FAMILY LAW

INTRODUCTION TO FAMILY LAW

The word ‘family’ is a word which is difficult, if not impossible, to define. In one sense, it means all persons related by blood or marriage. In another sense, it means all the members of a household including parents and children with perhaps other relations, lodgers and even servants. However, both these definitions are too wide for our purpose.

The word ‘family’ appears in many statutes and regulations, and lawyers and others need to identify who falls within the definition and who falls out of it. Essentially, a family maybe regarded as a basic social need constituted by at least two (2) people whose relationship may fall under one of the following:

- Firstly, the relationship maybe that of husband and wife or two persons living together in a manner similar to spouses. The large number of people now cohabiting outside marriage has forced the law to take cognisance of this social phenomenon. If an extra-marital relationship ends by death or separation, the parties may need the same protection as spouses and their children. Consequently, the legal position of cohabitants has to a certain extent been assimilated to that of married persons.
- Secondly, a family maybe constituted by a parent living with one or more children.
- Thirdly, brothers and sisters or other persons related by blood or marriage maybe regarded as forming a family. Their relationship, however, has only very limited effect on their legal position and these arise principally on the death of another family member.

SOCIAL ASPECT OF A FAMILY

In Africa, the word ‘family’ is used to refer to a social institution consisting of all the persons who are descended through the same line (the male line in a patrilineal society or the female in a matrilineal society) from a common ancestor and who still have allegiance to or recognise the overall authority of one of their members as head and legal successor to the ancestral founder together with a... persons who through the blood descendant of the founder are for some reasons attached to the households of persons so descended

PURPOSES OF FAMILY LAW

The purpose of family law is to examine the legal consequences that flow from these relationships. Many of them are personal but others affect financial positions and claims to property. This is why it is very important to determine what a family is because it is primarily concerned with the rights which one member of the family would claim over another or over the latter’s property. This is so as a family is a social unit comprising the father, mother and children (natural and/or adopted), or may also include parents and relations or relatives as we have seen from the African definition.

LEGAL EFFECTS OF A FAMILY

- The legal effect of a family is that in a husband and wife relationship, there is a tie that gives rights to certain obligations to maintain the child.
- Similarly, in parents and children situation, there are rights that the law would enforce and so action can be taken for failure to provide maintenance
- Also, for succession rights, particularly where it is a case of intestacy, even where it is a testacy estate, it can be subject to a challenge of the Will by a suppose beneficiary.

What the law determines as a family is also important because it has to do with the declaration of inheritance in the property of the deceased.

The term 'family' was considered in the case of **BENJAMIN V RENNER 1974** pg 182 where the High Court of Sierra Leone held that a wife's father has no obligation to a son-in-law living with them as he is not part of the family.

In the case of **SPENCER V GIBSON 2 SLLR 1962 pg 84&86**, Justice Dodds stated that a mother is included in a man's family with his wife (he has the responsibility to look after her). So here, the duty to look after the aged was considered by the court. Hence, family is also concerned with the relationship between parents and child as it gives rise to property interest and financial provision of the family.

It is because of the above reasons that it is important to know what a family is and so consider what law governs the family. We need laws to govern the family because of succession rights, rights to children, children's rights, property rights, matrimonial rights, etc.

DIFFERENT PERSPECTIVES ON FAMILY LAW

Professor Jonathan Henry considers family law as a law governing relationships between parents and children and all adults in close relationships. There are also fundamentalists who hold their own views about family law.

Eekelaal, a Norwegian, views family law as a law to protect or guard members who are bound together from physical, emotional and economic arm. He also considers that it could be seen as an adjustive means, in that, it helps families who are broken to adjust to a new life while apart.

- It encourages and support family life.
- It is protective and here, it is for economic protection.

This is the reason why the court will look at the income of family members to decide on maintenance.

There is also the feminist view in which those who subscribe to it feel that family is meant to enable men to exercise power over women and this is discriminatory in effect. But not many subscribe to this vie. Some others think that family law favours mostly women. For example, we look at the Child Rights Act, Devolution of Estates Act, etc.

WHAT IS THE COURT'S JURISDICTION IN FAMILY LAW?

Under family law, the court has four (4) distinctive functions or powers:

1. **Resolution of Disputes**:

The court's powers to resolve disputes between members of a family is usually called into play when the family unit breaks. Among the commonest subject of disputes are custody of children and access to them and the right to occupy the matrimonial home.

Within the Sierra Leone jurisdiction, it is not every court that handles matters of family interests:

- Where customary law is involved, it is within the jurisdiction of the Local Courts.

- If it is a Christian or civil marriage, it is within the jurisdiction of the High Court.

- In the Mohammedan Marriage Act, there is a special provision for the Registrar of Muslim marriages to handle such matters. Such Registrars are appointed at district level.

- Where maintenance matters arise, it is for the Local and Magistrate Courts to handle. If it is a matter of property, it is for the High Court to handle.

