

Damages for Adultery and Interference with Marriage Relation —From the Perspective of Anglo-American Law

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I. PRESENTATION OF QUESTIONS

Can one person get remedies if his/her spouse commits adultery with a third person? This legal question involves two aspects. The first aspect is the legal relation between spouses. Article 46 of the Marriage Law of the People Republic of China (2001 Amendment) (hereinafter the “Marriage Law”) provides that one person may claim damages in a divorce suit from his/her spouse who has extramarital cohabitation, but does not address issues involving adultery without extramarital cohabitation; The second aspect is the legal relation between the third person and the aggrieved spouse. The Marriage Law does not touch upon this aspect, and neither does the Tort law of the People’s Republic of China (hereinafter the “Tort Law”) that entered into force in 2010. Journal articles show that there were considerable objections to the aggrieved spouse’s right to claim damages under tort law from the paramour before the amendment of the Marriage Law.¹ After the amendment, some scholars object to tort liability for pure adultery that does not involve extramarital cohabitation,² but there are also supporters.³ In addition, there

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¹ Before the amendment of the “Marriage Law” in 2001, opinions opposing the victim spouse claim tort damages against a third person: e.g., 周孝正 (Zhou Xiaozheng), “专家稿”与“配偶权”质疑 [Questions about the “Draft of Experts” and “Spouse Rights”], 中国青年研究 [THE CHINESE YOUTH STUDY], issue 6 (1998); 杨光 (Yang Guang), 以法律惩罚“第三者”的立法价值评价 [Legislative Value Assessment on Punishing “A Third Person” by Law], 当代法学 [CONTEMP. L. REV.], issue 5 (2000); 周安平 (Zhou Anping), 性与婚姻的困惑——“第三者”民事责任的理论与现实之探讨 [Confusion about Sex and Marriage—Discussion on Theory and Reality of Civil Responsibility of A Third Person], 现代法学 [MOD. L. REV.], issue 2 (2001).

² See, e.g., 刘余香 (Liu Yuxiang), 论对“第三者”的法律规制 [On the Legal

are also some scholars supporting this opinion on the basis of article 22 of the Tort Law.⁴ In judicial practice, early before the amendment of the Marriage Law, there were already cases granting requests for emotional injury compensations from the other spouse and the paramour. For example, in *Zhou v. Wang* where the extramarital relation with sexual intercourse between the spouse and the third party had been for more than half a year, the court held that the “disreputable conduct greatly violated the Plaintiff’s spousal rights and caused significant mental harm to the Plaintiff, so the two Defendants shall compensate to the Plaintiff for his emotional injury.”⁵ After the Marriage Law was amended in 2001, there still have been similar cases in practice.⁶ However, there are also cases denying one spouse’s request for damages for emotional injury from the other spouse and the paramour. One main reason is that according to article 46 of the Marriage Law, only the spouse who has extramarital cohabitation relation or commits bigamy is liable for damages. If the spouse commits adultery without cohabitating with the paramour, he or she is not liable for damages under article 46.⁷ Another reason is the lack of other legal basis to allow the request for damages for emotional injury from the paramour.⁸

Regulations against “a Third Person”], 法学杂志 [LAW MAG.], issue 8 (2011).

³ See, e.g., 卢志刚 (Lu Zhigang), 干扰婚姻关系之精神损害赔偿 [Mental Damages for Interference with Marriage], 河南财经政法大学学报 [HENAN U. ECON. & L. J.], issue 2 (2012) (but this article is a bit vague about whether it is from the perspective of interpretivism).

⁴ See, e.g., 于晓 (Yu Xiao), 论干扰婚姻关系的侵害客体 [On the Injured Party in Interference with Marriage], 山东社会科学 [SHANDONG SOC. SCI.], issue 1 (2011).

⁵ 周某诉王某等确认生身父母纠纷案 [Zhou v. Wang on the Affirmation of Parental Relationship] (2000) 六民初字第 731 号, (Jiangsu Nanjing Liuhe Dist. People’s Ct. Sept. 28, 2000), CLI.C.228710 CHINALAWINFO.

⁶ See, e.g., 田某诉王某某一般人格权纠纷案 [Tian v. Wang on Rights of Personality] (2010)沙法民初字第 7148 号, (Chongqing Shapingba Dist. People’s Ct. May 27, 2011), CLI.C.384847 CHINALAWINFO.

⁷ See, e.g., 周浩诉韦玉琼离婚纠纷案 [Zhou Hao v. Wei Yuqiong on Divorce] (2005)大民初字第 41 号, (Guangxi Dahua Cnty. People’s Ct. May 22, 2005) CLI.C.93664 CHINALAWINFO.

⁸ See, e.g., 受害配偶对第三人主张侵权赔偿欠缺法律依据 [Victim Spouse Claiming Tort Damages against the Third Person Lacks Legal Basis], 人民司法·案例 [PEOPLE’S JUDICATURE—SELECTED CASES], issue 22 (2009) (analyzing Wang v. Zhang, (2008) 赣中民三终字第 314 号, (Jiangxi Ganzhou Interm. People’s Ct. 2008).

