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# Adultery in the Courts: Criminal Conversation in Ireland

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## Introduction

In April 1806, Valentine Browne Lawless, the second baron Cloncurry, noticed his young wife Eliza walking arm-in-arm with his friend, Sir John Bennett Piers, a notorious womanizer, spendthrift and gambler. His suspicions aroused, Cloncurry confronted his wife, who confessed to having an affair with Piers, then staying as a guest on their estate at Lyons, Co. Kildare. A miniature portrait of Piers and a lock of his hair were found among Lady Cloncurry's possessions. Piers, unsurprisingly, made a hasty departure, but wrote several times to Cloncurry denying the affair and making vague offers to duel. Cloncurry and Piers had been friends since their school days; furthermore, Piers owed Cloncurry a sum of money. While nothing, presumably, could entirely assuage the hurt feelings and wounded pride of the husband in such circumstances, the subsequent award of £20,000 damages by a King's Bench jury may have helped. Represented by John Philpot Curran and Charles Kendal Bushe, he sued Piers for 'criminal conversation'.<sup>1</sup> Meanwhile, Lady Cloncurry, having been portrayed as 'an artless and weak girl of nineteen', left the country, her reputation in tatters, and later gave birth to a son presumed to be Piers'.<sup>2</sup>

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\*I wish to acknowledge with thanks the assistance provided by Ms Clare Cresswell in preparing this chapter.

<sup>1</sup> Anon (1807) *A Full and Accurate Report of the Trial of Sir John Piers for criminal conversation with Lady Cloncurry: Taken in Shorthand by an Eminent Barrister Concerned in the Cause* (Dublin: C La Grange).

<sup>2</sup> The Cloncurrys divorced in 1807 and Lord Cloncurry remarried four years later: Patrick M Geoghegan, 'Lawless, Valentine Browne (Baron Cloncurry)' in the *Dictionary of Irish Biography*.

Criminal conversation or ‘crim con’ was a ‘notorious’<sup>3</sup> civil action which allowed a cuckolded husband to recover damages from his wife’s lover. It evolved out of *de facto* blackmail agreements in the late seventeenth century and gained popularity among the English nobility in the eighteenth century until its abolition by the Divorce and Matrimonial Causes Act 1857,<sup>4</sup> but because this Act did not extend to Ireland,<sup>5</sup> Irish crim con actions endured until the twentieth century.

Adulterous men and women were treated differently by the law:<sup>6</sup> although ‘adultery by either sex was a serious marital offence’,<sup>7</sup> when committed by a wife it was injurious not only to her husband but also to society more generally, given the importance of property, paternity and legitimacy in the eighteenth and nineteenth centuries.<sup>8</sup> The ‘control of sex, sexual relations, and sexuality’ – mainly through marriage – has long been a central element of social control in Ireland.<sup>9</sup> As Lemmings points out,

in an age where conventional concerns about patriarchy and the orderly transmission of property in families were challenged by social mobility, increasing social exchange and freedom of contract, the issue of controlling female sexuality was a major worry for the emerging middle class.<sup>10</sup>

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John Betjeman penned a poem about the seduction and affair in the 1930s: ‘The nobility laugh and are free from all worry / Excepting the bride of the Baron Cloncurry. But his lordship is gayer than ever before / He laughs like the ripples that lap the lake shore / Nor thinks that his bride has the slightest of fears / Lest one of the guests be the Baronet Piers.’ John Betjeman (under the pseudonym Epsilon), ‘Sir John Piers’, 1938, republished in John Betjeman (1940) *New Light for Old Chancels* (London: John Murray).

<sup>3</sup> Susan Staves (1982) ‘Money for Honour: Damages for Criminal Conversation’, *Studies in Eighteenth-Century Culture*, 2, 279.

<sup>4</sup> 20 & 21 Vic c 85, s 59. Instead, s 33 allowed a husband to seek damages from a co-respondent who had committed adultery with his wife. The Law Reform (Miscellaneous Provisions) Act 1970, s 4, abolished this action.

<sup>5</sup> See Diane Urquhart’s chapter in this volume.

<sup>6</sup> A wife’s adultery was sufficient grounds for divorce, whereas a husband’s adultery had to be accompanied by some aggravating factor, such as incest, bigamy, unnatural practices or cruelty: see Urquhart, this volume.

<sup>7</sup> Lawrence Stone (1993) *Broken Lives: Separation and Divorce in England 1660-1857* (Oxford: Oxford University Press), p 303.

<sup>8</sup> See Simone McCoughran and Fred Powell’s chapter in this volume.

<sup>9</sup> Tom Inglis (2005) ‘Origins and Legacies of Irish Prudery: Sexuality and Social Control in Modern Ireland’ *Eire-Ireland* 40 (3 & 4), 9, pp 11-12.

<sup>10</sup> D Lemmings (2009) ‘Introduction: Law and Order, Moral Panics, and Early Modern England’ in Lemmings, D and C Walker (eds) *Moral Panic, the Media and the Law in Early Modern England* (Basingstoke and New York: Palgrave Macmillan), p 3.

There was generally great public interest in crim con actions, with high courtroom attendance<sup>11</sup> sometimes regulated by ticket,<sup>12</sup> and detailed newspaper reports.<sup>13</sup> However, despite the attention they attracted, they were in fact relatively rare. Crim con cases peaked in England around the 1790s in the midst of a moral panic.<sup>14</sup> Ireland may have lagged behind by a couple of decades in this regard; while in 1804 crim con actions were described as ‘novel’,<sup>15</sup> a lawyer in 1816 lamented that crim con actions had become ‘so flagrant, and the crime so grown, to the total disregard of conjugal rights and state’.<sup>16</sup> In 1818 another lawyer remarked on the frequency of such cases<sup>17</sup> and in 1820 Lord Norbury said that adultery ‘was a crime extensively growing to magnitude and depravity in this country.’<sup>18</sup> These statements about the apparent increase in crim con actions may have been linked to a generalized moral panic associated with the mass exodus of nobility and gentry in the decades following the Act of Union.<sup>19</sup>

By the end of the decade, however, a lawyer remarked that it was ‘most creditable to this country to find that actions of this nature were exceedingly rare’,<sup>20</sup> suggesting either a decline in the number of cases or simply a decline in the perceived frequency of such cases. The rest of the nineteenth was punctuated by statements about the rarity of crim con

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<sup>11</sup> Anon (1835) *Court of Exchequer, Feb 22nd, 1835. Crim. Con. New Trial before the Chief Baron. Hodgens v Mahon* (Dublin: D Scott).

<sup>12</sup> *McCraith v Quinn, Belfast Newsletter*, 2 Aug 1872.

<sup>13</sup> Jurors were often warned to disregard any rumours or speculation that they had heard regarding the case: Anon (1804) *A Report of the Trial on an Action for Damages Brought by the reverend Charles Massy Against the Most noble the Marquis of Headfort for Criminal Conversation with Plaintiff's Wife* (Dublin: MN Mahon), and *Cloncurry v Piers* (1807). See also *Cloncurry v Piers* (1846) 3 *Jones & La Touche* 373.

<sup>14</sup> Stone (1993) *Broken Lives*, p 24, links this with the appointment of Lord Kenyon as Chief Justice of the King's Bench: he was ‘[i]nspired by his own brand of Puritanism, reinforced by the moral panic among the elite aroused by the French Revolution.’ See further Lemmings and Walker, *Moral Panic* (2009).

<sup>15</sup> *Massy v Headfort* (1804), p 2.