2. **Definition and Alteration of Status:**

What then would be the capacity of someone who wants to take advantage of the provisions of family law? Historically, this was the law's main role because it was primarily concerned with rights that the members of a family could claim over another or over another's property.

In the case of a man and a woman living together, those claims arose if they were married and their legal relationship still depends largely on their status.

Similarly, a child's status is now of less importance (legitimate/illegitimate) but a fundamental question "Who has parental rights and duties with respect to the child?" still depends on whether the child's parents were married to each other when he was born.

Now, akin to the court's power to define status is their power to alter it. Among the most important aspect of this is the jurisdiction to grant divorces and make adoption orders because marriage can be dissolved and a child can be legally adopted only by a judicial process.

3. **Protection**:

The protection of the weaker members of the family can be sought in the court. The court can give protection to victims of domestic violence (wives, husbands, cohabitants or children) by making non-molestation orders and orders excluding a party from the matrimonial home. As a last resort, they may order a child to be taken in the care of a local authority.

When the family unit ceases to exist either through separation or death, the court has extensive powers to make orders for the financial provisions of the members of the family on both these events.

The first decision of the court is for property adjustment and division. Even though termination of the family unit may leave the members adequately provided for, justice may nevertheless require the distribution of their capital assets and the court has powers to make orders for this purpose on the breakdown of a marriage, and to a limited extent, to the death of a member of the family.

Similarly, if a person dies intestate, his property may have to be distributed and the law of intestate succession is essentially a part of family law because it provides for the division of a deceased person's property among members of the deceased's family.

MARRIAGE

Apart from its abstract meaning as part of the social unit of marriage, marriage has two (2) distinct meanings:

a) The ceremony by which a man and a woman become husband and wife ot the act of marrying.

b) The relationship existing between a husband and his wife or the state of being married and this definition largely corresponds with its dual aspect of contract and status.

Marriage as a Contract

In English law, marriage is an agreement by which a man and a woman enter into a legal relationship and which creates and impose neutral rights and duties. In this point of view, marriage is a legal contract. It presents similar problems like other contracts: example of form and capacity, and like other contracts, it maybe void or voidable.

But of course it is quite unlike other commercial contracts and it is sui generis in many aspects. In particular, the following are the marked dissimilarities:

I. The law relating to capacity to marry is quite different from that of any other contract.

II. A marriage may only be contracted if social formalities are carried out.

III. The grounds on which a marriage may be void or voidable are for the most parts completely different from those on which other contracts may be void or voidable. Unlike other voidable contracts, a voidable marriage cannot be declared void ab initio by repudiation by one of the parties but may be set aside only by a decree of nullity pronounced by a court of competent jurisdiction.

IIII. A contract of marriage cannot be discharged by agreement, frustration or breach apart from death. It can be terminated only by a formal legal act, usually a decree of dissolution or divorce pronounced by a court of competent jurisdiction.

Marriage as a Status

This is the second aspect of marriage, which is much more important than the first. It creates a status. That is the condition of belonging to a particular class of persons. In other words, married persons to whom the law assigns certain peculiar legal capacity or incapacity.

In the first place, whereas the parties to a commercial agreement may make such forms as they think fit, the spouses' mutual rights and duties are very largely fixed by law and not by agreement.

Secondly, unlike commercial contracts that cannot affect the legal position of anyone that is not a party to it, marriage may also affect the rights and duties of third persons even though they are not a party to the marriage.

Definition Of Marriage

The classic definition of marriage in English law is that of Lord Penzer in **HYDE V HYDE 1866 LR 1 P&D @ 130** where he said marriage may be defined as the voluntary union for life by one man and one woman to the exclusion of all others. This definition involves four (4) conditions:

I. Marriage must be voluntary i.e both parties must give consent and if this is absent, it can be annulled.

II. It must be for life. This is the view traditionally taken by the Roman Catholic Church and some other denominations. It does not mean that by English law, marriage is indissoluble.

III. The union must be heterosexual.

IIII. It must be monogamous i.e neither spouses may contract another marriage so long as the original union subsists.

HISTORY OF MARRIAGE AS IT RELATES TO SIERRA LEONE LEGISLATURE

Before the late 18th century in England, marriage was regarded as valid when the parties to it consider it as valid. So the parties to it regard it as nothing but a permanent union. Between 1756 and 1836, all marriages in England had to be performed under the Anglican wing and therefore purely an ecclesiastical matter. From 1836, it ceased being purely ecclesiastical, as in 1836, civil marriages were introduced and such a marriage was regarded generally as a contract.

However, the influence of the Church of England still predominated making the male partner the dominant one in the union (see Ephesians 5:23). Because it was ecclesiastical, it adopted many bible teachings were the wife must be submissive to

the husband (see Ephesians 5:22). The Church of England was a State church. Hence, their doctrines were more or less considered as State laws. Thus, even when civil marriages were introduced, it was being influenced by the Anglican Church.