In addition, in *Zhou v. Wang*, Defendant Wang had a son with her paramour Wang (co-Defendant) as a result of their adultery during Wang's marriage with Plaintiff Zhou. After knowing the truth, Plaintiff divorced with Defendant by agreement and brought a lawsuit. Plaintiff's request for damages for emotional injury was granted as mentioned before. Besides, the court also granted his request for damages resulting from paying for the costs of the birth of the child and medical fees out of their community property during the marriage, based on the provision of general tort⁹—article 106 (2) of the General Principles of the Civil Law of the People's Republic of China (2009 Amendment) (hereinafter the "General Principles of the Civil Law").

This Article studies the issue of damages for emotional injury related to adultery, as well as the issue of damages for raising non-biological children. This Article observes the history and current practice of interference with marriage relations in the Anglo-American tort law and conducts a comparative analysis with Chinese cases, with the purpose of providing some perhaps valuable insights for the future development of practice and theory on this issue in China.

II. ADULTERY CLAIM FOR DAMAGE UNDER ENGLISH LAW

In the early history of common law, a husband enjoys the right to the consortium of his wife. If a third person seduces, harms or commits adultery with his wife, then he is violating this right.¹⁰ However, because the personality of a wife temporarily ceases to exist and is absorbed by her husband in the marital community,¹¹ the wife does not enjoy the same right as her husband.¹² Due to the lack of independent personality of the wife, her consent to extramarital intercourse in adultery does not have a material influence on her husband's right. For the husband, the

⁹ In China, torts can be categorized into general tort and special tort. General tort provides the general and universal elements of tort, while the elements of special tort are specifically prescribed by law and may vary from those of general tort. The concept of "special tort" is similar to the common law concept of "statutory tort." [Editor's note]

¹⁰ Evans Holbrook, *The Change in the Meaning of Consortium*, 22 MICH. L. REV. 1, 2 (1923).

¹¹ 1 WILLIAM BLACKSTONE, COMMENTARIES 442.

¹² Evans Holbrook, *supra* note 10, at 2–3.

adultery between his wife and her paramour is no different from a third person's assault on or robbery of the wife, all of which are regarded trespass *vi et armis* by violence.¹³ Although the economic loss as a result of the loss of service of the wife will increase the husband's compensation, it is not the necessary condition to husband's getting damages, because the harms of adultery on a husband are "dishonor of his bed," "alienation of his wife's affection," "destruction of domestic comfort" and "suspicion cast upon legitimacy of her offspring."¹⁴ The Matrimonial Causes Act 1857¹⁵ in England established the jurisdiction of the secular courts on the matters relating to matrimony and divorce in article 2.¹⁶ Despite the repeal of the action for criminal conversation in article 59, the Act kept the husband's right to request for damages from the paramour who committed adultery with his wife (generally known as an action for damages for adultery) in a divorce suit or a suit for separation. What's more, article 33 provided that unless prescribed to the contrary, the common-law principles and rules that previously applied to the action for adultery still continued to be applicable to the action. Article 34 even gave the court discretionary power to require the spouse who committed adultery to pay for all or partial costs of the litigation. In *Butterworth v. Butterworth and Englefield*, Justice McCardie reviews the existing cases in detail, and discusses in depth many aspects of the action for damages for adultery. This case has therefore become the most famous one in cases of action for damages for adultery. According to Justice McCardie, precedents showed two factors in examining the harms of the husband in the action for damages for adultery. The first factor was the actual value of the wife to the husband. It can be further analyzed from the pecuniary aspect and the consortium aspect. Considerations related to the

¹³ Early English common law distinguished trespass and trespass on the case. See 梅特兰 (F. W. MAITLAND), 普通法的诉讼形式 [THE FORMS OF ACTION AT COMMON LAW], at 119–20 (王云霞等 (Wang Yunxia et al.) trans., 2009).

¹⁴ FREDERICK POLLOCK, THE LAW OF TORTS: A TREATISE ON THE PRINCIPLES OF OBLIGATIONS ARISING FROM CIVIL WRONGS IN THE COMMON LAW 273 (2d ed. 1890).

¹⁵ The Matrimonial Causes Act, 1857, 20 & 21 Vict., c. 85. The long title is "An Act to Amend the Law relating to Divorce and Matrimonial Causes in England."

¹⁶ See William Searle Holdsworth, *The Ecclesiastical Courts and Their Jurisdiction*, in 2 SELECT ESSAYS IN ANGLO-AM. LEGAL HIST. 297–301 (Comm. of the Ass'n of Am. Law Sch. eds., 1908).