<sup>16</sup> Anon (1816) *Crim Con William Binns, Plaintiff, John Scott, Defendant, Before the Hon Justice Mayne* (Dublin: Wm Espy), p 3.

<sup>17</sup> *Nugent v Norie, Freeman's Journal*, 25 Feb 1818.

<sup>18</sup> Anon (1820) *Crim. Con. A Full, Faithful and Impartial Report of the Trial, wherein Sir John M. Doyle, KCB & KTS was Plaintiff, and George Peter Brown, Esq, Defendant. For Criminal Conversation with the Defendant's Wife* (Dublin: James Charles), p 42.

<sup>19</sup> Gillian O'Brien (2008) ‘Visitors’ Perceptions of Dublin 1800-30’ in O'Brien, G and F O’Kane (eds) *Georgian Dublin* (Dublin: Four Courts Press), p 23.

<sup>20</sup> *Coffey v Magee, Belfast Newsletter*, 23 Mar 1829.

actions.<sup>21</sup> The moral purity of the Irish, and Irish women in particular,<sup>22</sup> was a popular theme from the mid-nineteenth century onward;<sup>23</sup> although as Inglis points out, '[t]he notion that Ireland was a country of virtuous virgins, chaste mothers, and abstemious fathers was mythical.'<sup>24</sup> Nevertheless, it was remarked in 1859 for example that Ireland 'was celebrated not only for the chastity and purity of its women, but also for the honour of its men. It was seldom indeed that [a crim con] action was brought under the notice of the public.'<sup>25</sup> Perceptions of the frequency with which crim con actions came before the court may have depended on whether a particular case occurred in the context of a wider moral panic, and whether the circumstances of a particular case attracted much attention. Later cases involving middle-class parties and modest damages may have attracted less notice.<sup>26</sup>

## The Rationale for Crim Con Damages

Crim con could be pleaded either as an action in trespass<sup>27</sup> (on the husband's rights in relation to his wife<sup>28</sup>) or on the case.<sup>29</sup> Case was a form of action which developed out of trespass, but allowed for damages for less immediate and direct injuries.<sup>30</sup> Chitty considered it more convenient to

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<sup>21</sup> *Kinsella v Wingfield*, *Irish Times*, 24 Apr 1883.

<sup>22</sup> The Irish were 'justly proud wherever we go of the purity of our daughters and, as Irishmen, for the respect entertained for the marriage vow': *McCraith v Quinn*, *Belfast Newsletter*, 2 Aug 1872.

<sup>23</sup> See the contributions by Sinott, Brennan, Farrell and Earner-Byrne to this volume.

<sup>24</sup> Inglis (2005) 'Origins and Legacies', p 21.

<sup>25</sup> *Cashel v Harding*, *Nenagh Guardian*, 19 Mar 1859.

<sup>26</sup> For example, in *Balmer v McGrath*, *Belfast Newsletter*, 9 May 1896, the plaintiff sought damages of £100.

<sup>27</sup> *Blachford v Latouche*, *Freeman's Journal*, 13 Jan 1811 and *Hodgens v Mahon* (1835), p 1.

<sup>28</sup> J Chitty (1844) (H Greening (ed)), *Chitty's Treatise on Pleading and Parties to Actions: with Second and Third Volumes Containing Modern Precedents of Pleading and Practical Notes*, 3 vols, 7<sup>th</sup> ed (London: Sweet), vol 2, p 483.

<sup>29</sup> According to Chitty (1844) *Treatise on Pleading*, p 483, 'in actions of crim con it has always been the practice to bring trespass or case indiscriminately, on the ground that the party aggrieved might waive all damages resulting from the trespass.' Ferguson described crim con as 'an action on the case for the special damage.' WD Ferguson (1841-42) *A Treatise on the Practice of the Queen's Bench, Common Pleas, and Exchequer of Pleas in Ireland, in Personal Actions and Ejectments* vol 2 (Dublin: A Milliken), p 1192.

<sup>30</sup> William Blackstone (1800) *Commentaries on the Laws of England* vol 3 (13<sup>th</sup> edn, London: A Strahan), p 122, describes trespass on the case as a 'universal remedy' for 'wrongs unaccompanied by force'. It also allowed for compensation in cases where the injury was caused by omission, or where it was not immediately injurious. The actions of seducing a wife away

plead crim con on the case, because the injury was ‘not immediate, but consequential’, and because it made it unnecessary for the plaintiff to specify exactly when and where the incident (or incidents) of adultery had occurred.<sup>31</sup>

As well as providing compensation to the husband for the infringement of his rights, McCardie J. in the English case of *Butterworth v Butterworth* suggested a more ‘cogent moral foundation’ for the action:

The law has ever regarded the sanctity of married life as a matter of grave moment. It may be, therefore, that one of the original objects of the action was to maintain the purity of married life, and to defend the honour of husband, wife and children. The risk of damages might well have been deemed a check to the wanton inclinations of an intending adulterer.<sup>32</sup>

Under this interpretation, crim con not only served to vindicate the husband’s rights, but could also to deter potential adulterers<sup>33</sup> and uphold the sanctity of marriage. However, this moral rationale for crim con was not fully developed until the Victorian period; earlier crim con cases were more concerned with compensation and loss of honour.

It is clear from an examination of some 80 Irish cases and general statements of the law in England and Ireland that the purpose of crim con damages changed over time. Much of the early focus was on the exemplary or punitive nature of the damages: for example, Blackstone wrote that adultery with another man’s wife was the greatest civil injury recognized by law, and ‘the damages recovered [were] usually very large and exemplary’.<sup>34</sup> Smith B in 1804 pointed out that ‘this sort of action partakes of the nature of penal prosecution, and that large and exemplary damages

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from her husband, and harbouring another man’s wife could also be pleaded on the case: *Winsmore v Greenbank* (1745) Willes 577: 125 ER 1330.

<sup>31</sup> Chitty (1844) *Treatise on Pleading*, p 483.

<sup>32</sup> *Butterworth v Butterworth* [1920], pp 126, 132.

<sup>33</sup> A similar reading of crim con is also provided by DT Andrew (2013) *Aristocratic Vice: The Attack on Duelling, Suicide, Adultery, and Gambling in Eighteenth-Century England* (Yale: Yale University Press), p 230.

<sup>34</sup> Blackstone (1800) *Commentaries*, vol 3, p 139.

are usually awarded.’<sup>35</sup> He said that compensation in such cases was difficult to ‘calculate with exact precision’, and that therefore,

Juries should not be parsimonious in the damages which they award; but, on the contrary, should be liberal, to a degree bordering on prodigality and profusion, for the benefit of public example, and the protection of public morals.<sup>36</sup>

In early nineteenth-century Ireland the parties’ rank and fortune were held to be relevant considerations in estimating damages.<sup>37</sup> This would appear to be at odds the English courts’ approach around this time. In an English case decided in the same year as *Massy*, Lord Ellenborough advised jurors to be dispassionate and to focus on the loss sustained by the plaintiff: ‘[t]o the extent to which the plaintiff has suffered real injury, he will expect at your hands reparation.’<sup>38</sup> Three months later, he told another jury that the defendant’s financial circumstances were irrelevant.<sup>39</sup> In *Campbell v Hook*, Lord Kenyon pointed out that he knew nothing of the defendant’s financial circumstances, implying that they had neither been adduced in evidence nor referred to by counsel.<sup>40</sup> By the 1850s, the English view of crim con damages had gained traction in Ireland, with the court in *Wilson v*

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<sup>35</sup> *Massy v Headfort* (1804). By contrast, Lord Kenyon in *Anon* (1793) *The Proceedings Against Major Hook for Criminal Conversation with his Own Niece Mrs Campbell, Wife of Captain Campbell, before Lord Kenyon and a Special Jury. At Westminster, Feb 26th, 1793* (London: np), p 33, expressly stated: ‘this is a civil action, and that it is not a proceeding to punish the party as if he had been guilty of a breach of any criminal law of the country.’

