

Rosemary J. Coombe* 'THE MOST DISGUSTING, DISGRACEFUL
AND INEQUITOUS PROCEEDING IN OUR LAW':
THE ACTION FOR BREACH OF PROMISE OF
MARRIAGE IN NINETEENTH-CENTURY ONTARIO†

The breach of promise of marriage action has rarely been the subject of legal scholarship, and is generally regarded as a quaint legal curiosity of a bygone era. Dusting off this obscure common-law action, however, serves to illuminate a number of topics of interest to legal and social historians. In nineteenth-century common-law jurisdictions breach of promise suits attracted both public attention and legal concern. Local newspapers advertised upcoming trials and gave the proceedings remarkable prominence, courtrooms were packed with spectators, and judges struggled to maintain courtroom decorum when the trials became popular forms of entertainment. In legal circles the propriety of the action was questioned; it evoked a great deal of emotionally charged criticism, and became the subject of a lively transatlantic debate that continued throughout the Victorian era. Such suits became familiar in the province of Ontario between 1850 and 1890, a period in which the legal controversy about the action reached its crescendo. A focus on the action and its critics in the Ontario area serves to provide a local interpretation of what appears to be a wider phenomenon, and a jurisdictional framework within which to examine the interplay of cultural ideology and legal developments. A study of popular and legal attitudes to the breach of promise suit in Ontario reveals a great deal about Victorian preoccupations with male and female roles, the institution of marriage, and the maintenance of social order in an era of transition to industrial capitalism.

The action for breach of promise of marriage is also an interesting vehicle with which to explore the workings of Ontario courts in the Victorian age. It can be used to trace the development of a particular action in the formative years of the province's legal history, and it provides a rare opportunity to study judicial behaviour in a contentious context.

Because the action was instituted exclusively by women in the nineteenth century, its study is important to the expanding field of women's

* Faculty of Law, University of Toronto

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legal history. Opponents of the suit directed much of their criticism at the women who launched the proceedings, who were seen as violating Victorian standards of respectable womanhood. An investigation of this opposition reveals ambivalent attitudes towards women's participation in the legal process, and an examination of the behaviour of the judges who heard these complaints provides insight into nineteenth-century judicial attitudes towards women.

This study examines judicial management of the action for breach of promise of marriage in nineteenth-century Ontario through an analysis of reported cases, limited trial records, and newspaper accounts of local trials. Judicial treatment of the action was seen to be antithetical to dominant cultural ideals of love, marriage, and womanly demeanour, thus inciting popular fervour and exacerbating the developing legal controversy. Popular sentiments and legal controversy are traced through articles in local and international law journals readily available in Ontario and related commentary in local newspapers and periodicals. A full appreciation of the debate, however, requires a wider investigation into Victorian cultural mores and ideology. The breach of promise of marriage action attracted the attention it did because it offended bourgeois socio-cultural values and threatened Victorian visions of social order. The failure of the judiciary to respond to the controversy by appeasing critics of the action suggests that Ontario judges were strongly committed to the maintenance of judicial autonomy and discretion even when the suits they were entertaining became matters of contention. This demonstration of judicial independence adds a new dimension to our understanding of the role and influence of the bench in nineteenth-century Ontario.

The breach of promise action and Victorian cultural values

The action for breach of promise of marriage became the subject of increasing controversy in the latter half of the nineteenth century. The action was attacked by legal commentators in most common-law jurisdictions, and the debate rapidly became a transatlantic one as criticisms made in one jurisdiction were reprinted and disseminated in another. In Ontario the debate found its primary forum in local law journals, which also reprinted British and American criticisms; Ontario newspapers also provided a forum for indigenous commentary on the action.

Opposition to the breach of promise suit was peculiarly 'Victorian' in nature, and an analysis of the controversy requires an understanding of Victorianism both as a 'communications system' and an ideological framework. Daniel Walker Howe has demonstrated that Victorian

culture was a transatlantic one, shared by English-speaking peoples throughout the western world:

The Victorian cultural community constituted an international reference group in the nineteenth century world. If this reference group ... was not precisely coterminous with social entities defined in terms of citizenship, class, religion, ancestry, or urban residence, then what did define it? One way to answer this question is to view Victorianism as a communications system. The communications system of Victorianism was based on the English language and the media of print and (in due course) the telegraph and telephone. Knowledge of English put one in potential contact with a particular cultural heritage, including law, religion, and science ...¹

Ontario was part of this cultural community. Residents were influenced by many of the ideas circulating in British and American books, periodicals, and newspapers, which they imported in large numbers. 'Victorianism was modified in southern Ontario by the conditions of the new world but still had much of the character that that word suggests.'²

To characterize nineteenth-century Ontario as culturally Victorian is to ascribe to its residents a distinctive world view. Howe asserts that Victorian culture was defined by its value system and that any understanding of the culture must refer primarily to its values.³ The debate over actions for breach of promise of marriage resonated throughout the Victorian cultural area, and may fruitfully be appraised with reference to the value Victorians placed on order. Howe maintains that the Victorian preoccupation with order reflected a need for psychological stability amidst the rapid changes occurring during the nineteenth century.⁴ In Ontario, the perceived threat of social chaos in the late nineteenth century has been tied to the impact of industrialization, large-scale immigration, and rapid urbanization.⁵ The 'gospel of order' was enshrined by the daily press, which extolled Christianity, the work ethic, the family, marriage, and the home as defences against the persistent threat of social disintegration.⁶

In her seminal work *Purity and Danger*,⁷ the anthropologist Mary Douglas demonstrates that human societies have a universal tendency to

1 Howe, Victorian culture in America, in Howe (ed.) *Victorian America* (1976) 3, at 16-17

2 Glazebrook *Life in Ontario: A Social History* (1968) 161

3 Howe, *supra* note 1, 17

4 *Ibid.* 19

5 De Villiers-Westfall, The dominion of the Lord: An introduction to the cultural history of Protestant Ontario in the Victorian period (1976) 83 *Queen's Q.* 47, at 63

6 Rutherford *A Victorian Authority: The Daily Press in Late Nineteenth-Century Canada* (1982) 170-6

7 *Purity and Danger: An Analysis of Concepts of Pollution and Taboo* (1970)

impose order on experience by creating complex classification systems. A culture provides a positive categorical system within which ideas and experiences are ordered. Cultural categories are both rigid and public, and attempts to challenge or defy those basic categories are met with social sanctions of varying degrees of severity.

In creating a categorical system, a society defines an ideal order that must be publicly supported and upheld. No classification system, however, can fully organize the complexities of all phenomena, and societies must find ways of dealing with those things which cannot easily be fixed in prevailing cultural categories. The ideal order must be protected against these 'anomalies' because they threaten the categorical system. Douglas argues that such anomalies give rise to 'pollution behaviour,' the form of which varies from one culture to another. The initial recognition of anomaly creates anxiety, and social groups seek to abolish, condemn, suppress, and sanction activity that seems to threaten order by challenging the categorical system on which it is founded.

Victorian culture has been described as preoccupied with order and plagued by fears of disorder,⁸ and Victorianism clearly was characterized by a highly developed categorical system. Arguably, the breach of promise action attracted the concern it did because it was perceived to threaten conceptual boundaries by breaking down and merging categories that were culturally distinct. Victorian ideas about the proper roles of men and women, the nature of love and commerce, and the important separation between public and private spheres of activity were challenged by the breach of promise suit; consequently, it evoked 'pollution behaviour' that ranged from titillation and ridicule to outright condemnation and recommendations that the action be abolished altogether.

In Ontario, the breach of promise suit was contemplated with a great deal of uneasiness; in legal circles that uneasiness was manifested in uncharacteristically emotional criticism of the action in legal journals (and adversarial tactics), which continued throughout the latter half of the nineteenth century. An extract from the *Upper Canada Law Journal* of 1859 is representative of the tone of the debate:

The most disgusting, disgraceful and inequitable proceeding in our law is the action for breach of promise of marriage. There is none so open to abuse – so much abused in fact – in which justice is so rarely done. The reason is that it is never resorted to by those who have really suffered a wrong, but only by speculators in marriage, who first deliberately design to commit the great sin of marrying a man for some other object than love of him, and, failing in that

⁸ Howe, *supra* note 1, 19; Grossberg *Governing the Hearth: Law and the Family in Nineteenth-Century America* (1985) 61; Rutherford, *supra* note 6, 170–6

speculation, pursue their victim in a still more profitable suit. Wounded love does not console itself with 'damages.' Marriage ought not to be where love is not. The very fact, then, that a woman brings an action for breach of promise is conclusive proof that she could not have loved, and not having loved, she was not in a moral condition to marry; and not being in a state to perform the contract of love, she is not in a position to sue for the breach of it, and certainly, is entitled to no damages, for she has incurred none.⁹

The article expresses several themes that were to be echoed by legal commentators and the press until the end of the century. Victorians were upset by the perceived tendency of the action to impose monetary values on love and matrimony and its 'commercialization' of courtship and marriage. Criticism was often directed against the women who brought such actions, who were repeatedly characterized as extortionists lacking the attributes most cherished in Victorian womanhood. A closer analysis of these themes illustrates the extent to which the controversy surrounding the action stemmed from a sense that it threatened Victorian ideals of social order.

THE CONTRACTUAL MODEL: 'WHAT CANNOT BE REGARDED AS A MATTER OF TRADE OR DICKER'

Love and marriage were greatly romanticized in the Victorian period, and idealized as bulwarks against the damaging influences of commercial life.¹⁰ Marriage was presented as a sacred institution that served as a refuge from the world's commercialism. The values of commerce and the values of love and marriage were both antithetical and interdependent, but they were distinct, and the fear that love and marriage were being corrupted by commercial concerns was pervasive throughout the period.

Victorians exalted the spiritual relationship of marriage as an ideal institution in a social milieu where an emphasis on idealism was needed to check the commercial spirit of middle-class society.¹¹ In Ontario, as in Victorian cultures generally, this idealism stemmed from a profound disquiet with the obsessive materialism of the everyday world, and manifested itself in an opposition posed between commercial pursuits and spiritual attainments;¹² love and marriage were spiritual attainments that provided the individual with protection against the draining and destructive forces of the commercial world. In 1856 a Canadian audience

⁹ Breach of promise of marriage (1859) 5 *U.C.L.J.* 152

¹⁰ Houghton *The Victorian Frame of Mind* (1957) 350-93. See also Rutherford, *supra* note 6, 172

¹¹ Houghton, *supra* note 10, 269

¹² William Westfall, cited in Craven, *Law and ideology: The Toronto police court 1850-1880*, in Flaherty (ed.) 1 *Essays in the History of Canadian Law* (1981) 248, at 295

was told that '[l]ove is essentially romantic. It is the ideal of human existence. It imbues the dull, cold realities of life with the spiritual element and paints them with the beauteous colourings of imagination and of hope.'¹³

Any consideration of marriage as a commercial pursuit evoked strong condemnation. The Victorian concern that marriage remain untainted by commercial values was reflected in a continuing preoccupation with the social evil of mercenary marriages. Marriage-guidance manuals flooded English and American markets in the nineteenth century, and many were circulated among Canadian readers.¹⁴ The manuals were 'filled with fearsome stories of women who chose their mates solely for economic reasons. The moral was clear: all who enter into the married state from mercenary motives, though they may enlarge their possessions and increase their fortunes, live in splendid misery, and find that they have bartered happiness for wealth.'¹⁵ Canadian dailies reprinted syndicated American material on the topic on their women's pages; for example, in 1888 *Globe* readers were warned of the dangers of 'Marrying for Money.'¹⁶ The unhappiness of loveless marriages made to gain wealth, social position, and material advantage was a recurring theme in Victorian fiction, and love was exalted as the corrective for a marriage system dominated by the commercial spirit.¹⁷

The Victorian world-view demanded a strict separation of the categories of love and commerce, and a great deal of criticism was directed at those who attempted to introduce commercial or materialistic concerns into the spiritual sphere of matrimonial affection. Much of the criticism and hostility directed at the breach of promise suit is comprehensible within this context. Critics argued that the suit '[forced] the courts into a commercial view of what cannot be regarded as a matter of trade or dicker,'¹⁸ and that the contractual model applied by the courts to these actions was entirely inappropriate to matters that were not business affairs, but affairs of the heart. The Canadian *Local Courts and Municipal Gazette* reprinted a *Law Times* article which complained that 'there is

13 Sedgewick, Women's sphere, in Cook and Mitchinson (eds) *The Proper Sphere: Women's Place in Canadian Society* (1976) 26-7

14 Bliss, Pure books on avoided subjects: Pre-Freudian sexual ideas in Canada, in Atherton et al. (eds) *Historical Papers, 1970* (1970) 102. See also Glazebrook, *supra* note 2, 195

15 Branca *Women in Europe since 1750* (1978) 93. See also Welter, The cult of true womanhood 1820-1860, in Gordon (ed.) *The American Family in Socio-Historical Perspective* (1983) 373.