pecuniary aspect were the help of the wife with the husband's career, the wife's ability to manage the household, etc.; Considerations related to the consortium aspect were the purity and morality of the wife, love, etc. When assessing the husband's damages from the pecuniary aspect, a judge mainly relied on his good sense and experience, while regarding the specific factors about the paramour as almost irrelevant; nonetheless, when assessing the husband's damages from the consortium aspect, the behavior of the paramour was relevant. If the paramour has to use his wealth to seduce the wife of one person, it would demonstrate that the wife is not a woman who could be easily seduced and that she has a higher value to her husband in relative to wives who commit adultery just because of one time seductive implication. The second factor was the harms on the emotions or self-esteem of the husband. Considerations under this factor were more important than those under the factor of the actual value of the wife to the husband, and are uniformly recognized in textbooks and authoritative precedents. The behavior of the third person was very significant in assessing the harms on the emotions or self-esteem of the husband. The wealth or social status of the paramour *per se* was irrelevant, but the employment of the wealth or social status to facilitate adultery would aggravate the harms on the emotions or self-esteem of the husband. Thus, the wealth or social status of the paramour should be considered in evaluating damages. In addition, the character and conduct and affection of the husband were relevant in both aforementioned factors. The negligent, rude or cruel behavior of the husband might also have destroyed the love of wife, thus undermining his right to request for damages from the paramour. Lastly, Justice McCardie specifically pointed out that unlike the action for adultery in the early times, the paramour should not pay for the damages if he did not know about the marriage relation of the woman in the beginning and during the continuance of adultery.¹⁷

The Law Reform (Miscellaneous Provisions) Act 1970 of the United Kingdom clearly provides that, since this Act comes into force, no person shall be liable in tort under the law of England and Wales to any other person on the ground only of his having induced the wife or husband of that other person to leave

¹⁷ *Butterworth v. Butterworth & Englefield*, [1920] P. 126, 142–54 (Eng.).

or remain apart from the other spouse. As to the abolition for enticement, seduction and harboring of spouse, the reader might as well refer to the reasons raised by the English Law Commission's working paper, *Matrimonial and Related Proceedings: Financial Relief*, in 1967. For example, the paper observes that the damages for adultery treats the wife as the husband's chattel; the parties are able to place one another in a humiliating position and when proceedings are brought they tend to create great bitterness between the parties; Besides, when there is collusion between husband and wife, it lends itself to blackmail against the adulterer. To the reporters, the action purporting to compensate the husband for the fact that the defendant has had sexual intercourse with the wife is based on a rather barbarous theoretical basis. It is illogical that person committing adultery which results to breakdown of marriage is liable for pecuniary damages while in other situations resulting breakdown of marriage he is not. This amounts to unreasonable discrimination. Also, the reporters do not believe that the risk of liability to damages deters would-be adulterers.¹⁸

Adultery often goes along with the problem of paternity fraud. *A v B* [2007] EWHC 1246 (QB) (03 April 2007) was related to paternity fraud rather than adultery. An observation of this case might be helpful to understanding the unique characteristics of paternity fraud after the abolition of damages for adultery. In this case, A and B both worked for the same firm; both were unmarried. They started a sexual relationship which went on for some years. B became pregnant and her son, Y, was born in 1997. A thought the child was his own and paid for expenses associated with the child. In 2002, the relationship was in a poor way and A learned that Y was not a child of his own. After the relationship between A and B had broken down, A commenced proceedings against B claiming damages for deceit. An alleged that B concealed the truth that Y was not his biological son when she had

¹⁸ Law Commission, *Matrimonial and Related Proceedings—Financial Relief*, paras 128–32, (English and Wales Law Comm'n, Working Paper No.9, 1967), available at <http://www.bailii.org/ew/other/EWLC/1967/c9.pdf>. In addition, late Lord Denning described in his book that the fact that somebody was determined to sue another for adultery to get money may be called "blackmail." See [英] 丹宁勋爵 (LORD DENNING), *法律的界碑* [LANDMARKS IN THE LAW], at 125–28 (刘庸安(Liu Yong'an) & 张弘 (Zhang Hong) trans., 1992).

chances to tell the truth. This assertion was accepted by Judge John Blofeld, observing that the facts amounted to deceit and thus A was entitled to damages for emotional injury (£7,500 in the judgment). However, A's claim for damages for payment of cost of support was not accepted. One of the reasons, besides public policy, is that A gained a considerable amount of happiness from the relationship between him and Y before he learned the truth.¹⁹

III. ADULTERY CLAIM FOR DIRECT DISTURBANCE OF MARRIAGE UNDER U.S. LAW

In the common law of some US states, interference with marriage relation amounts to a tort. It consists of indirect interference with marriage relation and direct interference with marriage relation. When the interferer harms the body of one of the spouse, this amounts to a tort against him or her. Such tort is not interference with marriage relation. Meanwhile, such act results in loss of family service and other losses for the other spouse and thus amounts to a tort of indirect interference with marriage relation. When the interferer commits adultery with one spouse, it is not a tort against him or her because of consent. But it might result in pecuniary damage and mental damage to the other spouse. There is only a tort against the other spouse, i.e. interference with marriage relation. There is no other tort such as a tort against the spouse's body.²⁰ Therefore, it is a direct interference with marriage relation.

Under US common law, the characteristics of "action for adultery" can be first observed from the differences between it and "action for alienation of affection"—an action never existed in British law. An action for alienation of affection is also an action for direct interference with marriage relation. Its core is that the tortfeasor entices one spouse to part from the other spouse and results to the loss of family service and the alienation of affection for the other spouse. The core for an action for adultery, on the contrary, is not the loss of family service or alienation of affection; it is rather the infringement of the exclusive rights to

¹⁹ *A v B*, [2007] EWHC (QB) 1246 (Eng.).