<sup>36</sup> *Massy v Headfort* (1804), p 86. Similarly, counsel in *Taaffe v Fitzgerald* called for ample and exemplary damages: *Belfast Newsletter*, 1 Mar 1816. By contrast, however, Lord Norbury in *Guthrie v Sterne* said ‘there is nothing I would so strongly recommend to jurors, as moderation in damages.’ However, it is difficult to know whether he was being sarcastic here, given the jocular tone of his charge and his general reputation; he also commented, somewhat oddly, that ‘had the Defendant been in possession of as many “Christian” virtues as he had “Christian” names, he would not have been guilty of the crime of seduction.’ *Anon* (1815) *Crim Con. Court of Common Pleas, Friday, June 9, 1815. John Guthrie, Esq, Plaintiff; WPBD Sterne, Esq, Defendant* (Dublin: W Espy).

<sup>37</sup> *Massy v Headfort* (1804), p 89 and *Blachford v Latouche*, *Freeman’s Journal*, 13 Jan 1811. See chapter four for a discussion of the relevance of such factors in determining damages for breach of promise of marriage actions.

<sup>38</sup> *Anon* (1804) *The Proceedings on the Trial of Captain J Caulfield for Criminal Conversation with the Wife of Captain George Chambers, Daughter of the late Lord Rodney. Before Lord Ellenborough, in the Court of King’s Bench, on the 3<sup>rd</sup> Dec 1804* (London: np) p 82.

<sup>39</sup> *Anon* (1805) *The Proceedings against Henry Jadis, Esq. for Criminal Conversation with the Wife of the Hon Allan Hyde Gardner, Captain in his Majesty’s Navy, and Son to Lord Gardner, Before Lord Ellenborough, In the Court of King’s Bench, Guildhall, on Saturday the 2nd of Mar 1805* (London: np), p 71.

<sup>40</sup> *Campbell v Hook* (1793), p 35.

*Leonard*<sup>41</sup> holding that the jury ought to be guided solely by the injury to the plaintiff, and not the punishment of the defendant. The value of the defendant's property in this case was withheld from the jury, because it was deemed irrelevant to their calculation of damages, bringing Irish jurisprudence into line with a number of English decisions.<sup>42</sup>

Aside from occasional instances where juries appeared to award punitive damages<sup>43</sup> the focus on compensation remained well into the twentieth century. In 1974 the Supreme Court confirmed that damages ought to be restricted to what could be considered compensatory in respect of the loss suffered,<sup>44</sup> and in 1979 a jury was warned that 'there should not be any element of punishment of either side.'<sup>45</sup>

## The Nature of Crim Con Actions

The nature of crim con in Ireland changed over time. As in England, crim con cases were originally the preserve of the wealthy elite, and in the late eighteenth and early nineteenth centuries actions tended to be brought by wealthy or aristocratic men.<sup>46</sup> The 1816 case of *Binns v Scott* was even described by counsel as 'novel' because the parties were 'not in high life.'<sup>47</sup> However, from the second half of the nineteenth century we see crim con actions increasingly being taken by men of more modest means such as, for example, a stationmaster,<sup>48</sup> a coal merchant,<sup>49</sup> a mill-worker,<sup>50</sup> a gardener,<sup>51</sup> a farmer,<sup>52</sup> a chemical manufacturer<sup>53</sup> a clerk<sup>54</sup> a teacher<sup>55</sup> and a doctor in a

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<sup>41</sup> (1852) 5 *Irish Jurist* (os) 101.

<sup>42</sup> See *Calcraft v Earl of Harborough* (1831) 4 C & P 499; *James v Biddington* (1834) 6 CP 589; *Wilton v Webster* (1835) 7 C & P 198, 202.

<sup>43</sup> In *Fleming v Purcell*, *Belfast Newsletter*, 23 Feb 1893, a jury awarded £1000 damages 'to mark their strong condemnation of the defendant's conduct.' The damages in *Joynt v Jackson* may also have been punitive: Anon (1880) *Authentic Report of the Crim Con Trial of Joynt v Jackson in the Exchequer Court, Dublin, Commencing May 10<sup>th</sup>, 1880* (Dublin: Edward Smith).

<sup>44</sup> *Maher v Collins* [1974] 1 IR 232.

<sup>45</sup> *Mulvaney v Collins*, *Irish Times*, 10 Nov 1979.

<sup>46</sup> *Cloncurry v Piers* (1807), *Doyle v Brown* (1820).

<sup>47</sup> *Binns v Scott* (1816), p 4. It was not, however the only such case; in *Patterson v Pullen*, *Freeman's Journal*, 2 Dec 1800, the plaintiff was a publican while the defendant was a cutler.

<sup>48</sup> *Echlin v Brady* (1865) 10 *Irish Jurist* (ns) 188 and *Dundalk Democrat*, 18 Feb 1865.

<sup>49</sup> *Hewitt v Lyttle*, *Irish Times*, 16 Dec 1886.

<sup>50</sup> *Beaken v Dockeray*, *Irish Times*, 22 Feb 1882.

<sup>51</sup> *Devlin v Davy*, *Irish Times*, 7 Jan 1888.

<sup>52</sup> *Graham v Pattison*, *Irish Times*, 23 June 1935.

<sup>53</sup> *Mallon v Barnwell*, *Irish Times*, 25 Jan 1889.

<sup>54</sup> *Lowry v Bustard*, *Irish Times*, 16 Apr 1885.

lunatic asylum.<sup>56</sup> The damages sought in such cases were generally much lower than would have been the case in the aristocratic cases of a century before.<sup>57</sup>

The cases that came before the Irish courts involved Roman Catholics,<sup>58</sup> members of the Church of Ireland<sup>59</sup> and other denominations.<sup>60</sup> It was rare for crim con to be taken in response to an alleged rape or sexual assault.<sup>61</sup> The fairly typical scenario was a wife having an adulterous affair with a close friend or acquaintance of her husband, or sometimes with her employer.<sup>62</sup> Inglis observes that the history of Irish sexuality ‘remains a relatively hidden, secretive area’;<sup>63</sup> some crim con cases were more unusual and reveal a hidden world of sexual activity. For example, there was the ‘well-reared’ daughter of a Presbyterian Minister, married to a newspaper publisher, who ended up repeatedly having drunken liaisons with numerous bank employees in the lanes and alleys of Ballina.<sup>64</sup> There was the upper middle-class husband who cheerfully prostituted his wife and boasted about it.<sup>65</sup> There was also the woman admitted to a private asylum where sexual relations freely took place between patients, staff, visitors and prostitutes, and who became pregnant, probably by one of the doctors.<sup>66</sup> These sorts of cases belie the myth that there was no extramarital sexual activity in Ireland.

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<sup>55</sup> *Morrison v Roberts*, *Irish Times*, 30 Jul 1892.

<sup>56</sup> *Atkins v Packford*, *Irish Times*, 27 Jan 1887.

<sup>57</sup> Staves (1982) ‘Money for Honour’, p 289, has examined these earlier awards in detail and writes that the amount of damages in such cases was directly related to the ‘honour’ of the parties involved: ‘the courts tried to adjust damages to an estimate of how much honour the individual plaintiff had lost; how much honour each plaintiff had lost, in turn, depended in part on how much honour he was adjudged to have had initially.’