16 Cited in Rutherford, *supra* note 6, 58

17 Houghton, *supra* note 10, 381-5

18 Recent cases (1894) 7 *Harv. L. R.* 372, at 372

something very repulsive in the view of marriage as a matter of business instead of affection, and in appraising the value of settlement to which affairs of the heart legitimately lead.¹⁹

The perception that the breach of promise action commercialized courtship and marriage was supported by continuing judicial reinforcement of the common-law characterization of the suit as a simple breach of contract action, a characterization with complex historical origins. English ecclesiastical courts had exercised exclusive jurisdiction over the regulation of marriage, and until the seventeenth century the law of marriage was simply canon law, which recognized marriages contracted without form or ceremony and enabled parties to sue in the ecclesiastical courts for specific performance of agreements to marry.²⁰

Ecclesiastical recognition of clandestine and formless marriages created great hardship and confusion. Without witnesses it was very difficult to prove that a marriage had taken place, and a frequent answer to a petition for divorce was that there was no valid marriage or that one of the parties was previously married.²¹ To remedy the confusion resulting from clandestine marriages, Lord Hardwicke's Act, passed in 1753, stipulated the formal requirements necessary to validate a marriage and abolished the jurisdiction of the spiritual courts to order specific performance of agreements to marry.²²

Victims of broken vows were not left without a remedy, because the common law had developed an independent source of redress in the form of the action on the case that became known as *assumpsit*. The action for breach of promise of marriage originated in the period in which the contractual and tortious elements of *assumpsit* were still undifferentiated, and it retained this character even as these categories became more rigidly defined. Thus, Lord Justice Bowen referred to the action in the case of *Finlay v. Chirney* as 'a class of action which though in its form and substance contractual differs from other forms of action *ex contractu* in permitting damages to be given as for a wrong.'²³

When Lord Hardwicke's Act abolished the ecclesiastical jurisdiction over betrothals in 1753, the common-law action became a disappointed lover's only means of legal redress. Breach of promise actions thus

19 Breach of promise actions (1868) 4 *Local Courts & Municipal Gazette* 132, at 132

20 In theory, ecclesiastical law drew a distinction between marriages contracted *de praesenti* and spousals contracted *de futuro*. In the former case a ceremony would be ordered; in the latter case, a ceremony would be ordered if 'by reason of carnal knowledge or some other act equivalent' the spousals *de futuro* did become matrimony. Burn *Ecclesiastical Law* (1767).

21 James, The English law of marriage, in Graveson and Crane (eds) *A Century of Family Law* (1957) 27

22 An Act for the better preventing of Clandestine Marriages, 26 Geo. II, c. 33.

23 (1888) 20 Q.B.D. 494, at 504

increased in number as the principles of commercial and mercantile law were being consolidated and refined in the field of contract law, in which the action was designated. Consequently, the promise of marriage acquired many of the legal characteristics of a commercial bargain.

The growing contractual ideology that defined the breach of promise action coincided with an emerging acceptance of the notion that marriage was a private contract between two consenting individuals. Historians of the family, focusing on changing attitudes towards interpersonal relationships, describe a gradual movement towards an emphasis on individual autonomy and rights in the eighteenth century. Parental and community control over courtship declined and personal choice and romantic considerations became more important as a basis of spouse selection. The common law reflected this view of young men and women as independent individuals in a free market. Parties were free to contract at will, but, as with any contract, the common law provided a remedy when one party failed to fulfil the bargain he had made. The suit for breach of promise of marriage in the late eighteenth century embodied elements of both contract and tort, but was encumbered by virtue of its form and historical growth with many of the principles developed in commercial dispute settlement.

By the early nineteenth century, the commercial ideology of contract law largely determined the common-law treatment of marriage engagements. The contractual model found favour on both sides of the Atlantic. As Michael Grossberg notes in his discussion of judicial supervision of courtship in the United States, as a private law action 'the right of a rejected lover to seek damages appeared to Swift, in the commercial idiom so pervasive in early nineteenth century America, "as natural as to allow an action for the breach of a contract to purchase merchandise."' ²⁴ Assessing the breach of promise action in 1970, the Ontario Law Reform Commission commented on the historical origins of the suit as it was adopted in the province: '[B]ecause this body of law is in the context of contracts, the well-established historical bias of the common law in favour of the shrewd trader applies almost without distinction. In an engagement to marry, as in a sale of commodities, the legal emphasis has been on protecting the bargain once the agreement has been reached ...' ²⁵ It was in the guise of this commercial idiom that the action for breach of promise of marriage was first introduced in Upper Canada. ²⁶

²⁴ Grossberg, *supra* note 8, 34

²⁵ Ontario Law Reform Commission *Report on Family Law: Part II, Marriage* (1970) 10

²⁶ The common-law action of breach of promise of marriage became part of the jurisdiction of the civil courts in Upper Canada with the introduction of English civil law in 1792. The legislature of Upper Canada determined that in all matters of controversy relating to property and civil rights 'resort shall be had to the laws of

Although few cases were reported before the mid-nineteenth century, there is some evidence to indicate that Ontario jurists were still grappling with the complexities posed by the coexistence of tort and contract principles that defined the action early in the century, and that they perceived it to be necessary to fix the action more decisively within one realm or the other. In the 1824 case of *Davey v. Myers*,²⁷ the Court of King's Bench was faced with the question whether a breach of promise suit could be maintained by a woman against the executors of a deceased defendant. Determination of this issue demanded that the suit be classified in the realm of either contract or tort, and, despite the articulate arguments made by Attorney General John Beverley Robinson to the contrary, all of the judges affirmed a classification of the suit as a contract action.²⁸

England as the rule for the decision of the same.' See An Act Introducing the English Civil Law into Upper Canada, 32 Geo. III, c. 1 (U.C.). There is some evidence to suggest that the action was available to litigants in the Ontario area even before the formal introduction of English civil law. In 1789 the Court of Common Pleas held at Edwardsburg, in the District of Lunenburg, entertained the suit of Dorothy Brown against Herman Landen. Theoretically, as part of the (then) province of Quebec, the district was governed by French-Canadian civil law, but the action closely resembled the common-law breach of promise suit. The plaintiff introduced witnesses to testify that it was common knowledge that the parties intended to marry. Witnesses attested that several people heard the defendant call the plaintiff a whore and say that because he had slept with the plaintiff he would not marry her. Connection with the defendant was shown to have injured the plaintiff's character in the community, and witnesses testified that her prospects of marrying to advantage were consequently reduced. The defendant attempted to impute a lack of chastity to the plaintiff, but the evidence was discredited. The parties agreed to drop the proceedings, so it is impossible to determine how the courts handled such a complaint in this early colonial period. See Fraser *Fourteenth Report of the Bureau of Archives for the Province of Ontario* (1917) 367.

²⁷ Taylor 89

²⁸ Miss Davey brought an action for assumpsit against the executors of William Myers for a breach of promise of marriage made in the lifetime of the testator. A contract to marry was proved and admitted. The trial judge felt that although an action might be maintained for breach of such a contract by the testator, the evidence did not support the existence of a breach because the plaintiff had not required the testator to fulfil his contract, nor had he refused to do so. The jury found for the plaintiff, however, and awarded her £500 in damages.

Attorney General John Beverley Robinson moved on behalf of the defendant to arrest the judgment, arguing that such an action could not be maintained against executors of an estate because the action was one of tort, and actions for wrongs or injuries to the person do not survive but die with the party who is alleged to have committed the tort. The maxim 'actio personalis moutur cum persona' clearly applied.

Solicitor General Henry John Boulton argued for the plaintiff that personal actions do survive the death of the testator where the cause of action is a contract to be fulfilled or is based on a promise made by the testator. The testator promised the plaintiff he would marry her and broke that promise in his lifetime, and the plaintiff was therefore entitled to judgment because in actions arising *ex contractu* the action survives the death of the testator and an action of assumpsit lies against the executors.

The court refused to arrest the judgment against the executors and upheld the verdict for the plaintiff. In coming to this conclusion, all of the judges acknowledged the common-law characterization of the suit as a contractual action.

The Ontario judiciary, like their English and American counterparts, had fixed the breach of promise suit firmly within the realm of contract law by the mid-nineteenth century. As more of these cases came before the courts in the latter half of the century, judges were called upon to determine the applicability of many of the technical requirements of contract law to agreements publicly regarded to be romantic in nature. Ontario judges demonstrated a marked reluctance to deviate from commercial principles of contract law when dealing with breach of promise suits. This intransigence rapidly brought the action into disfavour in an age when love and commerce were, ideally, mutually exclusive realms of activity.

The 1851 case of *Parks v. Maybee*²⁹ is an early example of the dominant judicial approach. The case was resolved on the basis of a strict application of contract principles without regard to the romantic nature of the agreement or the obvious lack of emotional commitment on the part of either party. Catherine Parks and Ezra Maybee agreed to marry in January 1847, while Catherine was still an infant. In May of the same year, however, the defendant spoke to the plaintiff's guardian who (it appears from the reported case) agreed, with the concurrence of the plaintiff, that the engagement could be broken off and the marriage plans abandoned. The defendant married another woman in 1851, and the plaintiff brought the action.

The case was decided on the basis that the privilege of avoiding a voidable contract was a personal one. As an infant, the plaintiff was at liberty to avoid any contracts she entered into in her minority. Her guardian, however, had no right to rescind or repudiate her contracts and therefore could not discharge the defendant from his obligation to the plaintiff. Because the contract was entered into between the plaintiff and the defendant, the plaintiff was the only party who could absolve the defendant from his promise to marry. The plaintiff's apparent concurrence in, consent to, and approval of her guardian's conduct in the matter was held to be irrelevant. Like any other contract, the marriage contract could be ended only by the parties who made it, and in these circumstances one of the parties to the contract was not a party to the rescission.

Although the parties had been engaged a mere four months, and although the plaintiff had known for at least three years that the defendant had no intention of marrying her, the court upheld her suit. The judgment shows that in deciding the case the court did not venture beyond established contract principles, but it also suggests the possibility

29 2 U.C.C.P. 257.

that judges employed contract rules as a means with which to provide women with some protection against male irresponsibility.³⁰

A lack of reluctance to apply concepts grounded in commercial law to affairs of the heart is evident in Justice Hagarty's address to the jury in *Bristowe v. Spear*, in which he declares that the groom's failure to appear at his wedding makes him accountable 'just as [in] the case of a man agreeing to be at a place to purchase one hundred bushels of wheat at a given time.'³¹ It is also shown in *Major v. McKenzie*, brought to public attention by the *Toronto Globe*, which reported the proceedings and published the parties' love letters on the front page of its edition of 3 April 1873. The case deserves some attention. The wealth of detail reported by the *Globe* seems to indicate the interest the public took in these suits, and the report captures much of the drama inherent in these trials, in addition to providing a précis of the criticisms that were being voiced by lawyers.

The plaintiff, Florence Major, aged nineteen when the action was brought, had known the defendant, Marshall McKenzie, from the age of sixteen. Florence was the daughter of a shopkeeper in the village of Cashell; Marshall owned a nearby farm valued at \$9,000. They became engaged in the spring of 1871, and the defendant presented the plaintiff with a ring that fall. Because the defendant could not make proper provisions for a wife, the marriage was postponed until the following autumn. In the spring of 1872 the plaintiff's family moved to Yorkville, and the parties continued to exchange letters and occasional visits. The correspondence between the parties was introduced as evidence by Mr Matthew Crooks Cameron, counsel for the plaintiff. The reading of the letters created great mirth in the courtroom, and the presiding judge,

³⁰ The benchbook of Justice Macaulay, the trial judge, sheds interesting light on the facts of this case. The plaintiff, a young girl without property, had been taken in by the Williams family, who expected her to contribute to her upkeep by working on their farm. After a brief courtship with the defendant, the plaintiff became pregnant and the defendant gave Mr Williams \$100 to 'settle the matter.' In testimony, Mrs Williams asserted that the settlement had nothing to do with the defendant's promise to marry, which suggests that the money might have been received for the support of the child. The emphasis in the testimony is on the plaintiff's lack of means of support, the cost of supporting both her and the child, and her inability to find a station after having to leave the Williams family. Given that the action was brought three years after the courtship, it might be speculated that Miss Park brought the action as a means to obtain additional support for herself and her child. In the circumstances of this case, the characterization of the settlement as a rescission of the promise to marry permitted the judiciary to focus on formal rules about contracts made in infancy, thus evading questions about the parties' respective commitments to marry and providing the plaintiff with a much-needed financial settlement. Justice Macaulay's benchbook is located in the Ontario Public Archives, record group 22, series 390, box 11-E6. The case is referred to at 38-41.