²⁰ Peter B. Kutner, *Law Reform in Tort: Abolition of Liability for "Intentional" Interference with Family Relationships*, 17 *W. AUS. L. REV.* 34 (1987).

marital intercourse.²¹ Such a right, same as that in the UK, was at first entitled only to the husband. But now both the husband and the wife are entitled to this right in those states that have not abolished the action for adultery.²² According to Restatement (Second) of Torts, one who has sexual intercourse with one spouse is subject to liability to the other spouse whether or not he/she has knowledge of the marriage relation. “One who has sexual relations with a married person takes the risk that he or she is married to another.” In the determination of the amount recoverable for the emotional distress, many factors should be considered. If, during the marriage with the plaintiff the other spouse has repeatedly had sexual relations with the defendant, the plaintiff’s damages will be enhanced; if the plaintiff neglect or is indifference toward the other spouse, the plaintiff’s damages will be reduced; if the other spouse has previously had sexual relations with other persons, the damages will be reduced.²³

In the US, actions for adultery are dying out. Only a few states still allow actions for adultery.²⁴ Such lawsuit criticizes and punishes indiscretions in sex. Reasons for abolishing such lawsuit include: it facilitates blackmailing and extortion; it is likely that such litigations are motivated merely by greed or revenge; decent people will not pursue such lawsuits which bring disgrace to the family; the emotional injuries are difficult to be compensated by pecuniary means; adulteries are seldom calculatedly planned and, thus, damages do no help to curbing such activities. Moreover, the following idea has been receiving more and more acceptance: each spouse is an independent person, not a property the other spouse exclusively owns.²⁵

²¹ William E. Geer, *Criminal Conversation: Civil Action for Adultery*, 25 BAYLOR L. REV. 495, 496 (1973).

²² W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 916 (5th ed. 1984); RESTATEMENT (SECOND) OF TORTS § 685, cmt. d (1965).

²³ RESTATEMENT (SECOND) OF TORTS § 685, cmts. e, f, and g (1965).

²⁴ Up until 2012, only four states (Hawaii, Illinois, New Mexico and North Carolina) still allow alienation of affection lawsuits. See Laura Belleau, *Farewell to Heart Balm Doctrines and the Tender Years Presumption, Hello to the Genderless Family*, 24 J. AM. ACAD. MATRIM. LAW. 365, 372, n.38 (2012). In the early 20th century, Indiana introduced the first bill to abolish actions for direct interference with marriage relation, including actions for adultery. See Nathan P. Feinsinger, *Legislative Attack on “Heart Balm,”* 33 MICH. L. REV. 979 (1935).

²⁵ PROSSER & KEETON, *supra* note 22, at 930. In 1935, New Jersey adopted a

In *Koestler v. Pollard*, for example, decided by the Supreme Court of Wisconsin, Pollard and Koestler's wife had engaged in sexual intercourse during the marriage, which resulted in the birth of a child.²⁶ Koestler alleged that Pollard intentionally concealed from him his paternity of the child and revealed said fact after Koestler developed a bond with the child, which amounts to intentional infliction of emotional distress. Therefore, Pollard should be liable for damages for emotional injuries. Intentional infliction of emotional distress is a tort which is different from interference with marriage relation. According to Restatement (Second) of Torts, "one who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another" is subject to liability for such emotional distress.²⁷ Koestler claimed intentional infliction of emotional distress in order to circumvent criminal conversation which was abolished by the state legislation. This, however, was rejected by the Supreme Court of Wisconsin for the reason that it was essentially a criminal conversation claim. It ought to be rejected in order to achieve the public policy underlining the state legislation abolishing such claim. Louis J. made a thorough analysis on this. He first listed the required elements for actions for adultery: (1) an actual marriage between the spouses, and (2) sexual intercourse between the defendant and the guilty spouse during marriage; Then he listed the alleged facts in Koestler's complaint: (1) an actual marriage between Koestler and Vickie Lynn Koestler; (2) sexual intercourse between Pollard and Vickie Lynn Koestler during the Koestlers' marriage; (3) the birth of a child, C.K., during the marriage as a result of the aforementioned sexual intercourse; and (4) the initial concealment and eventual disclosure of the fact that Pollard is the biological father of C.K. Finally, he compared the two sets and observed that: the first two facts contained in Koestler's complaint are identical. The third and

bill abolishing actions for adultery. One court opinion might worth considering: "It is impossible to save the remedy for the honest, well-meaning, truly injured spouse without leaving the door wide open for the 'racketeer.' Therefore, the spouse having a bona fide complaint must, as a member of society, conform to a law designed for the protection of society." *Bunten v. Bunten*, 192 A. 727, 729 (N.J. 1937). See also Clark W. Toole, *Domestic Relations—Constitutionality of "Heart Balm" Legislation [Illinois]*, 4 WASH. & LEE L. REV. 185, 186 n.6 (1947).

²⁶ *Koestler v. Pollard*, 471 N.W.2d 7 (Wis. 1991).

