor had had consensual sex with a prior boyfriend, and if her allegations are true, her alleged rape by Thompson would not be any less grave. A woman need not preserve her chastity to deserve the law's protection.

What about a hypothetical case different from Kantor's, though - in which there was only trickery, and no rape? If states establish a civil action for rape, should they also establish a civil action for sex-by-trickery? That is a far more difficult question.

On one hand, getting someone to do something that harms them by lying to them is generally known as fraud - which can be the basis for a civil lawsuit or a criminal prosecution. And being intimate with someone, then later learning they lied to you, can certainly cause psychological harm.

On the other hand, establishing a sex-by-trickery action may assume that sex itself harms women, by robbing them of their chastity - another archaic assumption. And if the harm is the harm of sex-plus-the-lie, not just sex, then aren't we back in the territory of fraud? Is it really necessary to have another cause of action?

The tort of seduction will probably disappear from the law eventually. In the meantime, while it may serve to compensate women for sexual violation, it has also reinforces disturbing stereotypes about women's vulnerability, need for protection, and lack of sexual autonomy.

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