³¹ Ontario Public Archives, record group 22, series 390, box 102-E3, at 197.

Justice Thomas Galt, warned the audience that if necessary he would clear the court to restore order.

In her letters Florence complained that Marshall's visits were too brief and his letters too business-like, and expressed her fear that he would never leave his relatives in the country. Marshall accused her of flirting with other men, to which she replied that if anyone had told him such lies, he had shown himself 'greener than the greenest to swallow such nonsense.' Marshall complained that Florence had 'used him,' and in August told her that he could not live in town and that there was no longer any hope of their being married.

Florence's father responded to the letter decisively. He told Marshall that he had trifled with and wounded his daughter's feelings for too long: 'before you receive this I shall have placed the affair in the hands of a solicitor as I am determined to put you through.' John Major was true to his word, and the parties met before the York spring assizes on 2 April, 1873.

After the letters were read, members of the plaintiff's family were examined by both counsel. Despite the fact that Mr Major was only a local merchant, counsel for the defendant seemed eager to establish that the plaintiff's family had been well connected and socially prominent in London before their immigration, and tried to suggest that Florence's mother had dined with the Queen. Mrs Major responded by stating that she 'was willing to accept the honour of being called one of the aristocracy if counsel so wished.'

The counsel for the parties then proceeded to address the jury and sum up the evidence. Mr Cameron argued that the letters illustrated that love did exist between the parties, 'if not much of the poetry of that sentiment.' The letter ending the relationship was proof of an engagement, and showed how carelessly the defendant had ended a lengthy relationship in which he had engaged the affections of the plaintiff. Addressing the measure of damages, he reminded the jury of the plaintiff's position, her affections, and her blighted hopes. The defendant was said to be possessed of property worth \$9,000 and it was the law of the land that a married woman could not be deprived of her share. As his wife, \$3,000 of the estate would legally have belonged to her.

On behalf of the defendant, Mr McKenzie argued that it had never been established that the defendant refused to perform the contract. Moreover,

the defendant's conduct throughout had been that of a foolish boy; she herself had called him a 'greenhorn' and it was deserved. He was a soft, simple fellow, who had fallen into the hands of a clever, educated and aristocratic family ... Mr.

Cameron had said some hard things against the defendant, but the defendant had told him not to say a word against Miss Florence Major. But he would say that the course taken by her father and mother was reprehensible. The whole story would be in the newspapers in the morning ... instead of their coming to ask for damages the defendant might do so for bringing such nonsensical proceedings, which would never have been done if the defendant had not owned a good farm. Some of the best minds in the land thought that actions for breach of promise were a fault in the law and to force the relation of marriage on unwilling parties was prostituting the solemnity of the contract and reducing it to a mere mercenary and commercial transaction.

To counter the histrionics of counsel, Justice Galt reminded the jury that the action was simply a breach of contract and the whole question was merely whether the young man had promised to marry the young woman, and what the measure of damages was to be. He administered a rebuke to the audience for the levity of their demeanour during the trial and proceeded to address the jury on the question of damages. There was nothing, he said, in the conduct of the young man, aside from his fickleness, which called for heavy damages, but the jury were asked to consider what was due for the plaintiff's injured feelings. Clearly more influenced by the passion of Mr McKenzie's arguments, the jury returned with a verdict for the plaintiff, but awarded her only fifty dollars in damages.

The contrast between the judge's terse summary of the action as a mere breach of contract and the impassioned oratory of counsel, the behaviour of the audience, and the obvious interest of the public is instructive. It illustrates the growing disparity between common-law treatment of the action and public perception of the suit. The incongruity of awarding damages for a romantic falling-out, the introduction of such private matters as the intimacies of courtship into so public a forum as a court of law, and the spectre of a disappointed young bride transformed into a mercenary opportunist elicited both fascination and disapproval. Despite charges that the action reduced marriage to the status of a business transaction, the Ontario judiciary continued to endue the action with the attributes of a commercial dispute.

For example, in *Costello v. Hunter*³² the Court of Common Pleas was called upon to determine the application of the Statute of Limitations³³ to actions of this kind. Ann Costello alleged that the defendant had promised to marry her in the fall of 1873. When the time arrived, he said that he could not marry her because he had not built his house. The

³² (1886) 12 O.R. 333

³³ R.S.O. 1877, c. 117

plaintiff claimed she was willing to live in a shanty, but the defendant refused to marry until he had a suitable home. The defendant eventually built the house in 1878. Although the parties set no fixed date for the marriage after 1873, they maintained friendly relations until 1884, when the defendant married another woman and the plaintiff instituted her suit.

The Statute of Limitations required that all actions grounded in contracts be commenced within six years after the cause of action arose, and that no acknowledgment or promise by words only should be deemed evidence of a new or continuing contract which would defeat the application of the rule. At the trial in Hamilton in 1886, defendant's counsel argued that since no promise could be shown except for the one made in 1873, the action was barred by the statute. The trial judge, Justice John O'Connor, overruled this objection, and the jury found for the plaintiff and awarded her four hundred dollars in damages.

On appeal, defendant's counsel contended that the cause of action arose when the defendant failed to marry the plaintiff in 1873, or, alternatively, in 1878, when he failed to marry her upon completion of his house. In either case, he argued, the statute barred the action. Plaintiff's counsel maintained that renewed promises were made throughout the period from 1873, that no breach occurred until the defendant married in 1884, and that the statute commenced to run at that time. He suggested that a promise to marry was different from an ordinary promise because it must be considered to have been renewed each time the parties met.

Although admitting that the contract of marriage was a peculiar one, Chief Justice Matthew Crooks Cameron (who had been counsel for the plaintiff in *Major v. McKenzie*) refused to consider altering the traditional contract rule in the circumstances:

In one view it may be said that a promise to marry, where parties after an engagement constantly seek each other and remain on friendly terms, is renewed at each time of meeting as such a contract may be inferred from the conduct of the parties; but this kind of contract is subject to the law relating to ordinary contracts, and in the absence of express rescission of the original contract, I do not think it can be said there was any evidence in the case that went to establish a new contract. What evidence there is goes rather to support the continuance of the original engagement without objection on the part of the plaintiff to delay in the performance of the contract.

What reasonable ground of distinction is there between this case and that of a party undertaking to pay a sum of money at a particular time, which he fails to do, and every year, or every day in the year for six years, meets his creditor and acknowledges the debt, and promises to pay him?

In the one case there is a promise to pay, in the other a promise to marry, both unfulfilled, the language of the statute ... is as applicable to a contract to marry as a contract to pay.³⁴

Judicial consistency in subjecting the marriage contract to the same rules that governed commercial disputes was further demonstrated in the case of *Smith v. Jamieson* in 1889.³⁵ Originally heard at the spring assizes in Ottawa, the proceedings of the trial were given extensive coverage in the *Ottawa Free Press* of 23 March 1889.

Pauline Smith was compelled to earn her own living. She met the defendant in 1885 while working in his father's shop. After a two-year courtship they became engaged, and he presented her with a ring. At that time the defendant asked her to give up her occupation (because his family objected to her going out to work) and to devote herself to household duties so as to fit herself to become his wife, and promised to allow her the three dollars a week which she received in his father's shop. They planned to be engaged for a year before marrying. Although the wedding did not take place in the autumn of 1888 as planned, the defendant continued to visit the plaintiff and evidence attested that he was looked upon as her future husband. The engagement ended in February 1889. The defendant did not dispute the engagement, and merely stated that he had become tired of her over the winter.

Evidence indicated that the defendant had told the plaintiff that he would have \$1,200 from his mother's estate, half his aunt's property, and free rent from his father. The defendant denied this, but the jury appeared to have considered him a man of means. They gave a verdict for the plaintiff, awarding her \$1,000 for the breach of promise and \$207 as compensation for the wages she gave up during the period of her engagement.

The defendant appealed the verdict on the grounds that the damages were excessive and that the agreement to marry was required to be in writing according to the Statute of Frauds,³⁶ which stipulated that no action could be brought upon any agreement that was not to be performed within a period of one year from its creation, unless the agreement or some memorandum or note thereof was in writing. The argument was a novel one. A number of English cases held that the section of the statute that required contracts in consideration of marriage to be in writing did not apply to contracts to marry, and thus that promises of

³⁴ *Supra* note 32, at 342

³⁵ (1889) 17 O.R. 626

³⁶ 29 Car. 11, c. 3 (England)

marriage need not be written.³⁷ Clearly, any requirement that a promise of marriage be in written form would be an onerous one, but the Court of Queen's Bench appears to have accepted the application of this section of the statute. They decided the case on the narrow ground that 'if the engagement was to be for a year from the date of the agreement, it was not an agreement which was not to be performed within a year; it was, on the contrary, one which the law required should be performed within the space of a year from the time it was made.'³⁸ The judges thereby implied that if the parties had understood that the marriage was not to take place within a year, the statute would prevail, and the lack of any written evidence of the agreement would bar the action. Again, it was clear that no matter how technical the rule, the courts were prepared to apply contract principles to breach of promise suits without modification.

EVIDENTIARY STANDARDS: 'A VEHICLE FOR HUNGRY SPINSTERS AND DESIGNING WIDOWS'

Cognizance of the judicial commitment to the application of commercial principles when entertaining breach of promise suits is crucial to an understanding of the opposition to the action in the latter half of the nineteenth century. Judges were not alone in being accused of commercializing intimate relations, however; women who instituted such proceedings were subjected to scorn and contempt. Because Victorian cultural precepts discouraged women from seeking wealth or social position through marriage, a woman who intentionally and publicly sought pecuniary damages in compensation for a failed romance could be deemed to be equating the value of marriage with the values of commerce. By doing so, she challenged the rigid conceptual boundaries Victorians maintained between spiritual and commercial pursuits, and thus incurred great wrath.

That a woman would bring such an action was seen as evidence that she would 'design to commit the great sin of marrying a man for some other object than love of him.'³⁹ The *Canadian Law Journal* reprinted an article from the *American Central Law Journal* which complained that 'the woman who sues a man at law for breaking this promise has to complain that he would not marry her, even when he ceased to love her, and she, therefore, claims for a husband a man who does not love her, and tells her

37 *Harrison v. Cage* (1689) 91 E.R. 1156; *Cork v. Baker* (1717) 93 E.R. 367; *Atkins v. Far* (1738) 25 E.R. 1100

38 *Supra* note 34, per Street J. at 632

39 *Supra* note 9, 152

as much. Such a claim is almost revolting: but it really is the claim that is made in these cases.⁴⁰

Clearly these women were not claiming these men as husbands; rather, they were simply claiming compensation for injuries suffered as a result of the broken engagement. In their quest for monetary damages, however, the women were behaving in a manner consonant with the worst fears of those who were suspicious of feminine motives for entering into matrimony. Much of the criticism directed at 'commercial marriages' was therefore aimed at women, since only women were faced with the necessity of using marriage as a means of financial support. Critics maintained that when women failed in their quest to marry for financial means, they turned to the breach of promise suit as a way of satisfying their mercenary ambitions. The avaricious spinster became a common caricature invoked by critics who deemed the action a vehicle for extortion. To reiterate the *Upper Canada Law Journal* article of 1859: '[The action is] never resorted to by those who have really suffered a wrong, but only by speculators in marriage, who first deliberately design to commit the great sin of marrying a man for some other object than love of him, and, failing in that speculation, pursue their victim in a still more profitable suit.'

Women who brought such actions were described as 'scheming, enterprising, and anxious to hook a victim,'⁴¹ and the suit as 'a perpetual fount of extortion and blackmail'⁴² or a 'machine for the display of avarice on the part of hungry spinsters and designing widows.'⁴³ Even the *Toronto Globe*, which adopted a rather moderate position on the issue, admitted that 'the law as it now stands gives those who are inclined to take advantage of its provisions an opportunity for subjecting individuals to annoyance and expense and may easily be made to work into the hands of the blackmailer.'⁴⁴ Similarly, the *Toronto Telegram*, which recognized the

40 Breach of promise (1878) 14 C.L.J. 240, at 241

41 Ibid. at 240

42 By Lord Herschell, introducing a declaratory resolution in the English House of Commons on 6 May 1879, that the action be abolished except in cases where actual pecuniary loss has been incurred. The resolution was carried by 106 votes to 65.