<sup>58</sup> *Coffey v Magee* (1829); *Hurst v McDonnell* (1891) and *Fay v Barber* (1797).

<sup>59</sup> *Doyle v Brown* (1820).

<sup>60</sup> The Binns in *Binns v Scott* (1816) were reported to have been members of the Methodist Society.

<sup>61</sup> One such case, however, was *Graham v Pattison*, *Irish Times*, 28 June 1935.

<sup>62</sup> *Lowry v Bustard*, *Irish Times*, 16 Apr 1885; *Kinsella v Wingfield*, *Irish Times*, 24 Apr 1883.

<sup>63</sup> Inglis (2005), ‘Origins and Legacies’, p 9.

<sup>64</sup> *Joynt v Jackson* (1880).

<sup>65</sup> *Mansergh v Hacket* (1807), p 10.

<sup>66</sup> Anon (1816) *Crim Con. Report of a Trial, in the Court of Common Pleas, on Saturday, Dec 14, 1816. John Hinds, Gentleman Attotney, plaintiff. Philip Perry Price Myddleton, Defendant* (Dublin: R Conolly).

Crim con actions might be taken out of revenge, as part of wider marriage breakdown proceedings,<sup>67</sup> or simply to extort money, as in *Devlin v Davy*.<sup>68</sup> The plaintiff, an alcoholic gardener, had been imprisoned several times for assaulting his wife, who had obtained a divorce on grounds of cruelty. He brought a crim con action against Dr Davy, but both his daughter and his daughter-in-law testified that he had offered them money to give false testimony against the defendant. The daughter described her father as a ‘villain and a ruffian’, and told the court that her mother had financially supported the family for years. The jury unsurprisingly returned a verdict for the defendant, and the judge was particularly critical of the plaintiff, making an order that the Crown Solicitor should institute criminal proceedings against him for perjury. *Matthews v Moniali*<sup>69</sup> was probably an attempt to extort money from a married Church of Ireland clergyman who had recently fired his steward, the plaintiff. There were numerous examples of cases which did not appear to be *bona fide*,<sup>70</sup> or which may have involved a conspiracy against the defendant.<sup>71</sup> Sometimes the crim con action might have been viewed by the plaintiff as the solution to his desperate financial troubles, especially if he owed money to the defendant.<sup>72</sup> In *Murdock v Rynn*<sup>73</sup> the wife testified that her husband suggested that she ought to be ‘found’ in some ‘awkward places with Mr Rynne’, with whom she was on friendly terms, and that he would share with her any money recovered from him.<sup>74</sup>

## Proving Criminal Conversation

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<sup>67</sup> By the late eighteenth century, a crim con action was part of the slow, expensive process of obtaining a parliamentary divorce. See Diane Urquhart (2013) ‘Ireland and the Divorce and Matrimonial Causes Act of 1857’ *Journal of Family History* 38, 301. See WH Kisbey (1871) *The Law and Practice of the Court for Matrimonial Causes and Matters (Dublin: W M’Gee)*, pp 1-2. By the turn of the nineteenth century, many crim con cases in England involved some level of collusion between the parties: Stone (1993) *Broken Lives*, p 24; Katherine Binhammer (1996) ‘The Sex Panic of the 1790s’ *Journal of the History of Sexuality* 6(3), 409, 429.

<sup>68</sup> *Irish Times*, 7 Jan 1888.

<sup>69</sup> *Freeman’s Journal*, 14 Jul 1866.

<sup>70</sup> *Todd v Alexander*, *Irish Times*, 20 Jan 1917; *Toner v Bullick*, *Belfast Newsletter*, 9 Jul 1900.

<sup>71</sup> *Aylward v Morrisson*, *Belfast Newsletter*, 10 Sept 1813. McClelland B was appalled, and declared a nonsuit.

<sup>72</sup> *Brown v Blake* (1817); *Binns v Scott* (1816);-*Keenan v Pringle*, *Irish Times*, 5 Feb 1891.

<sup>73</sup> *Belfast Newsletter*, 2 May 1894.

<sup>74</sup> Also *Taaffe v Fitzgerald*, *Belfast Newsletter*, 1 Mar 1816.

Irish crim con cases were usually tried by special juries,<sup>75</sup> who determined whether adultery had been proven,<sup>76</sup> and if so, the quantum of damages to be awarded. These were cases 'wherein juries are permitted to exercise a degree of discretion not common in other cases, and wherein they are entire judges of facts.'<sup>77</sup> Nevertheless, either party could apply for a verdict to be set aside on the basis that it went against the weight of evidence, and that it was a verdict that no reasonable jury could have reached.<sup>78</sup>

A number of facts had to be proven before a jury awarded damages. First, it had to be established that the plaintiff and his wife had in fact been married.<sup>79</sup> Production of a marriage register was unnecessary; usually the testimony of the clergyman who had performed the marriage ceremony sufficed. It was unnecessary to prove that the defendant knew that the woman was married.<sup>80</sup> The plaintiff then had to prove adultery between his wife and the defendant. Given the nature of the act, most cases involved circumstantial evidence, often from servants.<sup>81</sup> This might include details of extended or nocturnal visits, secret letters,<sup>82</sup> whispered conversations, secretly commissioned portraits or the discovery of keepsakes,<sup>83</sup> closed<sup>84</sup>

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<sup>75</sup> However, crim con cases which were tried at assizes were more likely to go before a common jury: *Dunlop v Johnson*, *Belfast Newsletter*, 22 Jul 1886 and *Cronin v Murphy*, *Belfast Newsletter*, 17 May 1897. The latter was subsequently retried by a special jury.

<sup>76</sup> Unless the defendant had allowed judgment against him by default, in which case the jury's role was merely to assess damages.

<sup>77</sup> Anon (1797) *The Trial of William Barber, for Criminal Conversation with Jane Fay, Wife of Lawrence Fay, In His Majesty's Court of King's Bench in Ireland; Before the Right Honourable Earl Clonmell, and a Special Jury* (2nd ed, Dublin: J Whitworth), p 22.

<sup>78</sup> For example, *Cronin v Murphy* (1897). A motion to set aside the verdict in *Joynt v Jackson* was unsuccessful: *Irish Times*, 18 Jan 1881. Both *Fay v Barber* (1797) and *Hodgens v Mahon* (1835) were tried twice.

<sup>79</sup> Chitty (1844) *Treatise on Pleading*, p 484. This could prove difficult. In *Fay v Barber* (1797) the defendant claimed a non-suit on two grounds: Mr and Mrs Fay were allegedly of different religions, and had been married by a Catholic priest: see Maebh Harding's chapter.

<sup>80</sup> In *Worrall v Snow*, *Belfast Newsletter*, 12 Aug 1874, Mrs Worrall had concealed the fact that she was married, yet her husband still recovered damages. Chitty (1844) *Treatise on Pleading*, p 484, pointed out that it was unnecessary in such cases to allege or prove that the defendant knew that the woman was married, but that such knowledge was necessary in cases of seducing or harbouring a wife or servant.

<sup>81</sup> According to Kisbey (1871) *Law and Practice*, p 7, where there was no direct evidence of adultery, 'the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion.' In *McDonnell v Weddick*, *Freeman's Journal*, 21 June 1873, unusually, the only evidence proffered was the husband's uncorroborated testimony, and the case failed.

<sup>82</sup> *Fay v Barber* (1797).

<sup>83</sup> *Cloncurry v Piers* (1807).