However, over time, views have changed not only in England, but also all over the world. Now, it is a question of partnership between the husband and wife and so a contract. In a contract, the parties have equal status because it is a contractual relationship. Therefore, it was this partnership type of marriage that was transported to the colonies including Sierra Leone where British law was the basic law but was strange to the people in the colony.

INTRODUCTION OF A NEW SYSTEM OF MARRIAGE IN SIERRA LEONE

When introducing the marriage law in the colonies, the government in Britain made sure that the natives who found the new system strange were not discarded. Regarding the law pertaining to marriage of the natives, their own was a polygamous one. The situation compromised the English situation because matters such as inheritance, children situations could arise.

How Marriage By Banns Was Introduced

In 1753, Lord Hardwicke's Act was passed and that Act introduced into the Christian ceremony the publication of banns i.e a motive that certain persons want to get married. Since it was mixed community of the Natives and other freed slaves such as the Nova Scotians and the Maroons, problems were bound to arise and those problems had to be solved one way or the other. There were also the Quakers who had their own procedure, but even though it was not an Anglican group or under the Church of England, they were a religious group.

However, the new situation was not totally unacceptable to all within the community. Those settlers that were from Nova Scotia and from America were happy as they were familiar with what their slave masters had practiced. There were also the Maroons who were unhappy because they preferred the polygamous system. So, while rejecting it, the Christians accepted and adopted it. That situation made the missionaries unhappy but at the time, Sierra Leone was being run by the Sierra Leone Company and being displeased with this state of affairs, passed a resolution requiring all Maroons to make their marriages conducted by the Governor or his Representative.

In addition, the resolution also stated that any other marriages by the Maroons would be considered void. When the Maroons knew void marriage would have adverse effect on their inheritance of their property and the legitimacy of their children, they became concerned and this went on for seven (7) years.

In 1818, there were some discomforts as another regulation was passed which regulated marriages among the Maroons to the effect that all children born before 1808 were declared legitimate even though born out of wedlock. They also had a compromise situation which provided they could marry legally as long as an oath is taken before a Justice of the Peace. This situation continued until 1859.

The1859 Act introduced two types of marriages. It introduced Christian marriage which at that time stipulated it must be officiated by an Anglican Priest. Later on, other Priests were added because other missionaries were coming into the colony. So

there were provisions to accommodate these other predomination. There was also a defacto marriage which, though not celebrated and unregistered, provided for a grace period of one (1) year for it to be solemnised.

Later on, the consent of the parents became a requirement. But where age was a relevant factor or a very vital element, consent of the Chief Justice was required. Then it was obligatory to do a registration of a marriage if it was done before a Priest.

The next landmark was the Protectorate Marriage Ordinance. By 1903, the Protectorate Marriage Ordinance came into being which provided for non-natives(colony people) in the Protectorate to marry under the new form. This ordinance also accommodated Christian natives i.e those natives who had adopted Christian doctrines. Those natives who had adopted Christian doctrines could also marry if they obtained a certificate from the district registrar. In that case, an affidavit showing residence in the district for 15 days was necessary and so also proof that consent had been obtained.

Is A Foreign Marriage Recognisable In Sierra Leone?

The first question to is if the said marriage is valid under the jurisdiction where the couple was married. For example, where A and B purportedly married in Sierra Leone and then they travelled to the U. S and they want to do certain things that legally wedded people would, the question that arises is: Would they be taken as married?the answer is if it is valid in Sierra Leone's jurisdiction, then it would be valid in the U.S. Similarly, if the marriage is not considered as legal in the Sierra Leone jurisdiction, then it would also not be accepted as legal in the U. S.

However, it is important to note that a marriage that is valid in one jurisdiction would not necessarily be accepted as valid in another jurisdiction if the particular marriage is not applicable in the other jurisdiction. For instance, where a gay couple that were legally married in America comes to reside in Sierra Leone, they would not be considered as married. Note that if the laws of England up to 1st January 1880 are applied, a gay union would be illegal. But where a foreign marriage is legally accepted in our jurisdiction, all rights which accrued under that marriage where it took place would be recognised here. When once it is recognised in our jurisdiction, all rights pertaining under that marriage would be enforced under our laws. Such rights include the right to petition for a divorce if they are domicile here or to adopt children if they so desire.

VALIDITY OF A MARRIAGE: VALID, VOID AND VOIDABLE

There are three (3) types of marriages: valid, void and voidable marriages.

1) **VALID MARRIAGE**:

A valid marriage is one where every step to it has been completed or followed legally. It can only be terminated through divorce and death. And it is when a marriage is

valid that you have all the benefits. Example of these benefits are maintenance and what is known as consortium.

Contract Of Marriage In A Valid Marriage:

In order that a man and a woman may become husband and wife, two conditions must be satisfied:

- First, they must both possess the capacity to contract a marriage.

- Secondly, they must observe the necessary formalities.