43 MacColla *Breach of Promise: Its History and Social Considerations* (1879) 40

44 *Globe* Toronto, 12 May 1879. Canadian legal journals also frequently criticized the mercenary motives of women who engaged in legal action. In an 1862 editorial on seduction, the *Upper Canada Law Journal* called the action a 'delusion,' and said that it was more often than not launched to recover 'the wages of prostitution': see The law of seduction (1862) 8 U.C.L.J. 309, at 311. Constance Backhouse also notes that in the late nineteenth century there was grave concern that seduction and statutory rape laws permitted women to practise extortion, and that this issue was debated in the Canadian Senate in 1886: see Nineteenth-century Canadian rape law 1800-1892, in Flaherty (ed.) 2 *Essays in the History of Canadian Law* (1983) 200-47, at 231.

need for the action in its editorials, acknowledged that 'there can be little doubt that a great many of the victims of breach of promise suits are exposed to hardship which the law never contemplated; and that such cases are only too frequently prompted by a revengeful spirit.'⁴⁵

The breach of promise suit is most blatantly characterized as a vehicle for extortion in an 1868 reprint of a *Law Times* article in the Canadian *Local Courts and Municipal Gazette*:

As a matter of fact, nine-tenths of the action for breach of promise of marriage are purely mercenary. The woman has first deliberately set a trap for the man, and caught him, as designing mothers and clever daughters know so well how; and it is a matter of calculation that the victim must be bled somehow. If he marries, his whole fortune is captured; if he recovers his sense and escapes, then a good slice of it: this latter is the event most desired, and (not infrequently) the woman would herself have broken it off, if the man had proved more faithful than she had hoped.⁴⁶

Opponents of the action argued that the liberal evidentiary standards set by the judiciary enabled the suit to be used as a means of commercial speculation. Ontario judges did make it fairly easy for female plaintiffs to establish the existence of an engagement by use of circumstantial evidence, and critics maintained that such evidentiary standards made men potential objects of female victimization. The legislature eventually reformed the rules of evidence governing the action by requiring that a plaintiff's testimony be corroborated by other material evidence, but even then the Ontario judiciary interpreted the legislation in a manner which reduced rather than increased a plaintiff's evidentiary burden, thereby providing further support for those who saw the breach of promise action as a means of extortion.

According to early nineteenth-century rules of civil procedure, neither the plaintiff nor the defendant was permitted to give evidence in the proceeding. This created great difficulties in breach of promise suits. The plaintiff could not speak on her own behalf or cross-examine the defendant, and was therefore forced to rely on the evidence of family and friends who could testify to the existence of an engagement between the parties and to a breach of the engagement. The common law eased this requirement by providing that the contract could be shown by unequivocal conduct by the parties and an understanding in the community that a marriage was to take place. Mutual promises could be established where

⁴⁵ *Telegram Toronto*, 12 August 1876

⁴⁶ The action for breach of promise of marriage (1868) 4 *Local Courts & Municipal Gazette* 149, at 150

there was evidence of some form that indicated that one party had made a promise, together with evidence of the demeanour of the other that indicated concurrence in the promise.⁴⁷

Women were thus compelled to prove the existence of a contract to marry by circumstantial and hearsay evidence. Defendants were arguably at an even greater disadvantage. Clearly, it was easier to use letters and circumstantial evidence from witnesses to create the impression that a promise had been made than to use the same means to demonstrate that no such agreement existed. The defendant had to sit mutely while listening to the allegations of the plaintiff's witnesses and was given no opportunity to cross-examine the plaintiff herself.⁴⁸

The inability of parties to present their own evidence or be cross-examined on their allegations created a context in which charges of extortion against plaintiffs were inevitable. The nature of the evidence was such that witnesses would be few, and unlikely to know the whole story. Nor were they likely to be privy to the inner thoughts of the parties, though such information might be crucial to the cause or the defence. It was difficult in such circumstances to make out a case, and arguably even more difficult to defend one. Critics argued that if the defendant could not give his story to the jury, there was probably no evidence to offer for the defence, and a verdict for the plaintiff was almost a certainty. In addition, they charged, the acceptance of circumstantial evidence as proof of an engagement created an opportunity for a scheming woman to arrange circumstances so as to make it appear that she and the man she had inveigled into the affair were engaged to marry. There was a great potential for blackmail, since the man could easily be persuaded to settle out of court to avoid the publicity of a possible trial.

The common-law rule excluding the evidence of parties interested in

47 Chitty *A Practical Treatise on the Law of Contracts Not under Seal and upon the Usual Defences to Actions Thereon* (2d ed. 1834) 425

48 The difficulties of continuing a regime in which parties to the action would neither give evidence nor be cross-examined are illustrated in the complex case of *Wright v. Skinner* (1866) 17 U.C.C.P. 317, which involved parties in their mid-fifties. The defendant was separated from a former wife and allegedly misrepresented his marital status to the plaintiff. It was impossible to determine from the evidence of witnesses whether the plaintiff believed him to be divorced or not, and it must have been extremely frustrating to the defence not to be able to cross-examine the plaintiff herself. She also alleged that the defendant persuaded her to elope with him and to go through a marriage ceremony to which there were no witnesses present at the trial. According to the court, to presume the ceremony had taken place was to confirm that the defendant had committed the crime of bigamy, and to presume otherwise was to find the plaintiff guilty of acts of vice and immorality in deciding to live in adultery with the defendant. On appeal, the plaintiff was nonsuited on the basis that there were not enough facts to go to the jury. The trial court had been more impressed with the plaintiff's credibility; the jury had awarded her the (at that time) unprecedented sum of \$2,000 in damages.

the action was gradually abolished in England between 1846 and 1869.⁴⁹ The Evidence Amendment Act of 1851⁵⁰ made parties to actions competent witnesses on their own behalf, but it specifically excepted actions for breach of promise of marriage. An Act for the Further Amendment of the Law of Evidence removed this exception in 1869 and provided that 'the parties to any action for breach of promise of marriage shall be competent to give evidence in such action: Provided always, that no plaintiff in any action for breach of promise of marriage shall recover a verdict unless his or her testimony shall be corroborated by some other material evidence in support of such promise.'⁵¹ English plaintiffs and defendants could now be called as witnesses to give evidence in support or in defence of the action, and were liable to be cross-examined thereon.

The Ontario legislature passed its own Act to Amend the Law of Evidence in Civil Cases in the same year.⁵² Surprisingly, they maintained the prohibition so recently abolished in England. Generally, parties with an interest in a suit were allowed to serve as witnesses on their own behalf and could be compelled to give evidence, but the act clearly stipulated that 'nothing herein contained shall apply to any action, suit, proceeding or bill in any court, instituted in consequence of adultery or to any action for breach of promise of marriage.'⁵³

Commentators described the exceptions to the general rule in this statute as illustrations of its compromise character and transitional nature.⁵⁴ It satisfied no one, and the Ontario legislature was forced to address the matter again in 1873, when the law of evidence was further amended.⁵⁵ Once again, the prohibition precluding parties to the breach of promise suit from tendering evidence on their own behalf was retained.⁵⁶ It was not until 1882 that the Ontario legislature followed the English precedent of 1869 and made parties to a breach of promise action

49 See Harding *A Social History of English Law* (1966) 332.

50 14-15 Vict., c. 99 (England)

51 32 & 33 Vict., c. 68, s. 2 (England)

52 33 Vict., c. 13 (Ontario)

53 *Ibid.* s.5(b)

54 See *Law of evidence in Ontario* (1872) 7 C.L.J. 173.

55 36 Vict., c. 10 (Ontario)

56 There is some evidence to suggest that the Ontario legislature considered incorporating the English provision permitting parties to the breach of promise action to give evidence on their own behalf when amending the law in 1873. The Original Bills File at the Ontario Public Archives contains a handwritten copy of bill 20 as it was originally framed, and this included a verbatim reproduction of the English provision. The printed copy of the bill also contained this section, which indicates that it went to first reading, but the section is crossed out in black ink (although a marginal note suggests it was carried). Unfortunately, it is impossible to determine what debate took place. Newspaper Hansard does not mention this provision and there are no available records from the select committee to which the bill was referred.

competent to give evidence, provided that a plaintiff's testimony was corroborated by some other material evidence.⁵⁷

The legislature may have been prompted to permit the parties to tender evidence on their own behalf, and to introduce the requirement of corroborative evidence, by the liberal evidentiary standards set by the bench. For example, in 1880 the Court of Common Pleas upheld a verdict for a plaintiff even though there was no proof of mutual promises and no evidence of any courtship between the parties.⁵⁸ The plaintiff, aged twenty-four, had been seduced by the defendant while she was employed as a domestic servant for his father. The evidence disclosed that the defendant had said to the woman's father, 'I will marry her, if [the baby] is mine,' and that he would marry her when he got some land from his father. If a promise to marry could be concluded from these statements, that promise was made to the father, not to the plaintiff. Similarly, the plaintiff appears to have told her father that she intended to marry the defendant, but there was nothing to indicate that she made such a promise to the defendant himself. The court acknowledged that the case was weak, but they held that there was some evidence for the jury and the jury's verdict was upheld.

The plaintiff's youth and pregnancy may have had some bearing on the court's decision.⁵⁹ The case would more properly have been one of seduction, but because of the requirement in such actions (which the courts apparently still demanded in this period) that the woman be in service for the plaintiff, a father compelled to send his daughter out to work might have had difficulty establishing his standing to bring a seduction suit. It is possible that evidentiary rules in breach of promise cases were relaxed where seduction was apparent, but the requirements of that action could not be met. Critics who wished to see the breach of promise action abolished often argued that the action amounted to no more than an indirect mode of compensating women for seduction.⁶⁰

⁵⁷ 45 Vict., c. 10 (Ontario)

⁵⁸ *Fisher v. Graham* (1880) 31 U.C.C.P. 286

⁵⁹ Of the sixty-six cases surveyed, twenty-one clearly involved seduction. (In at least seven cases the plaintiff appears to have been post-menopausal.) The number of breach of promise cases in which the plaintiff was pregnant is probably higher than this figure indicates, however, because trial records could not be located for all cases, and reported cases tended not to mention a plaintiff's pregnancy even when it was evident from testimony at the trial. Even where trial records are available, full accounts of the testimony have not always been recorded by the trial judge.

⁶⁰ *White, Breach of promise of marriage* (1894) 38 *Law Q.R.* 135, at 142. Ontario court records suggest that in many of the breach of promise cases, either of the two actions could have been brought. If the service requirement could be met, and the woman's reputation was not in dispute, the seduction action was probably the preferred vehicle, because the woman could testify on her own behalf and possibly engage a jury's

The 1882 statute had little impact on the quantity or the quality of the evidence a plaintiff had to tender to succeed in her suit. The Ontario judiciary interpreted the statutory requirement for corroborative evidence widely, and continued to accept circumstantial evidence as showing the existence of a contract to marry. The appellate courts first considered the statutory need for corroborative evidence in the case of *Costello v. Hunter*, described earlier. Ann Costello alleged that the defendant had promised to marry her in 1873, but that when the time arrived he told her he could not marry her until he built his house. One witness swore that in 1882 he had the following conversation with the defendant:

He asked me if I took notice of the young women that were running backward and forward there? I said yes, I could not help but take notice of that. Well, he said, what do you suppose they are after? Well, I said, I suppose they are after you. The answer that he made me was, that they were not after him, they were after his brick house, but they were not going to get it, none of them. He says, I am going to take the one that wants me, not the one that wants the house. I said, 'I suppose that is Ann Costello?' and he said 'Yes.'⁶¹

Justice John O'Connor told the jury that corroborative evidence was that which made the evidence of the plaintiff probable: 'Her evidence may be supported by facts, by surrounding circumstances, by the conduct of the defendant, and by his cross-examination. If altogether there is evidence as makes her story a highly probable one, that is sufficient and there is corroborative evidence of her principal evidence.'⁶² He added that unless evidence of the type tendered by the witness could be taken as corroborative of the main promise, it would be almost impossible to prove a promise of marriage in most cases. 'You know young men, when they are going to, as they say "pop the question," do not do it in the presence of others as a general thing.' The jury found for the plaintiff and awarded her four hundred dollars in damages.

On appeal, Chief Justice Cameron defined the nature of the corroboration required in these cases. He created a very flexible requirement.

The corroboration required by the statute is some material evidence in support of

sympathies with the story of her 'fall from virtue' in relying upon the defendant's proposal of marriage. While locating records of testimony given in breach of promise suits I came across many seduction actions in which promises of marriage were mentioned; it also seems that the two actions were often brought simultaneously. Constance Backhouse also found this pattern of simultaneous suits in her archival research on seduction. See *The tort of seduction: Fathers and daughters in nineteenth-century Canada* (1986) 10 *Dalhousie L.J.* 45, note 35.