<sup>84</sup> *Hodgens v Mahon* (1835).

or locked<sup>85</sup> drawing-room doors, clothing torn, stained or in disarray,<sup>86</sup> beds that appeared to have been slept in by two persons,<sup>87</sup> and so on.<sup>88</sup> Servants might become suspicious if they were sent out of the house on apparently frivolous errands.<sup>89</sup> Sometimes the husband discovered his wife and her lover together. In *McCraith v Quinn*,<sup>90</sup> for example, the suspicious husband had followed his wife when she went out riding, and discovered her on a side-road conversing with the defendant, who had already been barred from their house. The enraged husband 'beat him with a stick, which he broke across his back.'<sup>91</sup> Events were even more dramatic in *Conyers v Westropp*,<sup>92</sup> where Mr Conyers burst into his wife's room with the aid of a few servants, and found the couple *in flagrante*. Westropp, a magistrate, jumped out of the bed in his shirt and 'a struggle ensued; Mrs Conyers interposed, endeavouring to screen her seducer from the vengeance of her husband; and she too was undressed.' Westropp fired a pistol, and received a severe beating at the hands of Conyers' servants, suffering a fractured skull and numerous lacerations from pitchforks. He was thrown out into the yard, covered with blood, whereupon Mrs Conyers flung herself over him, dressed only in a chemise, so that they would not kill him. One of the more sensational cases involving directly witnessed intercourse was *Joynt v Jackson*,<sup>93</sup> where several witnesses testified to having seen Mrs Joynt engaging in 'immoral acts' with around eight different men in Ballina.

It was not enough simply to show that the plaintiff had been married and that adultery had taken place between his wife and the defendant. An actual loss to the plaintiff had to be proven, especially if crim con was

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<sup>85</sup> In *Anon* (1807) *The Trial of J. Hacket, Esquire, for Adultery with Mrs Mansergh. In the Irish Court of Exchequer on Dec the 10th, 1807* (London: J. Day), the maid had grown suspicious because her mistress was in the habit of locking the doors when Mr Hacket called, so she 'spoiled all the locks, so that they could not secure the doors'. She then burst into the drawing-room where they were 'and caught them both upon the carpet', p 6.

<sup>86</sup> *Cloncurry v Piers* (1807).

<sup>87</sup> *Fay v Barber* (1797); *Hodgens v Mahon* (1835).

<sup>88</sup> *Doyle v Brown* (1820) involved testimony from a ship steward, hoteliers, chaise drivers and waiters.

<sup>89</sup> In *Hodgens v Mahon* (1835) the maid was sent out for butter at 9 pm.

<sup>90</sup> *Belfast Newsletter*, 1 Aug 1872.

<sup>91</sup> In *Smith v Kearon*, *Irish Times*, 13 Feb 1957, the plaintiff apparently spotted the defendant sneaking out of his wife's bedroom.

<sup>92</sup> *Belfast Newsletter*, 20 May 1834.

<sup>93</sup> *Joynt v Jackson*, *Irish Times*, 11, 12, 13 and 15 May 1880.

pleaded as an action on the case.<sup>94</sup> This loss had to be shown to be caused by the defendant's acts.<sup>95</sup> So for example, in *Joynt v Jackson*, Mrs Joynt had had adulterous affairs with a number of men, including her brother-in-law, but Jackson, as her first seducer, had been the initial cause of the plaintiff's loss.

The wife's voice was not heard in late eighteenth- and early nineteenth-century crim con cases. The action lay between her husband and her alleged lover; a wife could neither testify nor have witnesses to testify on her behalf. She might have her reputation destroyed in court<sup>96</sup> without being afforded a right of reply. She was 'not regularly before the court, though more deeply involved in the event than either of the others; who has no advocate ... to plead her cause, or to defend her from obloquy, from infamy, from destruction'.<sup>97</sup> Sir George Bowyer, MP for Dundalk, remarked in 1854 that

... although the wife was upon her trial, and its issue might involve her utter ruin and destruction, she had no part in the proceeding. She was not heard at all ... The most abominable charges might be brought against her by witnesses in the action, and enforced by all the eloquence and ingenuity of counsel; she might thus be held up to the world as a being utterly degraded; yet she was neither allowed to produce a single witness, nor to say a single word, either in vindication of her innocence or in mitigation of the imputed guilt.<sup>98</sup>

His proposed bill<sup>99</sup> sought to allow wives in crim con cases to testify, but was defeated.<sup>100</sup> However, the Evidence Further Amendment Act 1869<sup>101</sup>

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<sup>94</sup> As will be discussed below, this hinged on demonstrating the wife's high worth, the husband's happiness during the marriage and his misery upon discovering the adultery.

<sup>95</sup> John Dawson Mayne (1872) *A Treatise on the Law of Damages: comprising their Measure, the Mode in which they are Assessed and Reviewed, the Practice of Granting New Trials, and the Law of Set-Off* (2<sup>nd</sup> edn, Lumley Smith (ed), London), p 381.

<sup>96</sup> For example, in *Fay v Barber* (1797) the judge spoke of the wife's 'baseness' and described the defendant as 'keep[ing] a whore.'

<sup>97</sup> *Cloncurry v Piers* (1807), p 91.

<sup>98</sup> *Hansard 3*, lxxxii [420-1] 4 Apr 1854.

<sup>99</sup> *A Bill to Amend the Law Regarding Actions for Criminal Conversation 1854*, HC 1854 (61) ii, 121.

<sup>100</sup> It also proposed the replacement of damages with a court-imposed fine, thus preventing a husband from benefitting materially from his wife's adultery.

provided that '[t]he parties to any proceeding instituted in consequence of adultery, and the husbands and wives of such parties, shall be competent to give evidence in such proceeding'. As a consequence, by the late nineteenth century it was increasingly common for wives (and indeed husbands<sup>102</sup>) to take the stand and testify either that adultery had not taken place,<sup>103</sup> or admit that it took place but with the husband's full knowledge.<sup>104</sup>

## How Were Damages Assessed?

Staves points out that crim con actions raised interesting questions about

the meaning of money, the relationship between money and class, the expectations of the rights and responsibilities within marriage; of whether or not wives may be considered the property of their husbands; or more generally, of whether there is any such thing as property in persons.<sup>105</sup>

In assessing damages, juries had to take account of several factors, 'the relative weight attached to each of which changed over time'.<sup>106</sup> In the late eighteenth century, the emphasis was on the plaintiff's loss of honour, especially if there was the possibility of illegitimate offspring.<sup>107</sup> From around 1750 the primary concern became the plaintiff's loss of his wife's comfort and society. During this period, the size of the damages depended

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<sup>101</sup> 32 & 33 Vic c 68, s 3. See Michael Sinnott's chapter in this volume.

<sup>102</sup> *Whittaker v Berry*, *Irish Times*, 12 Feb 1894.

<sup>103</sup> For example, *Beamish v Longley*, *Belfast Newsletter*, 25 Mar 1875; *Murdock v Rynn*, *Belfast Newsletter*, 2, 3, 4, 7 May 1894; *McDonnell v Weddick*, *Freeman's Journal*, 21 June 1873.

<sup>104</sup> For example, *Joynt v Jackson* (1880), *Morrow v Morrow* [1914] 2 IR 183 and *Graham v Pattison*, *Irish Times*, 23 June 1935. In *Morrow*, Cherry LCJ, commented, p 188, that it was 'most unusual to examine the wife as a witness to prove her own guilt' and in *Graham*, Dowse CB observed that the wife was probably 'actuated by a wish to make the husband whom she had wronged the only atonement she could make.' *Irish Times*, 18 Jan 1881.

<sup>105</sup> Staves (1982) 'Money for Honour', p 279.