A. CAPACITY TO MARRY:

In order that a person should have capacity to contract a valid marriage, the following conditions must be satisfied:

a) One party must be male and the other female.

b) Neither party must be already married.

c) Both parties must be over the minimum age.

d) The parties must not be related with the prohibited degrees of consanguinity

The requirement of capacity to marry raises serious issues dealing with sex, monogamy, age, prohibited degrees of consanguinity and affinity. These would now be considered individually:

I. **Sex**:

A new problem arising out of operation to effect change of sex had to be considered by Omrod J. in the case of **CORBETT V CORBETT 1970 2 AER @33.** The petitioner in this case was a man. Before the marriage, the respondent had undergone a surgical operation for the removal of her male genital organs and the prohibition of the artificial female organs. After dealing at length with the medical evidence, the learned judge came to the conclusion that a person biological sex is fixed at birth (i.e at the latest) and cannot subsequently be changed by artificial means. That being so, the respondent who was male at birth was not a woman and the marriage was therefore void.

The law relating to consummation emphasises that English law still regards marriage as a normal heterosexual relationship.

II. **Monogamy**:

As a result of the English view of marriage as a monogamous union, neither party may contract a valid marriage while he/she is already married to someone else. If a person has already contracted one marriage, he cannot contract another until the first spouse dies or the first marriage is annulled or dissolved.

III. **Age**:

Both by Cannon Law and at Common Law, a valid marriage could be contracted only if both parties had reached the legal age. The legal age varies in the various jurisdictions. If either party was under this age when the marriage was contracted, it could be avoided by either of them when that party reach the legal age. But if the marriage was ratified impliedly by continued cohabitation, then it becomes irrevocably binding.

Reading Assignment: the age of legality in the Child Rights Act of 2007 and in the Constitution of Sierra Leone.

IIII. **Prohibited Degrees**:

Most, if not all, civilised societies prohibit certain marriages as incestuous. The prohibited relationship may arise from consanguinity i.e blood relationship or from affinity i.e relationship by marriage.

In the case of consanguinity, prohibition is based on moral and eugenic grounds. Most people view the idea of sexual intercourse and, therefore, marriage between for example, father and daughter, or brother and sister with abhorrence.

Furthermore, the more closely the parties are related, the greater will be the risk of their children inheriting genetic characteristics.

V. **Affinity**:

In the case of affinity, prohibition was originally based on the theological concept that husbands and wives were one flesh so that marriage with one's sister-in-law was as incestuous as marriage with one's own sister.

B. **FORMALITIES OF MARRIAGE**

The purpose of formalities in marriage is o ensure that marriage is solemnised only in respect of those who are free to marry and have freely agreed to do so, and that the statutes of those who marry shall be established with certainty so that doubts do not arise either in the minds of the parties or in the community about who is married and who is not.

There are however four (4) different types of marriages practiced in Sierra Leone and the formalities in such marriages are laid down by the corresponding law.

- Civil Marriage
- Mohammedan Marriage
- Christian Marriage
- Customary Marriage- see the main tribes of Sierra Leone

VALIDITY OF A MARRIAGE: THE CHRISTIAN MARRIAGE ACT

The fourth type of marriage is the customary marriage. It basis is found in section 170 of the 1991 constitution of Sierra Leone. The customary marriage does not have any legislation. By virtue of section 170, customary law marriage is legally recognised in Sierra Leone.

The legislation of Customary Marriage and Divorce Act 2007 (This act validates customary marriage)

There are certain formalities involved in customary marriage. There is a variance regarding formalities depending on the tribe been examined: Mende, Temne, Limba.

INCIDENCES OF MARRIAGE

Valid marriage gives rise to legal incidences. One such incidence is the matrimonial relationship. The realm of marriage creates what is known as matrimonial relationship. The principal effect of marriage at common law was that it got many purposes. It fused the legal personality of husband and wife into one. The clearest exposition of this doctrine of unity of husband and wife is that of Blackstone who said:

"By marriage, the husband and the wife are one person in law."

That is the very being in legal existence of the woman is suspended during the marriage or at least incorporated and consolidated into that of the husband under whose wing, protection and cover she performs everything and is therefore called in law fennecoberte" or under the protection and influence of her husband and her condition during marriage 'covertures'.

Upon this principle of a union, if person in ....husband and wife depend almost all legal rights, duties and disabilities that either of them acquire by the marriage. Blackstone considered that by marriage, the parties become inseparable but this is an imaginary union because that unity is only superficial and such idea has been fastly eroding.

In the case of **MIDLAND BANK TRUST COMPANY LTD V GREEN NO. 3 1982**, a husband and wife were sued for conspiracy. It was argued that they not be liable on the ground that they were one person in law and therefore would not conspire with each other. This defence failed. Lord Denning MR expressed thus:

"Nowadays, both in law and in fact, husband and wife are two persons not one"

The idea of this unity has led to the development of what is referred to as Consortium.