²⁷ RESTATEMENT (SECOND) OF TORTS § 46 (1965).

fourth facts contained in Koestler's complaint are direct consequences of the second and third facts. Specifically speaking, the third fact contained in Koestler's complaint is a natural and probable consequence of the second fact contained in Koestler's complaint because the birth of a child is a natural consequence of sexual intercourse; the fourth fact contained in Koestler's complaint a consequence of the third fact because concealment and eventual disclosure of the paternity of the child born as a result of the adulterous intercourse is undoubtedly a common occurrence in cases of criminal conversation. Justice Abrahamson, in his dissenting opinion, disagreed with Justice Louis' opinion that the plaintiff was essentially stating a claim for criminal conversation. He argued that although a particular set of facts may give rise to different causes of action, these causes of action were "separate and different."²⁸ Action for criminal conversation focused on the plaintiff's marital relationship, it did not require the defendant's conduct to be extreme and outrageous; and action for intentional infliction of emotional distress focused on the plaintiff's well-being, it did not require the plaintiff to be in a marital relationship when the tort is committed.²⁹ Another Supreme Court of Oklahoma case *Miller v. Miller* can perhaps supplement Justice Abrahamson's opinion.³⁰ In this case, the wife and her parents lied to the defendant that she was pregnant with his child, therefore the plaintiff got married to his former wife, and he only knew the truth after 15 years living together with his former wife. The plaintiff sued for damages on the theory of intentional infliction of emotional distress and was supported by the court. The plaintiff also claimed restitution of payments for the cost of support, but the court responded that: on one hand, the statute of limitation for him to disestablish paternity had passed and thus he could not recover it based on the theory of unjust enrichment which was condition upon the disestablishment; on the other hand, when the child support is paid pursuant to a valid and unreversed judgment, he cannot state a claim to recover it as unjust enrichment either.³¹

²⁸ *Koestler*, 471 N.W.2d at 9.

²⁹ *Id.* at 12 (Abrahamson, J., dissenting).

³⁰ *Miller v. Miller*, 956 P.2d 887 (Okla. 1998).

³¹ Even if it was procured by fraud, payment pursuant to a valid judgment cannot be recovered as unjust enrichment, unless it was vacated. For more about this principle of unjust enrichment in Anglo-American law. See 皮特·博克

It is also worth noted that in some US states, the laws expressly prohibit the recovery of payment of child support from his mother or country, even in a situation where paternity is disestablished.³²

IV. COMPARISON WITH CHINESE CASES AND OUR LESSONS

From previous parts, we can see that action for adultery is completely abolished in Britain, and is recognized only in a few numbers of states in the US. Certain reasons for this abolishment can hardly stand in a Chinese context. For example, the reason that we should abolish the action for adultery in order to prevent one of the spouses from profiting from this action or conspiring with the other spouse to extort the paramour because Chinese values reputation and adultery is highly detrimental to reputation. But some other common characteristics of the action for adultery shared by Britain and the US are worth reflecting. This Article contends that the core of the action for adultery in both Britain and the US is to treat the interest to enjoy sexual intercourse with someone as an exclusive right of his spouse, and to protect it with tort law. This explains why in the US law, the damages for the action of adultery would be reduced if the plaintiff is also committing adultery with others. This also explains why in the English law, the harder the wife can be seduced by money the larger the amount of damages would result from adultery. In these two situations, courts are actually examining the chastity of the spouse. Chastity alone can influence the amount of damages. In my view, it suggests that chastity of one spouse itself has value for the other spouse, and this value should be protected by tort law. The harm to it itself will result in damages, without considering the loss of family service or emotional distress.³³ This is probably why in *Butterworth v Butterworth and Englefield*, Jus-

斯 (PETER BIRKS), 不当得利 [UNJUST ENRICHMENT], at 266 (刘桥 (Liu Qiao) trans., 2005).

³² WYO. STAT. ANN. § 14-2-823 (West 2015). See also Paula Roberts, *Truth and Consequences: Part III Who Pays When Paternity Is Disestablished?*, 37 FAM. L.Q. 69, 69 (2003).

³³ In cases where one's property is damaged by tort, different from cases where one's use of property is interfered, we should consider the objective market value of the property. The damage of property reflects the existence of the tort, and the consequent damage of the tort. Therefore, the higher the objective market value, the higher the compensation, and we do not have to consider whether the owner's use of the property is interfered.

tice McCardie considered “the actual value of the wife to the husband” and “harms on emotions and self-esteem of the husband” separately in determining the amount of damages. Since of the core of the action for adultery in both Britain and the US is to treat the interest to enjoy sexual intercourse with someone as an exclusive right of his spouse and to protect it with tort law, then abolishing this action means to stop treating it as an interest that recognized and protected by tort law.