<sup>106</sup> Stone (1993) *Broken Lives*, p 303.

<sup>107</sup> As Stone writes, 'the principal fear was pollution of blood in a patrilineal primogenitural society.' Lawrence Stone (1990) 'Honour, Morals, Religion and the Law: The Action for Criminal Conversation in England 1670-1857' in A Grafton and A Blair, *The Transmission of Culture in Early Modern Europe* (Philadelphia), p 292. See McCaughran and Powell's chapter in this volume.

on how happy the couple had been before the alleged affair.<sup>108</sup> This is reflected in a statement from Buller in 1817:

As to adultery the action lies for the injury done to the husband in alienating his wife's affection, destroying the comfort he had from her company and raising children for him to support and provide for. And as the injury is great so the damages given are commonly very considerable. But they are properly increased or diminished by the particular circumstances of each case; the rank and quality of the plaintiff, the condition of the defendant, his being a friend, relation, or dependent of the plaintiff or being a man of substance, proof of the plaintiff and his wife having lived comfortably together before her acquaintance with the defendant and her having always borne a good character till then, and proof of a settlement or provision for the children of the marriage, are all proper circumstances of aggravation.<sup>109</sup>

A similar description of how to assess crim con damages was given in the English case of *Butterworth*<sup>110</sup> and later approved and summarized O'Higgins CJ in *Maher v Collins*:

In awarding compensatory damages, regard should be had to (a) the actual value of the wife to the husband, and (b) the proper compensation to the husband for the injury to his feelings, the blow to his marital honour and the hurt to his matrimonial and family life.<sup>111</sup>

The various aspects of this will be examined in turn.

### *The Value of the Wife to the Husband*

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<sup>108</sup> Stone (1990) 'Honour, Morals, Religion', p 293.

<sup>109</sup> F Buller (1817) *An Introduction to the Law, Relative to Trials at Nisi Prius* (7th ed, London: Bridgman), pp 26a-b.

<sup>110</sup> *Butterworth v Butterworth and Englefield* [1920] P 126

<sup>111</sup> [1975] 1 IR 232, at 237.

The assessment of the actual value of the wife to the husband had both consortium and pecuniary aspects. The latter was straightforward, and involved the plaintiff demonstrating the loss of his wife's services; for example, the neglect of him, their children<sup>112</sup> or her household duties.<sup>113</sup> It was claimed in *Patterson v Pullen*<sup>114</sup> that after the wife had intercourse with the defendant, 'her sobriety no longer remained, her strict attention, her economy and attention to her husband's interests were sacrificed to an indulgence in infidelity, to a waste of his property, and to disgust of his person!'<sup>115</sup> By the nineteenth century, the main premise of the action was founded upon the husband's loss of his wife's society; so he generally had no standing if he had been separated from his wife at the time of the alleged adultery.<sup>116</sup>

The plaintiff also had to establish his wife's high worth in terms of her physical attributes, sweet temperament, helpfulness and so on. Thus the wives in these cases were almost invariably portrayed as beautiful, charming and engaging. Mrs Brown was 'a person of considerable personal beauty';<sup>117</sup> Mrs Conyers was 'a lady of extraordinary beauty';<sup>118</sup> Mrs Hurst was 'young and good-looking';<sup>119</sup> while Mrs Taafe was 'the charm of every circle – gay, young, playful, lovely and innocent.'<sup>120</sup> As the solicitor general explained in *Mansergh v Hackett*, '[i]n cases of this nature, the lady is ... represented, in order to engage your sympathy, as a paragon of virtue, an

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<sup>112</sup> See *Hodgens v Mahon* (1835), p 9.

<sup>113</sup> In *Binns v Scott* (1816), p 4, Mrs Binns was described as 'a discreet woman whom [Mr Binns] looked upon as a faithful ally in his business, and a governess of his children.' In *O'Reilly v McKay*, the wife was described as 'a good mother and a good housekeeper.'

<sup>114</sup> *Freeman's Journal*, 2 Dec 1800.

<sup>115</sup> In *Maher v Collins*, O'Higgins CJ was at pains to emphasize that the husband had suffered no loss of his wife's services 'or other tangible hurt' – there had been no break-up of the family home, and she continued to run his businesses – but that 'the wrong done to him was largely concerned with the invasion of the privacy caused to his honour as a husband.' *Irish Times*, 5 Dec 1974.

<sup>116</sup> J Clancy (1819) *An Essay on the Equitable Rights of Married Women: with Respect to their Separate Property and also on their Claim to a Provision Called the Wife's Equity: to which is Added the Law of Pin-Money, Separate Maintenance, and of the other Separate Provisions of Married Women* (2nd ed, Dublin: C Hunter), p 451. Unusually, however, in *Lismore v Bingham*, *Freeman's Journal*, 21 Apr 1825, this served merely to mitigate damages to one shilling.

<sup>117</sup> *Brown v Ibbetson*, *Freeman's Journal*, 13 Nov 1845.

<sup>118</sup> *Conyers v Westropp*, *Belfast Newsletter*, 20 May 1834.

<sup>119</sup> *Hurst v McDonnell*, *Belfast Newsletter*, 16 June 1891.

<sup>120</sup> *Taafe v Fitzgerald*, *Belfast Newsletter*, 1 Mar 1816. There are many further examples of positive descriptions of wives by plaintiffs: *Beamish v Longley*, *Belfast Newsletter*, 23 Mar 1875; *Vanston v Whitecroft* (1897).

angel of light before your fall'<sup>121</sup> This fitted with the wider Victorian narrative of the married woman as passive, virtuous, dedicated 'household angels'.<sup>122</sup> Some wives were also portrayed as passive victims, falling prey to predatory men, who pursued them relentlessly until finally the wife succumbed.<sup>123</sup> As Binhammer observes, '[t]he question of the wife's passive or active sexual nature [became] the pivotal issue' in these trials.<sup>124</sup>

As for the husband's loss of consortium, *crim con* damages are one of the earliest examples of damages being awarded for emotional pain and suffering.<sup>125</sup> Staves describes the eighteenth-century law as 'reflecting the more general cultural awareness of such psychological intangibles.'<sup>126</sup> The plaintiff sought to maximize his damages by proving that he and his wife had lived in matrimonial harmony and domestic bliss before the defendant intervened. As Lord Norbury said in *Nugent v Norie*,<sup>127</sup> if the husband could not show that he had lost 'connubial happiness', his claim must fail.<sup>128</sup> Friends and acquaintances would describe the marriage as happy and mutually satisfactory.<sup>129</sup>

### *The Husband's Injured Feelings and Damaged Honour.*

The plaintiff was presented as heartbroken, outraged and humiliated. Evidence would be adduced as to his despair, and his signaling disapproval of the adultery by refusing to live with his wife thereafter.<sup>130</sup> In determining the injury to the plaintiff's feelings and his loss of honour, jurors took account of various aggravating and mitigating factors. Blackstone wrote in 1797 that damages were

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<sup>121</sup> *Mansergh v Hacket* (1807), p 8.

<sup>122</sup> Judith Rowbotham (1989) *Good Girls Make Good Wives: Guidance for Girls in Victorian Fiction* (London: Blackwell), p 52.

<sup>123</sup> In *Cloncurry v Piers* (1807), counsel argued, p 11, that '[a]lmost from the first moment in which Sir John Piers beheld this unfortunate lady, he had formed unwarranted and unjustifiable designs against her'. She was portrayed as an innocent, 'weak and artless girl'. The plaintiff in *O'Reilly v McKay*, *Irish Times*, 22 Oct 1954, described his wife as 'weak', and having been 'led astray'.