CONSORTIUM

Bromley in his work 'Family Law' considered that the concept of consortium is only an abstract notion. It is not something that is real and it only seems to mean parties living together as husband and wife with all the incidentals that follow. That is what is expected of a man and wife living together.

Consortium is not something which you can grasp, it is expected that it is abstract and not tangible. It is only the benefit of consortium that the couples or parties enjoy. Legally defined, consortium is the legal right of one spouse to the company, affection and services of the other. Their matrimonial relationship brings to play the duty of each party or spouse to cohabit with the other, and this will normally involve sharing the common matrimonial home but this is not absolutely essential as it is possible for spouses to cohabit only from time to time as where the case where the husband has to spend a long period of time from home for reasons of business or where he is the member of the armed forces and consequently can only live with his wife when he is on leave. As long as both parties retain the intention of cohabiting whenever possible,

the consortium is regarded as continuous and would come to an end only if one or both of the parties loses that intention.

Consortium then connotes the sharing of a common matrimonial home and common domestic life. Jurisprudentially, consortium resembles ownership in a sense as the husband and wife enjoy a bundle of rights that come with it. Some hardly capable of definition.

1) **Use of Surname:**

An adult may use any surname he chooses provided his intention is not to perpetuate a fraud. Most wives assume their husband's surname on marriage although they may continue to be known by their former names for business or professional purposes. Likewise, a woman usually retains her former husband's name after the marriage has been terminated either by death or divorce and a man has no such property in his name as to entitle him to sue for an injunction to prevent his divorced wife from using it unless she is doing so for the purpose of defrauding or some other rights of his is being invaded.

2) **Matrimonial Home**:

It is the duty of the spouses to live together as far as their circumstances may permit. But differences may arise between them as to where the matrimonial home is to be. In accordance with the view that the husband is the head of the household, the earlier opinion is that he has the right to determine this. However, this like other domestic matters of common concern is something both spouses have the right to be heard and which they must settle by agreement.

Where the spouses find it impossible to come to an agreement, neither of them has an absolute right to determine where the home is to be and all the circumstances must be taken into consideration. If the husband is the sole breadwinner, he may be entitled to the right word for the simple reason he may be entitled to the last word. But if the wife is working but the husband is not, her consideration must come first. However, whatever arrangement one proposes must be reasonable to the other's point of view.

3) **Sexual Intercourse**:

Each spouse owes the other a duty to consummate the marriage and that either the incapacity of or the wilful refusal of the respondent to do so will entitle the petitioner to a decree of nullity. This mutual right of intercourse continues after the marriage has been consummated provided that it is reasonably exercised. However, one party is not bound to submit to the demands of the other if they are inordinate, perverted or otherwise unreasonable or in any case if they are likely to lead to a breakdown in health.

Since consortium arises from matrimonial relationship, what happens when one party breached it? This leads us to look at the break or loss of consortium.

Loss of Consortium:

In the case of customary marriage where a wife leaves her husband to stay the weekend at her parents and the weekend turns into weeks, the husband can go to the local court to bring an action against the parents for keeping his wife without his

consent. The husband would sue or consort in a local court for harbouring, claiming that he has been denied as a husband of his wife's companionship. That is consortium lost.

Where there is a break in consortium, the other party cannot enforce their right to consortium. They have no power to enforce it. Under section 17 of Cap 102, which is the Matrimonial Courses Act of 1960, there is a provision for a spouse to petition for restitution of consortium. In such a case, the court would have to consider the relationship between the parties over a period of time but when one party is in breach of consortium, there is difficulty to enforce it.

Where the court may so decree as is provided in sect 17 of Cap 102, it has no power to compel a party to obey that decree. It only makes provision for a party who is denied and it can be cited in future proceedings. It has, however, been said to cover a wide variation of protections where the husband cannot force the wife to return to the home, he could however restrain her by protecting his own property. Example, his money or reputation. This is as far as the law would go. The law is powerless because the court cannot compel a party to comply for a restitution of consortium.

Since the 19th century, the courts have always held that it cannot force consortium by compelling a wife to return to the husband. A husband or wife can bring a petition for misusing money belonging to the husband or wife or one party keeping undesirable company.

In the case of **RE COCHRANE (1840)**, the court expressed doubts as to whether there were such limitations or power of the rights to such consortium. The House of Lords doubted if there were such limitations on the powers of the court. Here, the court held that in the case where kidnapping was established, the right to consortium was no defence.

In **R V JACKSON (1891) 1 QB 67**, the Court of Appeal in England considered the case where the husband was in New Zealand on service and so the wife had to stay in England with her parents. When he returned home to England, he asked his wife to go and stay with him. She refused to do so and he went to court. The court made an order for her to return. She refused to obey the court's order. The husband was offended by his wife's impertinence so he decided to hire two (2) men who awaited her outside the church she was attending and grabbed her as soon as she went out. She was taken to the house where she had everything she wanted but could not go outside. She then applied to the court for the writ of habeas corpus. When the court considered it, it was held that it was no defence for him to say he was enforcing his right to consortium. The court, therefore, ordered her immediate release. He had a right to consortium but not to enforce it. In this case, therefore, the court decided the limitations of the power to claim consortium.