61 *Supra* note 32, 334-5

62 *Ibid.* 335-6

the promise. Evidence sufficient to make out the promise is not required, but evidence that will support the promise, which means, I take it, that supports or strengthens the plaintiff's evidence that a promise was made. If this question was now presented for the first time I should have been disposed to interpret the statute as requiring some evidence that would have direct reference to the promise, and not the mere presentation of circumstances that would be quite as consistent with the non-existence of a promise as with its having been made.⁶³

He appears to have been influenced by the fact that before parties were permitted to give evidence, the circumstances and conduct of the parties were presented to the jury, who could draw from it the inference that an engagement had been made. In essence, the trial judge had directed the jury to consider the same factors as corroborating evidence, even though both parties were now free to present testimony. By refusing to overturn this direction, Chief Justice Cameron greatly expanded the scope of evidence that could be accepted as corroborating a plaintiff's testimony.

Judicial opinion on the matter was clarified in the 1888 case of *Yarwood v. Hart*.⁶⁴ The plaintiff had established the promise by her own testimony at trial, and the major issue to be determined on the appeal was whether her evidence had been corroborated by some other material evidence in support of the promise. Witnesses called on her behalf testified that the parties were of the same social rank, that there was nothing improbable in their becoming engaged, that the defendant had paid her attentions for six years, had visited her, had taken her driving, had given her presents, and had been received by her family. Letters were introduced in which he addressed her in loving terms. Obviously this was not evidence of an actual promise, but merely evidence that suggested that it was as likely as not that such a promise had been made. Despite this, Chief Justice John Douglas Armour held that such evidence constituted sufficient corroboration:

Where a promise by words to marry could not be proved, and before the parties were admissible as witnesses on their own behalf, the evidence given by these witnesses was just the kind of evidence that was always relied on as evidence from which a jury might infer a promise to marry. The change of the law rendering the parties admissible witnesses in their own behalf had not the effect of rendering such evidence less efficient to tending to support the promise to marry, than it was before the change was made.⁶⁵

If the changes in the law of evidence were intended to protect male

⁶³ Ibid. 339

⁶⁴ 16 O.R. 23

⁶⁵ Ibid. 25

defendants from the wiles of designing females,⁶⁶ they did not have the desired effect. The Ontario judiciary showed a marked reluctance to make the rules of evidence in breach of promise cases any more demanding, despite a clear legislative mandate to do so. The 1882 statute provided an opportunity for the judiciary to impose more stringent evidentiary standards on female plaintiffs, but judges did not seize this opportunity in a manner that would restrict a woman's chances of success in such a suit.⁶⁷ Rather, Ontario judges gave the new statutory requirements an interpretation that actually reduced the burden of proof on the plaintiff. Not only were plaintiffs now able to tender their own evidence, but the requirement of corroboration was defined to allow them to introduce as evidence anything that might suggest to a jury that a promise had been made. Thus, a woman was able to retain the advantage of tendering all evidence admissible before the passage of the statute and to reap the benefits that the statute's passage afforded her. Despite popular concern and legislative mandate, the Ontario judiciary refused to demand more cogent evidence from women who instituted the suit. In setting evidentiary standards, the Ontario judiciary again behaved in a manner that reinforced the objections of those opposed to the breach of promise action.

DEFENCES TO THE ACTION: 'THE GALLING AND INTOLERABLE CHAINS OF SLAVERY'

As judges continued to make it easier for plaintiffs to establish the existence of an engagement, they simultaneously reduced the means by which defendants could justify a termination of the relationship. Judges limited the defences open to men who found that they had made unwise choices just as the public began to embrace the idea that stable marriages between compatible partners were the foundation on which a desirable social order was based. A great many reasons were recognized as legitimate grounds for rescinding a promise to marry in a social milieu in which romantic love was the ideal basis for marriage. An 1879 *Globe* editorial is illustrative:

It is evident that from fear of legal proceedings, many promises made thought-

66 See, for example, the arguments made to change the evidence laws governing the seduction action which support this proposition: Law of seduction, *supra* note 44.

67 Judges in the United States showed a similar willingness to apply liberal evidence rules to breach of promise actions. Grossberg argues that judicial acceptance of circumstantial proof of marriage promises was motivated by a respect for the privacy of courtship and a belief in feminine modesty, and that judicial laxity in setting evidentiary standards imposed serious hardships on American men: *Governing the Hearth*, *supra* note 8, 39–40.

lessly on the impulse of the moment, and with little or no real affection, have been made good by marriage, to the life long misery of all concerned. Not only have two lives been thereby marred, but the tempers, feelings and prospects of children have been hopelessly blasted and the injurious influences of an ill-starred promise have been felt in ever-widening circles. Such occurrences, far more frequent than many suspect, may therefore ... lead to the enquiry whether the promises in question were not more honoured in the breach than in the observance, and whether it may not in every case be sufficient reason for a promise being set aside that either party wishes that it should be? Is it not proof sufficient that happiness in the married state is not likely when either concerned desires the promise to be broken? Is not that wish sufficient to turn the silken bonds of matrimony into the galling and intolerable chains of slavery, nay to make marriage itself a delusion and a snare? Very much can be said in favour of this view of the matter.⁶⁸

English common law had provided a number of defences for the fickle suitor in the seventeenth and eighteenth centuries, but these were gradually curtailed in the nineteenth century as a model of strict contractual liability came to prevail. Jurists were concerned that as long as the ecclesiastical courts maintained the power to compel the parties to marry, incompatible people might be forced into union. Consequently, a number of defences were available to justify the breach of a promise of marriage.⁶⁹ The abolition of specific performance in 1753 led to a reduction in the number of defences available, but well into the nineteenth century the defendant could still argue that his breach of promise was justified by mental and physical infirmities discovered in the plaintiff or false representations made by his fiancée about the status of her family and her situation in life.⁷⁰ English common-law courts gradually abolished these defences, and by the 1860s it was accepted that 'no infirmity, bodily or mental which may supervene or be discovered after the making of the contract to marry – unless it be incapacity on the part of the man or want of chastity on the part of the woman – can be relied upon by either, as a ground for refusing to perform such contract.'⁷¹

When *Hall v. Wright* came before the English courts in 1859,⁷² the judicial conviction that engagements were to be treated in the same fashion as all other contracts was firmly entrenched. The defendant in that case argued that the state of his health made the fulfilment of

68 *Globe Toronto*, 12 May 1879

69 For a summary of many of these, see *Cohen v. Sellar* [1926] 1 K.B. 536, at 543–5.

70 Chitty, *supra* note 7, 429

71 Chitty *A Treatise on the Law of Contracts and upon Defences to Actions Thereon* (8th ed. 1868)

505

72 (1859) 120 E.R. 695

conjugal duties dangerous for him. The court reluctantly held that this was no defence. Lord Campbell treated the marriage promise as absolute, and held that the person who makes an absolute promise was himself to blame if he does not, by contract, guard against the impossibility of performance. Baron Bramwell admitted that 'it seems unreasonable to deal with it as with a contract for sale of goods or other business transactions, though, no doubt the same principle governs both. Nevertheless however much we may shrink from the idea that a promise of marriage has anything in common with a commercial contract, broadly speaking most governing legal principles are the same in both cases.'⁷³ A few years later the same court cited the case as authority for deciding that it was no defence for the defendant to prove that the plaintiff had concealed insanity and previous confinement in a lunatic asylum.⁷⁴

A lack of chastity on the part of the plaintiff remained the sole defence available to men in English common-law courts, and was the only defence accepted by the Ontario courts in the nineteenth century. The defendant had to be able to prove that he had been ignorant of the woman's reputation when he made the promise, and that her unchastity was his chief motive for abandoning her.⁷⁵ A defendant could attempt to prove a woman's character by introducing evidence of public opinion founded on her conduct. In doing so, however, he took a great risk, for if the evidence was insufficiently persuasive a chivalrous judge might suggest to the jury that additional punitive damages be awarded to the woman because of the defendant's attempt to tarnish her character.

Such chivalry was demonstrated by Justice Thomas Galt in the 1873 case of *Jones v. Robson*, which came before the York spring assizes.⁷⁶ Miss Eveline Jones and Mr William Beverly Robson were described as being members of the oldest and most respected families in the town of

⁷³ Ibid. 777-8

⁷⁴ *Baker v. Cartwright* (1861) 142 E.R. 397

⁷⁵ It appears that extremely cogent evidence was necessary to establish such a defence in Ontario courts. In *McDonald v. Ferguson*, a case brought before Justice Richards in Lindsay in 1867, witnesses for both the plaintiff and the defendant testified that Mary McDonald had been seen driving with Nathaniel Cameron, that Cameron had been alone in her home, and that Ferguson had received an anonymous letter to the effect that Cameron was sleeping with his fiancée. Cameron's employer testified that Mary had come to him to ask him what Cameron had told him about her: 'I told her he said he had slept with her several times and they came very near being caught at one time by Win Henry and that he had written a letter to defendant telling him he had slept with her.' Although Justice Richards' benchbook does not indicate whether the latter evidence was tendered as a defence or in mitigation of damages, it was not sufficient in his eyes to bar the action. He instructed the jury 'to find guilt' if they were satisfied that there had been an engagement and defendant had broken the contract. Located in Ontario Public Archives, record group 22, series 390, box 93-E4, 376-88.

⁷⁶ Reported in the *Globe* Toronto, 3 April 1873

Markham. Mr Robson had courted Miss Jones for four years, since she was twenty. One witness recalled a conversation early in 1870 in which he told the defendant 'that people said he was going with plaintiff for no good purpose and defendant replied that his intentions were good and he intended to marry her.' Her family also disapproved of the relationship, and in the fall of 1870 sent her to New York 'to keep her out of defendant's way.' They obviously were unsuccessful, for in the fall of 1872 it was clear that Eveline was pregnant. Eveline's sister Margaret reconsidered the match in the light of her sister's condition, and gave her consent to the marriage. The defendant promised to come and marry Eveline in October, and to bring his brother as a witness. Preparations were made for the wedding, but William did not appear. Eveline sent her brother-in-law to determine what William's intentions were. The defendant told him that 'he did not intend to marry her, never had intended to do so, and she knew that as well as himself – he had no means to keep a wife and home was the best place for her.'

Eveline delivered her baby and commenced the action. William pleaded that he was justified in refusing to marry the plaintiff because her reputation was soiled. D'Arcy Boulton, counsel for the plaintiff, argued that the injury done to his client was greatly aggravated by the attempt of the defendant to cast aspersions on her character, and asked for \$5,000 in damages. Justice Galt was sufficiently persuaded to modify his earlier statement, that 'the action was simply a breach of contract,'⁷⁷ when addressing the jury:

[He] said that they should consider the difference between a breach of contract for the sale of 1,000 bushels of wheat in which damages could be ascertained by figures, and such a case as this before them. This element of difference was the injury to a person's prospects in life, and the wounded feelings ... He alluded to the defendant's plea, excusing him from the contract to marry the plaintiff on the ground that she was, at the time of the promise, unchaste. His Lordship commented in unmistakable condemnation of the defendant's course in this regard, and characterized as even more heartless than any other part of his conduct this attempt to blacken the character of the woman he was pledged to marry and whom he professed to love. The charge was pointedly in favour of the plaintiff.

The jury, equally sympathetic, awarded the plaintiff \$1,500 in damages. Judges appeared willing to modify strict contractual rules when they

⁷⁷ He made this statement earlier that day to the same jury with respect to the breach of promise action in *Major v. McKenzie*, discussed above.

regarded the women before them as worthy of special protection,⁷⁸ and offered extra safeguards to women who were deemed to have been subjected to unnecessary humiliation at the hands of former sweethearts. Generally, however, the contract model governed, and judges evoked the rule of caveat emptor when defences other than lack of chastity were suggested. Ontario judges rejected the appeals of men who discovered too late that their lovers were not the 'ladies' they had supposed them to be. A Mr Cornock discovered this judicial tendency in the spring of 1888, when his fiancée of ten years brought him before Justice John Edward Rose and a jury in Guelph.⁷⁹ Cornock argued that he was justified in terminating the engagement by reason of the plaintiff's character. He alleged that on several occasions she fell into violent fits of rage, used coarse and obscene language in public and in private, sang obscene songs in the company of other men, and frequented 'houses of improper character.' Justice Rose refused to admit this evidence on the basis that the defendant knew none of these facts at the time he made his promise, and there was no evidence that these factors motivated the breach. The jury found for the plaintiff and awarded her \$1,100 in damages.

The defendant moved for a new trial on the basis that such evidence provided a defence to the action, and that in any case the evidence was admissible in mitigation of damages. Chief Justice Armour, speaking for the majority of the Queen's Bench Division on appeal, upheld the trial judgment and added that even if the defendant had known of these facts when he broke the engagement, no defence had been established.