<sup>124</sup> Binhammer (1996) 'The Sex Panic of the 1790s', p 427.

<sup>125</sup> Along with damages for breach of promise for marriage; see Sinnott's chapter in this volume.

<sup>126</sup> Staves (1982) 'Money for Honour', p 293.

<sup>127</sup> *Freeman's Journal*, 26 Feb 1818.

<sup>128</sup> See Staves (1982) 'Money for Honour', p 282.

<sup>129</sup> *Fay v Barber* (1797); *Guthrie v Sterne* (1811).

<sup>130</sup> In *Cloncurry v Piers* (1807), p 20, Lord Cloncurry wrote to his father-in-law upon discovering his wife's affair, and her brother removed her from the house and from the country.

properly increased and diminished by circumstances; as the rank and fortune of the plaintiff and defendant; the relation or connection between them; the seduction or otherwise of the wife, founded on her previous behavior and character; and the husband's obligation by settlement or otherwise to provide for those children, which he cannot but suspect to be spurious.<sup>131</sup>

The husband's injury could be exacerbated by the defendant's conduct. Enticing the wife away or harbouring her after the adultery<sup>132</sup> could be aggravate damages, as could his close friendship with the plaintiff: in *McCraith v Quinn*,<sup>133</sup> damages of £5,000 were awarded where the defendant was the plaintiff's close friend, first cousin, and best man.<sup>134</sup> Other circumstances could further aggravate the injury to the plaintiff and, consequentially, the damages to which he was entitled. In *Massy v Headford*, the plaintiff was a Church of Ireland minister, and his counsel placed much emphasis on the timing of the act of adultery:

The day was Sunday, the hour the time of Divine Service; yes gentlemen, on that day, and on that hour, set apart for the service of our Creator, whilst the Reverend Rector was bending before the altar of his God ... upon such an occasion did the noble lord think proper to commit this honourable breach of hospitable faith.<sup>135</sup>

In *Fay v Barber* the judge spoke of the 'wanton lewdness' of the defendant, 'to keep a whore at the husband's expense, and make him pay for that which he does not enjoy'.<sup>136</sup>

On the other hand, the defendant's age and marital status were both relevant factors,<sup>137</sup> a mitigating factor might be, for example, 'evidence that

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<sup>131</sup> Blackstone (1796) *Commentaries*, pp 333-4.

<sup>132</sup> McCardie J in *Butterworth v Butterworth* [1920] P 126, p 131.

<sup>133</sup> *Belfast Newsletter*, 1 Aug 1872.

<sup>134</sup> Similar damages were awarded in *Doyle v Brown* (1820), and *Taaffe v Fitzgerald*, *Belfast Newsletter*, 1 Mar 1816.

<sup>135</sup> *Massy v Headford* (1804), pp 7-8.

<sup>136</sup> *Fay v Barber* (1797), pp 24-5.

<sup>137</sup> *Massy v Headford* (1804), p 98.

the Defendant was a giddy boy, unsettled in his principles, and seduced to gratify the lewdness of a wanton woman'.<sup>138</sup>

The general conduct and character of the wife almost invariably came under scrutiny in crim con actions. Binhammer argues that 'what is on trial in crim con actions is not the individual guilt or innocence of the men involved but the sexuality of the new domestic woman.'<sup>139</sup> In 1854, Bowyer observed that if the wife's 'previous character were bad, the injury to the husband would be less. Thus, it was the interest of the defendant to run down the character of the woman in order to diminish the amount of damages.'<sup>140</sup> There are many examples of defendants portraying their lovers as wanton, lascivious, of defective character and loose morals.<sup>141</sup> In *Cloncurry v Piers*, for example, much was made of the fact that Lady Cloncurry had allegedly committed adultery with Piers the first time they found themselves alone. The implication was that she was not 'a modest woman, bred up in religious habit, of a retired disposition', and this greatly reduced her value.<sup>142</sup> The Chief Justice described it as 'a conquest of no great difficulty ... The conquest was so easy... That her value could not be highly estimated.'<sup>143</sup> The jury found for the plaintiff, and while the damages awarded were high, at £20,000, this was only one-fifth of the £100,000 sought, suggesting that while they were convinced that the adultery had taken place, they considered Lady Cloncurry to be devalued for the reasons outlined. In *Blachford v Latouche*<sup>144</sup> the wife was in her thirties, had been married some 14 years, and was portrayed as having flung herself upon the relatively young, innocent defendant. Counsel for Latouche asked the jury

what loss has the plaintiff sustained in being deprived of the society of a woman who, herself advanced in years, with a perfect knowledge of the world, after a few weeks acquaintance

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<sup>138</sup> *Fay v Barber* (1797), p 25. Also *Townley v Lyle*, *Irish Times*, 6 Feb 1886.

<sup>139</sup> Binhammer (1996) 'The Sex Panic of the 1790s', p 422.

<sup>140</sup> *Hansard* 3, cxxxii [421] 4 Apr 1854.

<sup>141</sup> According to Buller, the defendant could 'call witnesses to her general character' F Buller (1806) *An Introduction to the Law Relative to Trials at Nisi Prius: Containing Additions to the Present Time* (New York: Riley & Co), p 296.

<sup>142</sup> *Cloncurry v Piers* (1807), p 101.

<sup>143</sup> *Cloncurry v Piers* (1807), p 144. It was also argued, p 102, that the speed of Lord and Lady Cloncurry's courtship and engagement suggested that her family had been anxious, because of her defective character, to marry her off.

<sup>144</sup> *Freeman's Journal*, 13 Jan 1811.

with a mere boy, would, in defiance of the honour of her sex, and of her sacred duty as a wife, have been guilty of such a crime?

Again, the jury awarded one-fifth of the damages sought. A defendant might also disparage his lover's physical attributes; Mrs Binns was variously described by the defendant's witnesses as 'middle aged... lusty' 'not very handsome ... a large corpulent woman'.<sup>145</sup> Even up to the late twentieth century, a defence strategy appeared to be to portray the wife as being of low worth. Counsel for the plaintiff, in cross-examining the defendant in *Mulvaney v Collins*, asked 'are you asking the jury to say she is a worthless slut who is worth nothing to a decent married man?'<sup>146</sup> The defendant did not answer, but later agreed that she was a completely worthless woman.

The husband's conduct was also scrutinized, and he could expect to have his damages reduced<sup>147</sup> if he was abusive<sup>148</sup> or unfaithful. In *Patterson v Pullen*<sup>149</sup> Lord Kilwarden observed that although the plaintiff's abuse of Mrs Patterson did not disentitle him to damages, it would 'disqualify him from heavy damages', and he was awarded just sixpence. If the husband were known to have had adulterous affairs of his own, this might also reduce his damages, for two reasons: first, because evidence of his unfaithfulness negated arguments of matrimonial happiness before the wife's seduction, and secondly, 'because such dissipation and neglect is likely to set a bad example to the woman: it tends to sap her morals, to estrange her affections, and facilitate her seduction.'<sup>150</sup> In *Glerawley v Burn*,<sup>151</sup> defence counsel argued that Glerawley's extended absences from home had left his wife 'exposed to the shoals of seduction,' and relatively low damages were awarded. If connivance by the husband could be proven, this defeated the action altogether. In many cases, however, connivance was difficult to prove, and juries merely awarded low damages if they were

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<sup>145</sup> *Binns v Scott* (1816), pp 10, 16.

<sup>146</sup> *Irish Times*, 10 Nov 1979.

<sup>147</sup> Kisbey (1871) *Law and Practice*, p 17.