R V REID (1973) QB 291: here, it was also decided that such a case like **RE COCHRAINE** was kidnapping for which the husband would be guilty, and the court in this case established that the right of consortium was no defence. In summary, RE COCHRAINE and REID are saying that an aggrieved party should not use extra-judicial methods to reinforce his right to consortium.

Consortium Lost But Not Complained:

In such situations where there is loss of consortium, no party would complain because they had voluntarily agreed to lose consortium. No party would be subject to any sanctions by the court for loss of consortium by the other.

Also, the loss of consortium may be by judicial separation i.e where the court has made an order. In such cases, the court usually makes an award not for loss of consortium but an award to enable the other party continue to enjoy certain benefits which should have been enjoyed if separation had not being ordered. The defaulting party who is responsible for the separation would have to pay damages order from the duty of cohabitation.

Damages As A Remedy For Loss Of Consortium:

The problem to be considered here is whether as a result of someone's actions, one spouse, for e.g the husband, loses the consortium of the wife.The question then is: Can he recover damages for his loss on X? Two situations must be examined:

- It is where the husband already has a cause of action against X either in contract or in tort and claims that X's runs in fact has led to the loss of consortium. For e.g where he had been so disfigured as a result of X's negligence/bad driving that his wife has left him.

- It is where the husband is drowned for complains is that X's action had deprived him of his wife's services of societies. For e.g that his wife had had to spend a considerable time in hospital because of X's negligence which caused her injury.

PLACE V SEARLE (1932): here, the plaintiff and defendant had a fight. The defendant was the enticer of the plaintiff's wife. The plaintiff was offended because it was the defendant that tried to cause the loss of consortium for him in the marriage. After the fight, the husband suggested to the wife who was standing by in the fight. He said to her: "Come on, Gwen. Let's go". And then left with her. The court found in favour of the plaintiff that there had been an enticement and so the loss of consortium. The enticer in this instance who was the defendant served to be liable for damages.

Consortium Extending To Other Areas Of The Law Such As Breach Of Contract

But the law of consortium have also stretched to other areas where there s breach and therefore, damages result. In **JACKSON V JACKSON (1909) 2 KB**, the plaintiff's wife died as a result of food poisoning through eating a can of contaminated salmon which the defendant had sold to the plaintiff. The Court of Appeal held that he could recover of for the loss of his services. In these circumstances, the loss of consortium is occasioned by the seller of the contaminated salmon as it was not fit for its purposes and not of merchantable quality.

That could also stretch to the law of tort for breach of the duty of care in negligence (**DONOUGHUE V STEVENSON**). In **LYNCH V KNIGHT (1801)**, the House of Lords submitted that the sole question here was whether loss of consortium was too remote a consequence of the defendant's breach, and consequently, it was immaterial whether the plaintiff was a man or woman. Here, the defendant had stated that the plaintiff's wife had committed adultery. This was not correct and therefore,

slanderous. Thus, the liar had to pay damages for loss of consortium.

Another case is **LAMPERT V EASTERN NATIONAL OMNIBUS CO. LTD. (1954)**. Here, the defendant had a vehicle operated by one of the worker, the defendant's servant. An accident occurred in which the plaintiff was disfigured. In her disfigured condition, she lost her consortium. The Court held that she was entitled to damages if she could prove that the loss of consortium arose due to her disfigurement.

Loss Of Consortium Due To Financial Loss

BEHRENS V BEHRENS MILLS CIRCUS LTD (1957):

This was a case where the husband and wife were midgets and they attracted an audience and made money out off it. They appeared in exhibitions together. The wife was involved in an accident and became incapacitated and could not perform. The husband could not perform alone and had to stay home to look after the wife so she could recover fast. Staying at home, they lost financially. He stayed at home to mitigate loss by looking after the wife instead of hiring someone. Because of that financial loss, he was entitled to consortium. The Court held he could recover that loss.

NOTE: in this instance, the loss of consortium was not that they were not together but they had to work together to earn financially.

How The Court Goes About Quantifying This Loss

Where the loss is occasioned by an adulterous act, damages are recoverable because it is trespass on the husband or wife's rights. This is not far from the notion that the wife is the property of the husband and if someone interferes with it, consortium will be paid for.

Under customary laws, you pay damages as in general law. Damages are not punitive but compensatory and because it is compensatory, there must be proof of the damage suffered. The Court would look into various issues. For e.g, how good was the husband and the wife, what assistance was the wife giving, how good was that person in housekeeping.

As to the question of whether the loss of consortium is quantifiable, the court looks at it from various angles such as whether the adultery was before or after the separation. If they were separated before the act of adultery, then the adulterer should not be liable, but if they were together, then he will be liable.