Assuming that we decide to adopt their abolishment of the action for adultery (it is just an assumption at this point, and we will deal with the question of whether we should adopt it later in this Article), it means that, using civil law’s terminology, in determining the illegality of a tortious act, conduct harming “the interest to exclusively enjoy sexual intercourse with one’s spouse” should be deemed as not possessing illegality, therefore, damages purely as a result of conduct harming “the interest to exclusively enjoy sexual intercourse with one’s spouse” will not be compensated. Nonetheless, we should still ask: if the wife conceal from her husband that the child is actually the child of the paramour that she commits adultery with, and inflict damages on the husband, are they still damages purely as a result of conduct harming “the interest to exclusively enjoy sexual intercourse with one’s spouse”? Logically speaking, it is possible to give a negative answer, because the damages in this question are the emotional distress or economic loss as a result of paternity fraud. So, harming “the interest to exclusively enjoy sexual intercourse with one’s spouse” may, though not necessarily, result in this kind of damages because a man cohabitating with a woman (without a marital relationship) can also suffer from it, just like the *A v B* case mentioned before. *Miller v. Miller* is also the same because the birth of the non-biological child was the result of sexual intercourse prior to the marriage. The marriage did not exist when the sexual intercourse happened, so there was no harm to “the interest to exclusively enjoy sexual intercourse with one’s spouse.” In addition, in cases where both parties are married to each other, the opinion of Justice Louis in *Koestler v. Pollard* that the damages of paternity fraud are essentially the same as the damages for the action of adultery is not completely sound. Assuming the abolishment of the action of adultery, on one hand, it is reasonable to reject compensating damages resulting from natural consequences of adultery in the name of “intentional infliction of

emotion distress” or other causes of action in tort law because otherwise it is detrimental to the goal of abolishing the action of adultery; but on the other hand, paternity fraud may not be a natural consequence of adultery. In my view, the decision of whether to compensate this damage involves value judgment. For any country, legitimizing or not punishing adultery does not necessarily equate legitimizing or not punishing paternity fraud. The reason why this Article focuses on the issue of paternity fraud is that the action for adultery in mainland China normally involves such issue. The following parts will turn to introduce and observe some of these cases.

By searching keywords “adultery,” “sexual intercourse,” or “sexual relationship” in combination with “damages” or “restitution” in PKULaw and Lawyee databases, we can find relevant cases.³⁴ From these cases, we can see that: (1) in all cases except one,³⁵ the spouses were compensated with damages for emotion injury if the adulteries resulted in defendants’ giving birth of children,³⁶ and no damage were awarded otherwise;³⁷ (2) in

³⁴ 北大法宝 [PKU.LAW], <http://www.pkulaw.cn> and 北大法意 [LAWYEE], <http://www.lawyee.net> (last visited March 15, 2013). Key word “divorce” is added when searching in Lawyee database.

³⁵ 张某某与王某某离婚纠纷上诉案 [Zhang v. Wang] (2009)沪二中民一(民)终字第 608 号, (Shanghai Second Interm. People’s Ct. Apr. 8, 2009) CLI.C.276948 CHINALAWINFO.

³⁶ 周某诉王某等确认生身父母纠纷案 [Zhou v. Wang] (2000)六民初字第 731 号, (Jiangsu Nanjing Liuhe Cnty. People’s Ct. Sept. 28, 2000) CLI.C.228710 CHINALAWINFO; *See also* 邹某某诉李某等返还受欺骗抚养非亲生子费用和侵犯配偶权索赔案 [Zou v. Li] 案件字号不详, (Jiangsu Nanjing Liuhe Cnty. People’s Ct. Sept. 25, 2000) CLI.C.21407 CHINALAWINFO; 陈某与那某抚养费纠纷上诉案 [Chen v. Na] 案件字号不详, CLI.C.240603 CHINALAWINFO; 陈某与肖某等抚养权纠纷上诉案 [Chen v. Xiao] (2012)长中民未终字第 0490 号, (Hunan Changsha Interm. People’s Ct. Mar. 14, 2012) CLI.C.887910 CHINALAWINFO; 彭某诉邓某抚养纠纷案 [Peng v. Deng] (2011)涟民一初第 1301 号, (Hunan Lianyuan Cnty. People’s Ct. May 4, 2012) CLI.C.1241128 CHINALAWINFO; 田某诉王某某一般人格权纠纷案 [Tian v. Wang] (2010)沙法民初字第 7148 号, (Chongqing Shapingba Dist. People’s Ct. May 27, 2011) CLI.C.384847 CHINALAWINFO; 应小明诉陈淑红配偶权侵权案 [Ying Xiaoming v. Chen Shuhong] (2008)嵊民一初字第 900 号, (Zhejiang Shengzhou People’s Ct. Aug. 18, 2008) CLI.C.352964 CHINALAWINFO; 曹 A 与黄 A [Cao A v. Huang A] (2010)闵民一(民)初字第 8703 号, (Shanghai Minhang Dist. People’s Ct. Feb. 26, 2011); 林承桂诉郭晓丹离婚后损害赔偿纠纷案 [Lin Chenggui v. Guo Xiaodan] (2009)梅民初字第 1445 号, (Fujian Mingqing Cnty. People’s Ct. Dec. 14, 2009); 王林瑞诉丁红英案 [Wang Linrui v. Ding Hongying] (2009)德民一初字第 184 号, (Jiangxi De’an Cnty. People’s Ct. Aug. 10, 2009).