I am of the opinion that these paragraphs do not set up any justification in law for the breach by the defendant of his promise to marry the plaintiff, and that, therefore, the evidence tendered in support of them was rightly rejected. The discussions and decisions in *Hall v. Wright*, *Beachey v. Brown*, and in *Baker v. Cartwright* show that the misconduct in the woman which will alone justify the breach of his promise by the man, must amount to want of chastity, that is, of bodily chastity; and no such want of chastity is set up in these paragraphs.⁸⁰

Furthermore, such evidence would not be admissible to mitigate damages:

It may be that general evidence of reputation is admissible in actions of breach of

⁷⁸ Miss Jones might have been deemed worthy of additional protection because her parents were (apparently) deceased. This is suggested by the fact that her sister gave her consent to the marriage, and her brother-in-law was enlisted to determine the defendant's intentions.

⁷⁹ *Grant v. Cornock* (1888) 16 O.R. 406

⁸⁰ *Ibid.* 412

promise of marriage in mitigation of damages, but the authorities which go to shew this are extremely unsatisfactory, and it is difficult to understand from them upon what principle it is admissible for that purpose.

But the evidence tendered was not general evidence of reputation but evidence of particular facts, and was not, in my opinion, admissible in mitigation of damages.⁸¹

Justice William Glenholme Falconbridge sympathized with the defendant's plight and suggested, obiter, that the 'chastity' required of a lady who hoped to hold her fiancé to his pledge was something more than just virginity. 'I do not find it equivocally laid down in the English cases that want of sexual purity is the only cause which will justify a breach of promise. I do not regard the discussions in *Hall v. Wright* and *Beachey v. Brown* as amounting to that, although I am free to confess that Erle, C.J. in *Baker v. Cartwright* seems to assume that they do. I prefer to think that the "chastity" referred to is not merely freedom from unlawful sexual commerce, but freedom from obscenity or impurity in language or conversation.'⁸²

The defendant appealed the judgment once more, and the Court of Appeal upheld the decisions of the lower courts.⁸³ The defences available to fickle suitors were conclusively defined by Chief Justice John H. Hagarty:

I consider the upshot of the authorities to be that want of chastity—bodily chastity—is apparently the only justification for breach of the contract open to a defendant setting up a defence of the present character.

So far as the plaintiff's conduct was concerned, it is difficult to understand how the matters stated in the defendant's pleas could bar the action; they all seem to amount to matters of manners and social habits. We cannot see what should be the standard. It must always be a question of degree and social habit, and it would be as unwise as it would be invidious to attempt the creation of any positive rule ... the law, we think wisely—for the general guidance of life—declines to absolve the breaker of such a contract on the grounds assigned in this action.⁸⁴

⁸¹ Ibid. 413

⁸² Ibid. 417

⁸³ (1889) 16 O.A.R. 532

⁸⁴ Ibid. 539. The approach taken by the Ontario judiciary in limiting the number and scope of defences available in breach of promise actions typified the behaviour of judges throughout common-law jurisdictions. American judges extended few defences to bolting bridegrooms, and U.S. courts 'rejected out of hand the appeals of men who had not thoroughly investigated their brides before asking for their hands.' These defendants found that not even discoveries of drunkenness and black ancestry would absolve them of liability: Grossberg, *supra* note 8, 41. Judges in both Ontario and the United States were behaving in a manner consistent with judicial treatment of contract

In limiting the number of acceptable justifications a man could tender for terminating an engagement, judicial behaviour was once again at odds with social norms. By refusing to recognize incompatibility of any kind as a legitimate reason for revoking a promise of marriage, Ontario judges imposed a form of strict contractual liability in a social milieu that favoured granting greater flexibility and freedom of choice to courting couples.

AWARDING COMPENSATION: 'WOUNDED LOVE DOES NOT CONSOLE ITSELF WITH DAMAGES'

The award of damages for injuries suffered by the plaintiff as a result of her abandonment was the last stage in a breach of promise suit, and the one in which the judiciary was least involved. The jury assessed the damages suffered by the plaintiff and the compensation she should receive, a task in which they were given minimal instruction and a great deal of discretion. Victorian Ontarians appear to have believed that a broken engagement was a great tragedy for a woman, but critics sneered at the idea of compensating wounded feelings with money, and berated juries for the irresponsibility they demonstrated when exercising their discretion to award pecuniary damages.

Many felt that it was incongruous to award pecuniary damages for a failed romantic affiliation, an attitude summed up in the comment that 'wounded love does not console itself with damages.'⁸⁵ Legal critics persistently refused to consider the various purposes for which damages were awarded at common law, and focused exclusively on the nonsensical practice of awarding damages for wounded feelings and release from a doomed union. The *Local Courts and Municipal Gazette* reprinted an extract from the *Law Times*: 'From the opening of the counsel of the plaintiff to the final verdict, it is always assumed that the woman is an injured innocent, the man a sneaking coward, and heavy *damages* are awarded to the plaintiff, for what?—for having escaped from a bad husband and a life of misery.'⁸⁶

This narrow view of the purpose of damages ignored the loss of social position and future security attendant on a broken engagement, as well as the impact of being jilted on a woman's chances of finding another

law generally. As Atiyah notes with respect to the English judiciary, 'after 1830 or thereabouts, laissez-faire ideology did have a significant influence on the development of contract law. In particular, many equitable doctrines enforceable in the Court of Chancery and designed to protect those who entered into foolish and improvident bargains, began to be whittled away by the judges': *An Introduction to the Law of Contract* (3d ed. 1981) 5.

⁸⁵ *Supra* note 9

⁸⁶ *Supra* note 46

marriage partner. Victorian social history tells us little about the social consequences of a broken betrothal, but a few speculations can be made. Studies of popular women's novels in the late nineteenth century reflected the view that 'virtually all women, consciously or unconsciously, desire only one career – marriage ... The alternatives are few and, among heroines, either spring from or lead to disaster.'⁸⁷

The breach of promise suit was considered a 'solace' to women because 'marriage and a settlement were the one object in a woman's life, whereas men had numerous engagements to occupy their time and attention, and to divert chagrin and disappointment.'⁸⁸ Indeed, women who supported the action argued that for this reason the suit was necessary for women, if not for men. Critics gave short shrift to their arguments: 'There are, indeed, women who say that there is a difference – that a man can easily find a wife, and that his prospects are not blighted by a disappointment of this kind; but the women who say this are not the women to be listened to on such a question.'⁸⁹ Supporters of the action replied that 'it provides almost the only protection for marriageable women against designing men or fly-away fellows who get themselves "engaged" to half-a-dozen young ladies at once.'⁹⁰

It is difficult to determine what the actual consequences of being jilted were for Ontario women in this period. It is clear that the broken engagement was a subject of pathos in Victorian art,⁹¹ and was romanticized in Victorian novels. In her study of popular English women's novels of the period, Susan Gorsky notes that jilted women continually 'solve[d] the problem of how to live without a man by contracting brain fever or entering a gradual decline to death.'⁹² Nicholas Tawa found that popular American love songs of the mid-nineteenth century portrayed an idealized woman who was expected either to endure severe and lasting agony or to lose her life when her lover cast her aside for another.⁹³ A *Globe* editorial on the breach of promise suit opined that 'a failure to make good an engagement to marry as a matter of fact frequently blights the

87 Gorsky, *Old maids and new women* (1973) 7 *Journal of Popular Culture* 68, at 69

88 E. Wilmot, opposing the abolition of the action in the English Parliament in 1879; cited in Cretney, *Law Reform (Miscellaneous Provisions) Act 1970* (1970) 33 *Mod. L. R.* 534, at 534

89 *Supra* note 40, 240

90 *Telegram* Toronto, 15 March 1879

91 See Roberts, *Marriage, redundancy, or sin: The painter's view of women in the first twenty-five years of Victoria's reign*, in Vicinus (ed.) *Suffer and Be Still: Women in the Victorian Age* (1973) 45–76.

92 *Supra* note 87, 74

93 Tawa, *The ways of love in the mid-nineteenth century American song* (1976) 10 *Journal of Popular Culture* 337, 340

future of many a promising life,⁹⁴ and the *Telegram* asserted that it was 'evident that a young lady who has been "jilted" has had her chances of making a market seriously impaired.'⁹⁵ Although the consequences of a broken engagement may have been overstated, Victorian Ontarians appear to have genuinely believed that a man who jilted a woman lowered her expectations of contracting a desirable marriage.

A woman's future prospects would be especially damaged where engagements were long and sex ratios imbalanced. Between 1851 and 1891, the average age at marriage increased in Ontario, and the sex ratio became increasingly unfavourable for women.⁹⁶ Statistics do not provide any evidence of the length of engagements during this period, but the cases indicate that many men postponed marriage for financial reasons, and women often waited several years for men to accumulate the resources to set up households. Women engaged to men for long periods of time might well find themselves at a disadvantage vis-à-vis younger women when the numbers of marriageable men were limited. Michael B. Katz illustrates how severe this problem may have become in southern Ontario's urban centres in his study of population statistics in Hamilton for the years 1851, 1861, and 1871: 'the number of women substantially exceeded the number of men in the age groups 15 to 19, 20 to 24, and 25 to 29. For example, among the 20- to 24-year-olds in each of the three years the sex ratios were 8:7, 6:5, and 8:6. These ratios, of course, imply severe problems for women who wished to find a spouse.'⁹⁷ An imbalance in sex ratios, limited alternative means of livelihood, and the cultural idealization of marriage as a woman's highest goal in life suggest that a broken engagement was probably one of the more serious injuries a woman could suffer in Victorian Ontario.

In any case, nineteenth-century judges left the amount of damages almost entirely to the jury's discretion, and these assessments were rarely set aside on appeal. Juries could be instructed to take into consideration the injury to the plaintiff's feelings, the prejudice to her future prospects of marriage, the 'loss of an establishment in life,' the difference between her present position and the position she would have enjoyed had she achieved matrimony, the social conditions of the parties, whether the defendant had taken advantage of the promise in order to seduce the plaintiff, and the extent of the defendant's property. Evidence of particularly heinous conduct on the part of the defendant might further aggravate damages.

94 *Globe* Toronto, 12 May 1879

95 *Telegram* Toronto, 15 March 1879

96 Gee, *Marriage in nineteenth-century Canada* (1982) 19 C.R.S.A. 311, at 317-19

97 Katz, Doucet, and Stern *The Social Organization of Early Industrial Capitalism* (1982) 66

Occasionally, a defendant would attempt to introduce evidence of the complainant's character to mitigate damages. This issue was first addressed by an appellate court in the 1856 case of *McGregor v. McArthur*.⁹⁸ The defendant asked that an assessment of damages be set aside on the grounds that the trial judge did not permit him to ask the plaintiff's witnesses questions about the plaintiff's general character on cross-examination. Chief Justice James B. Macaulay said that general bad character, unknown to the defendant, could form no defence to the action, but that the defendant could cross-examine plaintiff's witnesses to discover evidence of her character previously unknown to him in order to lessen the extent of his liability: 'In seeking damages for a breach of contract in which character might be very material, the plaintiff may be expected to come prepared to meet any general disparagement of her character that might be attempted.'⁹⁹ The chief justice added that although facts about the plaintiff's character would be inadmissible in mitigation of damages, mere rumours or suspicions might be allowed. Since a defendant was liable to compensate his forsaken fiancée for loss of reputation and damage to her character and social standing, he was given the opportunity to show that the woman's reputation in the community was less than impeccable, and thus that no great injury had been suffered. Once again, though, he ran the risk that if he was unable to substantiate his allegations a judge might disapprove of his attempts to demean the plaintiff and compensate her for this ordeal by finding him liable for additional damages.

By admitting unsubstantiated rumours of bad character as a means by which a defendant could lessen his liability, the Ontario judiciary demonstrated that their sympathy did not extend to women who deviated from Victorian standards of respectability. Although the governing contractual framework did not permit judges to allow men to break their betrothals with impunity, juries could be directed to consider community reputation when assessing injuries. It is likely that juries considered the woman's character and reputation in assessing damages, regardless of whether they were expressly directed to do so. In the 1865 case of *Martin v. Furman*, it was evident that the defendant and plaintiff had been living together for several years, that the plaintiff had had a baby while living with the defendant, and that she had a daughter from a previous relationship. The plaintiff did not bring proceedings until the defendant married another woman. Although Justice Richards instructed the jury that they need only satisfy themselves that a promise of marriage had

⁹⁸ 5 U.C.C.P. 493

⁹⁹ Ibid.

been made and broken, the jury appear to have felt that the plaintiff had compromised herself by living with Furman and bearing his child without pressing him into marriage. She was awarded the insulting sum of one dollar in damages.¹⁰⁰

In *Isaac v. Rice*,¹⁰¹ a County of Grey jury refused to return a verdict for a young woman who was said to be of bad character and to have acted indecently with the defendant's male cousin, although the evidence suggests only that she shared a bed with Joseph and his brother while fully clothed and in a room with other family members. At some point in her seven-year courtship with the defendant she became pregnant, and the testimony suggests that she and her father independently pressed both the defendant and his cousin to assume the responsibilities of matrimony and parenthood, thereby suggesting that the paternity of the child was at issue. The defendant's cousin told the court that the two men 'joked about her.' Although Justice Hagarty expressed doubts about the admissibility of the evidence of the plaintiff's character in mitigation of damages, he admitted it 'with hesitation,' and it undoubtedly influenced the jury's decision. The jury may have refused to return a verdict on the grounds that the evidence of the defendant's having made a promise was insubstantial, but other Ontario juries had returned verdicts in favour of plaintiffs on the basis of even less evidence in cases where the woman before them appeared to have an unblemished character.