Another case is a Sierra Leonean case called **WILSON V GENET (1968-69)** ALR SL Series @ pg58. The court in Sierra Leone refused damages when the adulterer stated that they were separated. However, in the Court of Appeal, it considered that if the adulterer knew that the party was married and continued, he should be liable for aggravated damages. In such a case, the court would consider certain factors like, for e.g, the husband's feelings, whether it affected his marital honour. The psychological effects on the parties, whether they were left opened to ridicule or whether the parties were left embarrassed.

The court would also want to assess what sort of person the other party is. Is he a person of influence or affluence and have he used it to deny the other party of consortium. A defence which is normally used is ignorance i.e you did not know the other party was married, but that did not hold.

There Are Other Instances Where Loss Of Consortium Can Lead To Non-Financial Loss Of Consortium

There must be certainty that financial benefit being lost must have arisen from a tight relationship between the parties and not just consortium. This was the consideration in the case of **NIGHTINGALE FOR GENTLEMEN CO. 1955.** Here, the husband and wife were dancing partners and worked as a team. They had double income and it was twice than that which anyone of them would have earned if they danced with anybody else. They shared all income and expenses. They stayed together in hotels which reduced their expenditure. When the wife died, the husband was unable to earn as before. Therefore, he claimed loss of consortium.

In the High Court, it was considered that what he was deriving was a business relationship and that being husband and wife was incidental and he can't recover. The Court of Appeal said that such a matter should be viewed in a realistic manner. If benefit enjoyed arose from being husband and wife, then damages are recoverable. But if it is a business relationship, then it is intertwined. Although it was intertwined, pairing with someone else would not yield interest. The Court of Appeal considered that the business relationship was only on the surface of it but depended on the supreme bond of husband and wife relationship.

Another case is that of **MALYON V PLUM 1969.** Here was a husband and wife, and the husband had a business which they decided to convert into a company. He had 999 shares and the wife had 1 shares out of 1000 shares. They both owned the company but it was one-man business under his control. The wife worked in the office from time to time earning £600 a year. Another person would have been paid £200 a year. Unfortunately, the husband died. The wife took over but she did not succeed. She wanted compensation for her loss. The court said she would succeed because she was earning more than any ordinary person earned.

Financial benefit which is lost must come from a husband and wife relationship and not from a business relationship.

ARUN KUMAR AGRAWAL V NATIONAL INSURANCE CO. LTD. was a decision of the Indian Court of the 27th July, 2010, reported in the Human Rights Law Digest of Spring Vol.8 No.1 @77.

In that case, the wife died in a road accident after a truck had hit her. She was not earning but it was estimated that if she was earning, it was stipulated to be 5000 rupees a month. It was claimed that her total loss amounted to 600,000 rupees. But the Indian High Court said that she wasn't earning and what was assessed was only notional. The matter went to the Court of Appeal who agreed with the High Court. The matter went to the Supreme Court and it was held that the contributions of a wife or mother to the home is invaluable and cannot be commuted in terms of money; that what she does in the house as a wife and mother cannot be assessed as that of an employed housekeeper.

The Supreme Court said that her services are always rendered with true love and affection in monogamous households. It went on to say that in assessing compensation in such a case, the services must be viewed broadly considering the personal care and attention given to the husband and children as wife and mother and cannot in any way be compared to the services of a close family member.

FELICIANO V ROSEMARY

Here, the parties cohabited together as husband and wife though not legally married. The court said that loss of consortium can only be compensated in the case of married couples.

BAER V AMERICAN AIRLINES {Unreported} (2002)

Here, some children lost their mother in a plane accident and so claimed for loss of consortium. It was stated by the High Court that the children cannot recover because such damages are normally restricted to husbands and wives relationships.

Another incidence to marriage:

MAINTENANCE:

When we talk about family life, we talk about maintenance. Invariably, it is expected that the husband maintains the wife. He has that obligation and there is a presumption in law that the wife is always considered to be the husband's agent and that developed from the common law doctrine of unity of legal personality. However, the husband in maintaining the wife has a duty to provide necessaries not luxuries. If he failed to provide necessaries, he would be liable for neglect. At common law, the wife could not sue that husband for loss of maintenance but she could pledge his credit for necessaries.

Nevertheless, the ecclesiastical court looking at the situation of the wife who is neglected, came up with the idea of 'alimony'. Alimony, either pending suit which is called alimony pendent lite or a permanent alimony because the wife's needs must be in accordance with his resources.

On the whole, the enforcement of financial support during a subsistence of the marriage is provided mainly by the enforcement of common law principles. The wife's hope of financial support lies in her ability to enforce the common law duty of a husband to support his wife. It follows that if the duty is terminated for some reasons, the wife would no longer be able to receive support from her husband.