³⁷ 周浩诉韦玉琼离婚纠纷案 [Zhou Hao v. Wei Yuqiong] (2005)大民初字第

every case where the adultery resulted in defendant's giving birth of child, plaintiff's request to recover the cost of support were supported by the court, without referring to article 92 (restitution of unjust enrichment) of the General Principles of the Civil Law;³⁸ (3) in the only case where the defendant was pregnant because of pre-marital sex and subsequently conceal from her husband that child was not his biological child, the plaintiff's claim for damage for emotional injury based on violation of his personality interest was denied by the court, because the court finds that the defendant did not violate her obligation of conjugal fidelity.³⁹

The Law Commission states the following in their working paper on the adultery damages:

Accordingly, we are inclined to the view that damages for adultery (and the action for enticement) should be abolished altogether and not replaced by any financial liability (other than for costs). However, we feel that this is not a question on which we at this stage ought to give a firm opinion. It is a matter of the moral judgment of society generally, which may feel that in outrageous cases a rich seducer should be made to pay. We shall welcome the comments from the readers of this paper, both lay and legal.⁴⁰

Similarly, the answer to damages for adultery in China also depends on the moral judgment of society, and it should be that of China, but not of the UK or the US. Therefore, the perceptions and attitudes in China towards this issue are what really matters;

41 号, (Guangxi Dahua Cnty. People's Ct. May 22, 2005) CLI.C.93664 CHINALAWINFO; 张建芬诉朱德扬离婚案 [Zhang Jianfen v. Zhu Deyang] (2001) 黄浦民初字第 738 号, (Shanghai Huangpu Dist. People's Ct.) CLI.C.225519 CHINALAWINFO (the adultery results in pregnancy but the child is aborted); 罗梅清与伍建雄离婚纠纷上诉案 [Luo Meiqing v. Wu Jianxiong] (2003) 佛中法民一终字第 1872 号, (Guangdong Foshan Interm. People's Ct. Oct. 8, 2003) CLI.C.64788 CHINALAWINFO.

³⁸ In the comment on *Zou Moumou v. Li Mou*, the commentator opines that the court should refer to the rules of unjust enrichment in supporting plaintiff's claim to recover the cost of support.

³⁹ 张某诉李某一般人格权纠纷案 [Zhang Mou v. Li Mou] (2009) 浙甬民一终字第 760 号, (Zhejiang Ningbo Interm. People's Ct. Aug. 26, 2009) CLI.C.822570 CHINALAWINFO.

⁴⁰ Law Commission, *supra* note 18, at para. 142.

it is doubtful the moral judgment reflected in the history of damages for adultery in Britain and the US could have meaningful reference to China's adultery damages practices. Even from the perspective of universal values, foreign moralities are irrelevant to China's adultery damage issue. However, in contrast to the Law Commission's legislative perspective—the only question is whether to abolish the action for adultery, we need to pay close attention to the moral judgment reflected in Mainland China's interpretation of domestic positive laws. Judicial decisions definitely adopt an interpretive approach as judges are constrained by positive laws, yet it is still difficult to conclude whether these decisions embody the moral judgment of our society. This Article will assume that the limited judicial decisions herein reflected the moral judgment of our society under the constraint of the positive laws (or moral judgment that do not contradict positive laws). Premised on this, the rest of this part seeks to provide a systematic legal dogmatic interpretation to those decisions under China's positive laws and learn from Britain and US common law practices regarding an action for adultery rather than the moral judgments of their societies.

First, mere committing adultery seems insufficient to claim damages for emotional injury under positive laws in Mainland China. The Marriage Law of the People's Republic of China with the 2001 amendment expressly states in article 4, "Husband and wife shall be faithful to and respect each other." However, enumerated circumstances for claiming damages for divorce in article 46 does not include adultery, although adultery is a clear violation of the obligation of conjugal fidelity. Article 3 of the 2001 Supreme Court's judicial interpretation of marriage law (Interpretation No. I of the Supreme People's Court on Several Issues in the Application of Marriage Law of the People's Republic of China, 2001 Judicial Interpretation No. 30 [2001]) states: "If any party initiates a lawsuit based on article 4 of the marriage law, the people's court shall not accept the case. If the people's court has accepted such case, it shall make a ruling to dismiss the lawsuit."⁴¹ Accordingly, it is improper to interpret the adultery

⁴¹ 关于适用<中华人民共和国婚姻法>若干问题的解释(一) [Interpretation (I) of the Supreme People's Court of Several Issues on the Application of Marriage Law] (promulgated by the Sup. People's Ct., Dec. 24, 2011, effective Dec. 27,

that does not violate article 46, section 2 (cohabitation between a person who has a spouse but co-habits with a third person) as constituting a violation of spouse right and purport to claim damages for it. In addition, this Article is also against holding the unfaithful spouse and the paramour liable under article 22 of the Tort Law.⁴² The reason is that the judicial branch should respect the Marriage law's intention, which is to refrain from intervening pure adultery, and to avoid conflict it by applying article 22 of the Tort Law, and ultimately preserves consistency in the legal regime.⁴³

Second, combining the common law distinction between damages for pure adultery and damages for paternity fraud (despite there is disagreement) and the foregoing articulation, the author proposes that while the claim for damages for pure adultery should be denied, the claim for paternity fraud may be supported. The distinction is justified because the two claims serve to protect different interests. The adultery claim seeks to vindicate the interest of exclusive enjoyment of sex life with spouse; by contrast, the paternity fraud claim involves the protection of a different personal interest, which is unnamed and is defined as general personal interest for this Article's purpose. The emotional injury incurred due to infringement of this general interest includes not only the damage to one's dignity and reputation but also the damage of one's bond with his non-biological children and of maybe missing the optimal chance to give birth to his own biological children. This perspective affords a consistent explanation to the Mainland Chinese judicial practices, where damages are more likely to be awarded in paternity fraud case than in adultery case. If the claim for damages for pure adultery is denied and the focus is turned to compensation for emotional injury resulting from paternity fraud, the emphasis will be on factors including, how long the husband is deceived, whether the husband lives together with the children and the emotional connection between them but not on how long the adultery had last.