Juries were also told that they could take the wealth and social status of the defendant into consideration when assessing damages. They could compare the social position the plaintiff would have enjoyed had the marriage taken place with her present situation in determining the extent of her injury. Plaintiffs forsaken by wealthy defendants were often awarded handsome sums by sympathetic juries, and such awards were unlikely to be overturned. For example, a jury awarded the unprecedented sum of \$4,500 in damages to a plaintiff at the London fall assizes in 1875. Miss Woodman, a farmer's daughter, was eighteen when the courtship began, and the defendant paid attentions to her for almost two years. He wrote her eighty letters and 'amorous poetical productions' in which intentions of marriage were indicated. The defendant succeeded in inducing the plaintiff to burn these avowals of his affection, and subsequently became indifferent to her. He was an inspector for a loan society, middle-aged, and shown to be possessed of means valued at \$50,000.

In 1879 the defendant attempted to obtain a new trial on the grounds of

100 Ontario Public Archives, record group 22, series 390, box 81-E2, 418

101 Ibid. box 102-E1, 240

excessive damages only.¹⁰² Counsel for the plaintiff argued that it was not open to the court to disturb the verdict on that ground unless the verdict was perverse or the result of some undue prejudice on the part of the jury. He observed that there was no evidence to suggest that the defendant's means were overestimated, and 'the verdict would scarcely, if at all, exceed the interest for one year at eight percent on the value of the defendant's estate.'¹⁰³ The court agreed that the damages were unusually large, but since the promise had been given, and the value of the defendant's estate was undisputed, it could find no reason to interfere with the jury's verdict.

Ostensibly, juries were in the best position to judge the extent of the injury suffered by a particular plaintiff and to reflect public perception of the impact of a broken engagement on a woman's prospects in life. But critics maintained that juries were totally irresponsible in awarding damages; 'If the girl be pretty, the jury generally give her heavy damages: If she be unattractive, they often have a sneaking sympathy with the man. She who has her fortune still before her is handsomely recompensed, while her plainer sister, who could ill afford to lose the best years of her life, is often sent empty away.'¹⁰⁴

In theory, the common-law action provided Victorian women with legal redress and financial compensation for real injuries suffered as a consequence of the humiliation of a broken engagement. In reality, however, it is difficult to determine whether the damages awarded bore any relationship to the injuries suffered. Opponents of the action placed so much emphasis on the absurdity of giving money to women to compensate them for wounded feelings and the loss of an obviously undesirable marriage partner that the real social and economic injuries suffered by women were obscured. The action so thoroughly offended bourgeois values that it subjected the judiciary, the jury, and the women who brought it to hostility, scorn, and contempt. By the end of the nineteenth century it could be maintained that instituting a suit for breach of promise exposed a woman to greater humiliation than being abandoned, and the social costs of bringing such an action outweighed any benefits that might be derived from it.

PRIVATE LIVES AND PUBLIC FORUMS: 'NO TRUE WOMANLY FEELINGS TO BE OUTRAGED'

Much of the legal criticism of the breach of promise action was characterized by hostility towards the women who brought these suits

¹⁰² *Woodman v. Blair* (1879) 30 U.C.C.P. 452

¹⁰³ *Ibid.* 454

¹⁰⁴ Breach of promise of marriage, *supra* note 60, 141

before the courts. This is only partially explained by Victorian notions of marriage and commerce and the desire to keep the values of commerce from corrupting love and matrimony. Animosity towards female plaintiffs in breach of promise suits must be understood within the wider context of Victorian cultural beliefs about the ideal roles of men and women.

Victorian cultural ideology separated men and women and assigned them distinct spheres of influence and activity. This ideological construction was considered essential to the maintenance of social order. Women who instituted actions for breach of promise of marriage transgressed the boundaries between public and private spheres of activity: men functioned in the public sphere of politics and commerce, while women exercised influence in the private realm of the home.¹⁰⁵ Victorians revered the home as a sanctuary, a sacred and private place, and the source of all moral virtues; a shelter from the anxieties of modern life, the home was the wellspring of the ethical and spiritual values the commercial spirit of the public realm threatened to destroy. Women were frequently referred to as 'angels of the house,' and were held to be the moral guardians of the family.¹⁰⁶ They were expected to preserve moral idealism in an age of greed and competition, and to counteract the debasing influence of a masculine life preoccupied with worldly ambitions.¹⁰⁷

Victorians believed that the separation of men and women into public and private spheres was divinely ordained and the principal safeguard of social order. 'It was God's will that women should spend their lives as guardians of the home. By running the home and bringing up children, women were fulfilling God's intention that men and women should complement each other's work. The morals of society were secure in women's hands ... in nineteenth century England, the argument continued, middle class society had almost perfected God's design for the division of labour.'¹⁰⁸

¹⁰⁵ See, for example, Rutherford, *supra* note 6, 177. There is an enormous body of literature dealing with the nineteenth-century concepts of public and private spheres defined by gender which is well known to social historians. Cott provides a detailed summary of much of this literature in *The Bonds of Womanhood* (1977) 197–206. I have made certain selections from this literature to illustrate particular aspects of this ethos, but my choices are by no means exhaustive, and many of these works illustrate similar themes.

¹⁰⁶ Degler *At Odds: Women and the Family in America From the Revolution to the Present* (1980) 26

¹⁰⁷ Houghton, *supra* note 10, 351–2. See also Branca, *Women's history: Comments on yesterday and tomorrow* (1978) 11 *Journal of Social History* 575; Ryan *Womanhood in America from Colonial Times to the Present* (3d ed. 1983); Burstyn, *Religious arguments against higher education for women in England 1840–1890* (1972) 1 *Women's Studies* 111.

¹⁰⁸ Burstyn, *supra* note 107, 114. See also Ryan, *ibid.*, 115.

This view of women's role, often described as 'True Womanhood,' was propagated throughout England and America in books and magazines by, for, and about women. Women's literature manifested a pervasive fear of any dislocation of values, blurring of roles, or merging of categories. 'By careful manipulation and interpretation they sought to convince woman that she had the best of both worlds – power and virtue – and that a stable order of society depended upon her maintaining her traditional place in it.'¹⁰⁹ Women who attempted to participate in public life were sternly rebuked for neglecting their true mission: the moral elevation of man.

The concept of 'separate spheres' accompanied the transition to industrial capitalism in England and the United States, and has been described as a middle-class rationale for a lifestyle fostered by industrialism¹¹⁰ and a form of self-evasion by 'a society both committed to laissez-faire industrial expansion and disturbed by its consequences.'¹¹¹

The origins of industrial capitalism in Canada can be traced to the period between 1851 and 1871,¹¹² and Canadians began the debate about 'woman's proper sphere' at this time.¹¹³ Canadians accepted the doctrine of separate spheres and the ideal of domesticity for women which it embraced.

In Canada, as in England and the United States, this ideal was a middle-class one, and the woman defined by it became the measure of respectability. Women venturing into the public sphere were ridiculed and disparaged, especially if they sought to participate in arenas typically occupied by men, because these ventures shook the foundations of a cultural order believed to be divinely ordained and to represent the apex of human social evolution. Canadian women were warned that if a woman tried to 'leap out of her sphere' and move in another, 'the whole moral relations of society would behoove to be changed'; but, because those relations were unchangeable, her attempts would bring danger and ruin.¹¹⁴

Women who instituted breach of promise suits transgressed Victorian cultural norms in a number of ways. In addition to venturing into the public domain of a court of law, the plaintiff made public the intimate details of her romantic life; by bringing her private life into a public forum, she not only crossed the boundary between public and private spheres of activity, she threatened to merge and dissolve those cultural

109 Welter, *supra* note 15, 386–7

110 Burstyn, *Victorian Education and the Ideal of Womanhood* (1980) 19

111 Douglas *The Feminization of American Culture* (1977) 12

112 Katz et al., *supra* note 97

113 Cook and Mitchinson, Introduction, in Cook and Mitchinson (eds) *supra* note 13, 1–5

114 Sedgewick, *supra* note 13, 9

categories altogether. Critics of the action resented women who so blatantly ignored Victorian conventions and the ideal of womanhood those conventions represented. They insisted that no woman worthy of protection would bring a breach of promise suit, and the law was of benefit only to those who least deserved its intervention:

The really injured woman never seeks pecuniary damages for wounded affections. The very fact that a woman will go into court and permit her heart's secrets to be exposed to the public gaze and her love passages made the fest of counsel and the provocation to 'shouts of laughter,' is of itself proof that she is not a woman whom any man ought to be compelled to marry. The action, in fact, answers itself. It should be said, 'Your presence here is proof positive that you had no true womanly feelings to be outraged, and therefore you have incurred no damage.'¹¹⁵

By revealing the intimate details of courtship in courts of law, women took matters that belonged in the soft shadows of the private sphere and exposed them to the cruel glare of public scrutiny. Such behaviour represented such a serious departure from Victorian cultural norms that some critics charged that plaintiffs denied their womanhood simply by instituting an action.

By violating the Victorian doctrine of separate spheres, the plaintiff clearly forfeited any claim to respectability. Critics of the breach of promise action displayed a clear class bias:

There are ladies above the ranks of those who bring such actions: they too have reputations and are sometimes jilted, and yet a jury's sympathy is not appealed to in mock vindication of their character. Such ladies need no vindication of their honour, nor do they look upon money as a substance to be weighed in the scales with love ... The middle and lower middle classes of society alone can claim the honour of having in their circle persons who are not ashamed to apply love wholly and solely as an article of commerce and a mercenary snare ...¹¹⁶

Even supporters of the action admitted that the nature of the suit degraded the women who brought it, and that the controversy created the public impression that the action was a kind of legal farce and the plaintiff either a vindictive person or, more commonly, a vulgar harpy. In 1890 the British periodical *The Spectator* commented:

The consequence is, that the better the injured party, the more refined, the more likely to suffer from being jilted, the less likely is she or he to bring the action, which is thus left almost exclusively to the brassy, the designing and the avaricious ... Moreover, it has become 'bad form' not only for refined women to bring such an action, but for any woman who makes any pretence to refinement: while the

¹¹⁵ Supra note 46, at 149–50

¹¹⁶ A word for Amelia Roper *The Spectator* 18 January 1890 83

immense majority of working women, if jilted by working men, think of a suit at law as an expense far too heavy for their purses ... The right of action is, therefore, useless to the great majority of the population, it is worse than useless, offensive to the better classes, and it is a cause of derogation, to use a phrase they would not understand, to that section of the middle class which alone makes use of the privilege which the law secures.¹¹⁷

Respectable women were expected to keep the details of their private lives out of public courtrooms, and this attitude extended beyond the breach of promise suit. For example, in an 1886 debate in the Canadian House of Commons, Senator Alexander Campbell opposed proposed seduction legislation on the ground that any woman who deserved sympathy would not enter the court because of an overwhelming sense of shame.¹¹⁸

The characterization of female plaintiffs as vulgar middle-class mercenaries is not borne out by the records of Ontario breach of promise cases in the nineteenth century. Plaintiffs appear to have come from diverse backgrounds. Some were members of the most highly respected families; others were daughters of merchants, farmers, and barbers; still others worked for a living, in stores, as tavern-keepers, as teachers, and as domestic servants, for example. Newspaper accounts of trials describing the dress and demeanour of the women counter any suggestion of vulgarity, and though the action may have been perceived as a 'legal farce,' it is interesting to note how many of Ontario's most eminent counsel represented parties to the suits.

The disparity between the critical perception of the participants in breach of promise actions and the women who actually presented themselves in the courts is not altogether surprising. The foundations of the opposition were ideological, and plaintiffs were portrayed as the menacing creatures they were sensed to be. Judges and juries, however, did not face ideological constructions, but individual flesh-and-blood women, each with her own story of romance, betrayal, and hardship endured. The Ontario judiciary's continued sympathy towards these women in the face of opposition by legal commentators and public sensationalism requires further consideration.

Judicial behaviour and Victorian cultural attitudes: Concluding observations

With few exceptions, the Ontario judiciary appear to have been remarkably sympathetic to the women who brought breach of promise actions in

¹¹⁷ Ibid.