<sup>148</sup> In *Fay v Barber* (1797) there was evidence that the husband was abusive towards his wife, and on one occasion he had locked her in a closet for nineteen days without a fire or adequate food. He recovered £1,000 damages. The jury may have been of the view that his treatment of his wife on that occasion was somewhat justified, as he had acted out of jealousy and suspicion of the defendant.

<sup>149</sup> *Freeman's Journal*, 2 Dec 1800.

<sup>150</sup> *Massy v Headfort* (1804), p 91.

<sup>151</sup> *Belfast Newsletter*, 4 June 1820. Note that this was an action involving the Irish peer, Viscount Glerawley, which was tried in the English Court of King's Bench.

suspicious. For example, in *Geoghegan Nowlan v Glentworth*,<sup>152</sup> both parties were imprisoned in the Dublin Marshalsea for debt. They became friends and the Mrs Nowlan became Viscount Glentworth's mistress, with her husband's knowledge. Although connivance was not definitively proven, the jury, no doubt suspicious, awarded only 40 shillings in damages.<sup>153</sup>

The plaintiff's conduct in relation to his wife came under close scrutiny in the case *Hodgens v Mahon*.<sup>154</sup> Miss Walker had been made a ward of Chancery as a child, and was abducted from her boarding school by Hodgens at the age of thirteen. He was arrested and imprisoned, but after petitioning the Lord Chancellor he was released on recognizances of 20,000 pounds that he would not go near Miss Walker again. However, he could not resist; he kidnapped her a second time, fleeing to the continent where they lived as man and wife for several years, having been married by a 'degraded clergyman'.<sup>155</sup> When she came of age and they returned to Ireland and Hodgens presented her to the Lord Chancellor, asking whether or not it would be in her best interests to be officially married to him now that she was free to choose. The inevitable conclusion was that because she had been living with Hodgens as his wife for the past six years, it was unlikely that anyone else would now want her, and her reputation would be ruined if they were not married. This, according to the Chief Baron was to be considered by the jury as a factor likely to diminish any award of damages: 'If a man comes to seek damages for a lost property it is fair for the jury to say to him "did you come honestly by that property." Similarly, he should be able to show 'how he became possessed of that wife.'<sup>156</sup> The judge (and, unsurprisingly, counsel for the defendant) was very critical of Hodgens' actions, asking '...if he did use the privilege of a husband upon the person of that infant, how dare he come into this court seeking for the compensation of your verdict.'<sup>157</sup> The jury in that case awarded the plaintiff a paltry £200 in damages; a small fraction of the £10,000 sought.

Finally, the existence of children often presented itself as an aggravating factor. The adulterous wife had not only betrayed her husband

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<sup>152</sup> *Freeman's Journal*, 10 Jul 1822.

<sup>153</sup> In *Taaffe v Fitzgerald*, the defendant admitted his guilt and suggested connivance by the plaintiff. This was not proven, but the jury awarded only a quarter of the damages sought.

<sup>154</sup> *Hodgens v Mahon* (1835).

<sup>155</sup> *Hodgens v Mahon* (1835), p 3. See Maebh Harding's chapter in this volume.

<sup>156</sup> *Hodgens v Mahon* (1835), p 28.

<sup>157</sup> *Hodgens v Mahon* (1835), p 29.

but had also abandoned her children, who, it was claimed, had to live with their mother's infamy. In one case it was said that adultery 'makes the children hated of the parent, and daughters travel through life, reproached with the vileness of their mother.'<sup>158</sup> Losing the wife's care of the children could also contribute to the husband's pecuniary loss, especially if the family were large.<sup>159</sup>

Children born after the adultery took place obviously raised questions about their paternity, and the husband might find himself obliged to financially support his rival's child. For example, in *Cloncurry v Piers*, Lady Cloncurry gave birth to a son, presumed to be fathered by Piers, and the solicitor general pointed out that this boy stood to inherit some of Lord Cloncurry's estate.<sup>160</sup>

## Conclusions

By the time of the passing of the Divorce and Matrimonial Causes Act 1857, there was a growing body of opinion that, for various reasons, the 'ancient, but not venerable'<sup>161</sup> action of crim con ought to be abolished. Staves argues that on one hand the action seemed medieval as it depended upon the notion of a wife as property, yet, on the other hand, it 'seems to represent a degree of progress over the earlier resort to private violence'.<sup>162</sup> However, by the nineteenth century, '[i]ncreasingly, accepting money for one's wife's adultery became morally repulsive. How could a financial sum ever recompense a man for the loss of domestic felicity?'<sup>163</sup> Some viewed the payment of damages by a woman's lover to her husband as effectively allowing husbands to prostitute their wives. The law of the United Kingdom was seen as being increasingly out of step with the rest of Europe. Damages were difficult to assess, and there appeared to be a lack of consensus as to whether they were to be merely compensatory or also exemplary. Binhammer also argues that the moral foundation of crim con

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<sup>158</sup> *Fay v Barber* (1797), pp 24-25.

<sup>159</sup> In *Fay v Barber* (1797) there were seven or eight children; in *Beaken v Dockeray* (1882) and *Binns v Scott* (1816) there were six.

<sup>160</sup> *Cloncurry v Piers* (1807), p 45.

<sup>161</sup> JF MacQueen (1860) *A Practical Treatise on the Law of Marriage, Divorce, and Legitimacy: As Administered in the Divorce Court and in the House of Lords* (2nd ed, London: Maxwell, Sweet, Stevens & Sons), p 129.

<sup>162</sup> Staves (1982) 'Money for Honour', p 293.

<sup>163</sup> Binhammer (1996) 'The Sex Panic of the 1790s', p 429.

actions was 'eventually eroded by the ideal of companionate marriage'.<sup>164</sup> There was also increasing recognition of the potential unfairness of such actions to women:

As time went on, more and more thoughtful men and women began to realize that in a crim con suit a wife could be falsely charged by a husband anxious only to be rid of her, or falsely blamed for enticement, or falsely accused of previous promiscuity by a lover anxious to mitigate the damages against him.<sup>165</sup>

Despite these various problems with crim con, its abolition in England was not followed in Ireland. It not only existed but evolved over the following century until its eventual abolition by section 1 of the Family Law Act 1981.<sup>166</sup>

From the mid-nineteenth century onwards there was something of a democratization of crim con actions. No longer the exclusive preserve of the wealthy elite, lower middle-class and working-class men increasingly viewed the action as being open to them. The cases reported in the newspapers around the turn of the twentieth century lacked much of the glamour associated with cases from a century earlier, and damages awarded were more modest. By the twentieth century crim con had less to do with financially compensating the husband for the loss of his wife,<sup>167</sup> and more to do with public enforcement of private morals.

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<sup>164</sup> Binhammer (1996) 'The Sex Panic of the 1790s', p 429.

<sup>165</sup> Stone (1990) 'Honour, Morals, Religion', p 300.

<sup>166</sup> The Law Reform Commission had proposed the abolition of criminal conversation in its *First Report on Family Law*, 1980 (LRC 1-1980). The twentieth century history of crim con and its ultimate decline has been dealt with thoroughly by Diane Urquhart, who charts the role of feminist groupings in campaigning for crim con's abolition in Diane Urquhart (2012) 'Ireland's Criminal Conversations' *Études Irlandaises*, 37(2), 65-80.

<sup>167</sup> Notwithstanding the comments of Butler J in *Braun v Roche* to the effect that a wife was 'something that the husband owned', and that he ought to be compensated for her loss 'just as you would compensate him for a thoroughbred mare or cow.' *Irish Times*, 22 June 1972.