2011) CLI.3.38081 CHINALAWINFO.

⁴² See Yu Xiao, *supra* note 4, at 142 (2011).

⁴³ The view is against the holding that paramour liability under Tort Law of the People's Republic of China. See also 冉克平 (Ran Keping), 论配偶权之侵权法保护 [On the Protection of Spouse Right Under Tort Law], 法学论坛 [LEGAL F.], issue 4, at 106 (2010).

Therefore, as it is illustrated in the aforementioned British case, *A v. B*, the spouse could be still held liable for paternity fraud, even if she did not commit adultery. In a Chinese case with a similar fact pattern, the court reached a different conclusion because it still analyzed the paternity fraud under the framework of violation of the obligation of conjugal fidelity, and neglected the distinction between emotional injuries caused by paternity fraud and that caused by adultery.⁴⁴

Last, claim for damages for paternity fraud can be based on article 22 of the Tort law, because there is no confinement of damages for emotional injury to *jus personarum* infringement in this Article.⁴⁵ In contrast, the Tort law of the People's Republic of China (Draft) published by the Standing Committee of the National People's Congress (NPCSC) proposed such confinement in article 22.⁴⁶ An interpretation consistent with this legislative history should be: general personal interests beyond *jus personarum* are not excluded from the scope of article 22. Accordingly, paternity fraud claim under article 22 is legally well grounded, although this Article defines paternity fraud as infringing the husband's general personality interest rather than certain specific personality right. In addition, courts in Mainland China are supportive to those claims in judicial decisions and treat them as tort claims, without referring to article 92 (restitution of unjust enrichment) of General Principles of the Civil Law.⁴⁷ The negligence element must be established before holding the biological father liable under tort law. The biological father is far from negligent and cannot be responsible for the damages if he does not even realize the existence of his biological child. However,

⁴⁴ See comment on *Zou v. Li* and the relevant discussion in this Article.

⁴⁵ 侵权责任法 [Tort Law] (promulgated by Standing Comm. of the Nat'l People's Cong., Dec. 26, 2009, effective July 1, 2010) art. 22, CLI.1.125300 CHINALAWINFO ("Where any harm caused by a tort to a personal right or interest of another person inflicts a serious mental distress on the victim of the tort, the victim of the tort may require compensation for the infliction of mental distress").

⁴⁶ 侵权责任法(草案) [Tort Law (Draft)] (published by Standing Comm. of the Nat'l People's Cong., Nov. 6, 2009), available at http://www.npc.gov.cn/npc/xinwen/lfgz/flca/2009-11/06/content_1525914.htm (last visited Mar. 9, 2016).

⁴⁷ 民法通则(2009 修正) [General Principles of the Civil Law (2009 Amendment)] (promulgated by Standing Comm. of the Nat'l People's Cong., August 27, 2009, effective Jan. 1, 1987) art. 92, CLI.1.167199 CHINALAWINFO.

different from the issue of damages for emotion injury, it is worth considering whether this constitutes an unjust enrichment claim when the deceived husband pays for the cost of support which should be borne by the biological father. Considering the public policy of child protection, and that the deceived husband's enjoyment and happiness during his living together with the non-biological child will not retroactively disappear after he discovers the truth,⁴⁸ it is inconclusive, and worthy of further study, as to the possibility of recovering those costs of support either as damages under tort law or unjust enrichment.

V. CONCLUSION

Damages for adultery are relevant to different cultures and values. This Article presents a general introduction of the abolishment of action for adultery in both Britain and the US and draw mainly from the distinction of separating pure adultery claim from paternity fraud claim in their practices, rather than the moral judgments reflected. Based on the selected cases and analysis of positive laws, this Article reaches the following interpretive conclusions. First, a claim for damages for emotional injury caused by mere adultery should be denied. Second, a claim for damages for paternity fraud should be granted as compensation for infringing general personality interests according to article 22 of the Tort Law. Finally, the answer to the possibility of recovering the cost of support remains uncertain and needs further studies.

⁴⁸ 最高人民法院关于夫妻关系存续期间男方受欺骗抚养非亲生子女离婚后可否向女方追索抚育费的复函 [Letter of Reply of the Supreme People's Court on the Issue Whether the Deceived Husband Could Recover Raising Non-Biological Children Against the Wife During the Period of Marital Relationship] (promulgated by Sup. People's Ct., 1991) CLI.3.11100 CHINALAWINFO ("After research, the Supreme Court thinks if the husband is deceived to raise the non-biological children birth during the period of marriage, the husband can recover a reasonable amount of rearing expenses paid after divorce. The recovery of rearing expense incurred during marital relationship involves more complicated issues and needs further research"). Such restraint attitude does not seem to exist in the judicial cases cited in this Article; yet, how to interpret this reply is worth considering and further studies.