¹¹⁸ Backhouse, *supra* note 44, 232 n. 112

the nineteenth century, especially in the manner in which they used their discretion to reduce the evidentiary burden borne by female plaintiffs and in their limitation of the defences open to men who had repudiated their betrothals.

It cannot be assumed from this behaviour that Ontario judges were unaware of, or completely uninfluenced by, the debate that raged over the breach of promise action. Trial judges had to maintain order in packed courtrooms and quell the excitement of audiences and the excesses of counsel, a task undoubtedly made more difficult by the attention focused on such suits by the press. Most judges probably read the law journals that served as the primary forum for critics of the breach of promise suit, and individual judgments make it clear that some members of the bench were keenly aware of the arguments favouring its abolition.

In 1877 the case of *Morrison v. Shaw*¹¹⁹ was dismissed because the jury was not convinced that a promise to marry had been established. The plaintiff moved for a new trial on the basis that the jury had been misdirected. The Court of Queen's Bench refused to grant the new trial on the grounds that no cause of action could be found. In coming to this conclusion, however, Chief Justice Robert Alexander Harrison made several comments that indicate a familiarity with and an appreciation of a number of the arguments made by critics of the suit:

While actions for breach of promise of marriage are generally favoured by jurors, they are not equally favoured by all jurors any more than by all Judges. There are some jurors, as well as Judges, who look upon such actions as often involving wrongs more fanciful than real. But most jurors who are asked to give large damages to a woman for loss of prospects or wounded feelings have a natural desire to see the woman who is the real or supposed sufferer, and this desire is generally gratified, although sometimes most painful to the feelings of the woman principally concerned. In this case, for some reason not explained, except in the affidavit of the plaintiff's attorney, the desire, if existing, was not gratified.

The reason assigned in the affidavit for non-appearance of the plaintiff at the trial was the advice of her attorney that she could not be a witness, and so need not attend. If her appearance or her presence would have aided her action, as is sometimes the case before jurors, we have no doubt that different advice would have been given. Attorneys, where clients are young or good-looking, generally conceive it to be their duty, especially in actions of this kind, to endeavour by the presence of the young woman to strengthen the favourable impression which the jurors are asked to take of the evidence.¹²⁰

119 40 U.C.Q.B. 403

120 Ibid. 407-8

The judgment illustrates a recognition of critics' charges that women who brought such suits suffered no damages deserving of compensation, and that juries were biased in favour of awarding damages to attractive young women. Chief Justice Harrison's comments also suggest one of the ironies inherent in complaints about the action. On the one hand, a woman who did not appear in court was told that she could expect to lose because of her failure to satisfy a jury's curiosity: on the other hand, a woman who did appear in court should not expect to succeed, because her willingness to expose herself in the public arena indicated that she was too immodest to have suffered the type of injury for which damages were awarded. Justice John Edward Rose reiterated the latter sentiment in *Costello v. Hunter*.¹²¹ Without even addressing the facts of the case at bar, he delivered a rare statement of judicial policy in an era of Canadian history often characterized by its judicial conservatism.¹²²

I am not sure that actions for breach of a promise to marry should ordinarily receive much encouragement.

It may be that in gross cases a recalcitrant lover should be punished for trifling with the affections of the forsaken one, but unless the result of monopolizing the attentions has been to prevent a settlement in life, and the action is brought to recover a sum, the income of which will serve as a provision in lieu of the income hoped to be derived from the marriage, it is difficult to see any advantage to the plaintiff from such an action.

If the plaintiff be a woman, one would think the chances of marrying would not be increased by the exhibition of herself in Court as rejected or forsaken, subjecting herself to the ridicule attendant upon a cross-examination as to the incidents of the courtship, and by in some sense making herself public property.

It certainly is not in the interest of the public, or the parties, that those who have no affection for each other should be forced into an unwilling marriage, for morality is not served by such a union. Moreover, it would appear that any woman cannot, on the whole, suffer loss if a man who does not love, refuses to marry her. To be released from such a one must be a great gain.¹²³

The judgment echoes many of the criticisms levelled at the action and the women who instituted it during this period. It manifests the same distaste for women who made themselves 'public property' by leaving their proper sphere, and a belief that such women suffered no damages

¹²¹ Supra note 32

¹²² Jennifer Nedelsky, Judicial conservatism in an age of innovation: Comparative perspectives on Canadian nuisance law 1880-1930, in Flaherty (ed.) supra note 12, 281-322

¹²³ Supra note 32, 345-6

worthy of compensation. The statement is an isolated one, however, and the sentiments expressed by Justice Rose appear to have had little impact on the prevailing attitudes of the Ontario bench towards breach of promise actions.

By and large, Ontario judges refused to respond to the controversy surrounding the action by limiting the scope or success of these suits. The judiciary for the most part ignored the policy arguments that favoured curtailing or abolishing the action. It can be argued that this is evidence of judicial conservatism, which has been described as 'a tendency literally to conserve or maintain existing law by strictly, even mechanistically, applying established rules. The conservative judge is unwilling to modify rules, and thus, [is] little interested in policy arguments about the effect of his decision or the social function of a rule.'¹²⁴

Judicial behaviour with respect to the breach of promise action cannot be fully explained merely by labelling nineteenth-century Ontario judges as 'conservative' in approach. Admittedly, judges continued to apply established contract rules despite the outcry about the propriety of imposing commercial values on courtship and marriage. Because they impartially applied those rules in the context of an increasing number of policy arguments against such an approach, Ontario judges may be said to have manifested a 'conservative' attitude. Similarly, in limiting the number of defences open to suitors to justify the breaking of their engagements, Ontario judges may be seen as simply following precedents set by English courts, which took literally the governing contract model in evoking the concept of caveat emptor to deny a man release from liability for his promise, no matter how socially acceptable his refusal to marry might be.

But characterizing the Ontario judiciary as passive adherents to English precedent, merely applying common-law rules to the suit without regard to the social policy arguments advanced by critics, fails to do full justice to judicial behaviour in this period. Ontario judges exercised a great deal of discretion when dealing with breach of promise actions, and in so doing they showed a remarkable degree of sympathy for the women who instituted the proceedings. By limiting the evidence a defendant could introduce in mitigation of damages, and by holding the spectre of punitive damages over the heads of men who attempted to sully the reputations of their former fiancées, judges both increased the difficulties men faced in defending such actions and extended protection to the women who came before the bench. Similarly, by the manner in which the judiciary chose to interpret the 1882 statutory requirement for corroborative evidence they

¹²⁴ Nedelsky, *supra* note 121, 281

exercised their discretion to reduce the evidentiary burden borne by women.

Despite their awareness that the dignity of the law was hardly upheld by the circus-like atmosphere that prevailed in breach of promise proceedings, and despite an awareness of the legal and policy arguments for curtailing or eliminating the action, Ontario judges continued to entertain the suits. Moreover, they exercised their discretion in a manner that helped to enable women to prove their cases in court and protected them from the excesses of defendant's counsel. Popular sentiment, legal controversy, and the 1882 legislative mandate provided Ontario judges with sufficient justification for limiting the scope and likely success of such actions, but they refused to invoke their judicial powers to that end. Judicial intransigence in this area clearly involved an active choice rather than a passive acceptance of existing law. Ontario judges not only exercised discretion, they chose to exercise it in a manner that appears to have exacerbated the contention surrounding the suit.

Judicial reluctance to limit the right of women to be compensated for broken vows is evident on both sides of the border. Grossberg found that U.S. judges in this period were similarly unmoved by criticisms of the action: 'While there appears to have been a certain toughening of judicial attitudes toward female litigants late in the nineteenth century [no parallel development occurred in Ontario], judges made no attempt either to curtail drastically or eliminate a woman's right to be compensated for abandonment at the alter. Too many precedents, too many beliefs lay behind the suit for the bench to succumb to its critics.'¹²⁵ This judicial perseverance is perplexing. Reported judgments from the period do not reveal any motivating factors that would explain the continued judicial acceptance of the suit in the face of mounting criticism and cultural attitudes inimical to the action.

It appears that the Ontario judiciary did feel constrained when dealing with those aspects of the suit clearly governed by the prevailing contractual ideology in English common law. Judges applied the principles of contract law consistently, albeit reluctantly, to agreements to marry. Likewise, the judiciary employed laissez-faire ideology, pervasive in contract law generally, to refuse to protect men from the consequences of entering into rash or improvident engagements, despite their expressed sympathy for men who carelessly committed themselves to females who lacked the attributes valued in Victorian womanhood.

Possibly, judges believed that the courts had a unique responsibility to protect women from the vicissitudes posed by a marriage market in which

¹²⁵ Grossberg, *supra* note 8, 53

they (ideally) participated as independent and freely contacting individuals. This ideal was clearly at odds with a reality which determined that women, unlike their male counterparts, were likely to suffer severe social and economic repercussions when the bargains they made did not reach fruition. Grossberg presents this argument as one explanation for similar behaviour by American judges in the period: '[T]he suit illustrates not only the pervasive influence of contractual ideology on domestic relations, but more significantly, a judicial recognition of the gap between the law's theoretical assumption of contracting equality between men and women and the reality of feminine powerlessness.'¹²⁶

Contractual ideology did not govern all aspects of the suit, however, and in setting evidentiary standards and directing juries with respect to damages judges could exercise wider latitude because they were not constrained by fixed contract principles. It is arguable that in these areas judicial behaviour more closely reflected Victorian cultural norms; refusal to impose stringent evidentiary burdens on female plaintiffs may attest to an affirmation of Victorian notions of respectable womanhood. Judges clearly rejected the idea that participation in the juridical forum was inherently an unfeminine activity, and may have been motivated by a respect for womanly modesty and shame in their refusal to impose evidentiary requirements that would embarrass and humiliate those whom the court was obligated to protect.

Indeed, judicial activity in this area may be seen as entirely consonant with Victorian cultural mores. Given the prevailing conviction that women could not be permitted to venture independently into the public realm, their institution of legal proceedings could be met with alternative responses. On the one hand, they could be vilified and chased back into their proper sphere through the use of ridicule and insult, a tactic that legal commentators, dealing with such women as a category and speculating on the suit in the abstract, chose to employ. On the other hand, it could be determined that women would be able to proceed into the public domain only under the cloak of male protection, a protection that judges and juries, who were appealed to by particular women in a specific context, were usually prepared to extend. To evoke this protection, however, a woman had to physically present herself in the public forum and personally appeal to the protective instincts of male judges and jurors. As the case of *Morrison v. Shaw* indicated, a woman who failed to grace the legal proceedings with her presence was not seen as venturing into the public domain in which she could appeal for male protection, and judges and jurors showed little sympathy when considering her claims.

¹²⁶ Ibid. 38

Not all women who appeared before the courts were deemed worthy of protection. Judges may have recognized that the ease with which they permitted women to establish engagements created opportunities for abuse, and therefore may have used discrimination when directing the assessment of damages to adjust the balance of power. Judges and juries showed little sympathy for women who had forfeited all claims to social respectability, but refused to allow defendants to impugn the characters of women whose social reputations were otherwise intact.

Judicial resistance to pressures to curtail or abolish the right of women to seek legal redress for broken engagements may indicate a determination not only to protect women but to protect the courts' jurisdiction over these matters. In the absence of any definitive legislative activity in the area, judges may have thought it their duty to protect the traditional common-law rights of the individual against collective pressures. Certainly they insisted on maintaining their independence in this area, and defied all attempts to encroach upon their freedom to deal with these cases as they saw fit. This judicial autonomy was influential in ensuring that the action continued to be available to women well into the twentieth century.

Although judicial behaviour when entertaining breach of promise suits fostered contention because it appeared to deviate from cultural norms, a closer analysis of judicial activity reveals a far more complex scenario. Ontario judges were clearly motivated and influenced by prevailing cultural attitudes, and their behaviour both reflects and repudiates popular assumptions about the action. Judges in this era were faced with an enormous challenge when orchestrating these suits, and met this challenge by establishing a delicate balance of interests. The Ontario judiciary responded to community concerns by incorporating Victorian cultural mores into their judgments, but they accomplished this by means that show a principled refusal to permit public contention to compromise the integrity of the common law or the interests of the individuals it was developed to protect.

Canadian legal history is still in its infancy, and legal historians have a limited sense of judicial self-consciousness in the formative period of Canada's juridical culture. Investigation of the action for breach of promise of marriage in the nineteenth century suggests that studies of particular actions in social and cultural context raise provocative questions about the nature of judicial concepts of social and professional responsibility, and the proper purpose and function of judicial discretion. It is imperative that these issues continue to be addressed if we are to fully appreciate the role played by the judiciary in shaping our social history.