Though we are still grappling with the law of marriage in Sierra Leone, we can always ne guided by the laws of the U.K. because in the U.K., there are provisions for domestic proceedings in the Matrimonial Courses Act and sect.2 of the Act gives the court a wide discretion to other periodical payments or a lump sum. The Family Law Act of 1996 gave the court the discretion to order payment of rents, mortgages and all outgoings in respect of property occupied by a spouse. The necessity principle does not work very much in favour of the wife because the husband may conceal his real income and there are no real guidelines as what is considered necessaries to the wife.

However, where a wife is guilty of adultery, she is not entitled. The facility of taking credit on the husband would be lost on the death of the husband. And similarly, where there is a decree of divorce or nullity, the agency principle stops.

Furthermore, where a marriage is void, everything obtained has to be returned because there was no marriage. In our laws in Sierra Leone, Maintenance Act Cap.100 at sect. 2 makes provision for women to take out summons for wilful neglect but the emphasis is on the term 'wilful neglect'. But in such circumstances, the entire situation is what is looked at. The husband must be in a fit and proper situation to provide maintenance.

However, if a situation changes, a party can go to court asking for a variation either

upwards or downwards. For e.g, where the situation has been improved for the wife far better than the husband's or that the husband's situation has improved, maintenance too can be improved.

Conclusion To Valid Marriages:

A valid marriage is one where every step to it is completed. Under the Christian Marriage Act, for e.g, if A wants to get married and decides to go to the beach at Lumley to have the marriage celebrated, it would not be valid as the beach for the purposes of marriage according to our laws is not a place of worship.

A valid marriage goes on forever until something happens to end it. A marriage would end in one of two ways: death or divorce. It is where the marriage is valid that we have all the benefits accrued such as maintenance and the rest that comes with a valid marriage.

2) VOIDABLE MARRIAGE:

In the case of a voidable marriage, the marriage is considered for all intents and purposes until for some reasons, it is declared a nullity. Hence, it is important to note that a voidable marriage is valid until it is annulled.

Instances Where Voidable Marriages Are Set Aside

In most cases, voidable marriages are set aside because of lack of consent of one of the parties. For e.g, where a party goes into the marriage under duress or mistake. Even DV marriages are considered voidable marriages, as there was no proper consent since there were conditions.

Grounds On Which A Marriage Would Be Voidable

1. **Incapacity to Consummate**:

One important area in which we find voidable marriage is where there has been a lack of consummation, which can be in a number of forms and one such form is the incapacity to consummate. If at the time of the ceremony and either spouse was incapable of consummating it, he/she was regarded as lacking the physical capacity to contract a valid marriage, and the union could therefore be annulled.

Where there is incapacity to consummate, for e.g, the man is impotent, such a marriage that was proper in every sense of the word stands to be voidable because the marriage cannot be consummated. But where the wife knows about the condition of the husband being impotent but agrees to marry the husband, she cannot go back on her words by calling for an annulment. She would be estopped.

2. **Wilful Refusal to Consummate**

Another form is wilful refusal to consummate. Apart from incapacity, there could be wilful refusal to consummate. A marriage will be voidable if it has not being consummated owing to the respondent's wilful refusal to do so. Wilful refusal connotes a 'settled and definite' decision came to without just excuse and the whole history of the marriage must be looked at.

A case on that is **KAUR V SINGH (1972) 1 AER @pg292.** The parties who were Sikhs married in a registered office on the understanding that they should not cohabit until they have gone through a religious ceremony of marriage in a Sikh temple. It

was held that in the circumstances, the husband's refusal without excuse to make arrangements for such a ceremony amounted to wilful refusal to consummate the marriage.

It should be noted from the onset that the courts are concerned with the inability of one party to have sexual intercourse and not whether the act of sexual intercourse is capable of producing a child. Sterility is not a ground for annulling a marriage even though the sterility was produced by a voluntary operation which the other party did not agree to. The case to this is **D V D (1970)** {Family Division)

Here, the parties have agreed that because of the inability, they would adopt a child. Subsequently, there arose the issue of nullity in which the court said you cannot ask for the decree of nullity when you had already agreed.

What The Law Considers As Consummation

A marriage is said to have been consummated as soon as the parties have sexual intercourse after the solemnisation. The distinction between the act of intercourse and the possibility of that act resulting in the birth of a child cannot be kept clear. Once the parties have had sexual intercourse, the marriage is said to have been consummated even though one or both of them is sterile. If this were not so, the marriage would never have been consummated if, for e.g, the wife is beyond the age of child bearing.

In order to amount to consummation, the intercourse must be 'ordinary and complete' and not 'partial and imperfect'. The necessity to complete intercourse has raised difficulties where the spouses have used some form of contraceptives. In **COWEN V COWEN (1946),** it was held that there had been no consummation where the husband had invariably worn a contraceptive object or practiced ***coitus interuptus.***

But two years later, the House of Lords in **BAXTER V BAXTER (1947) 2 AER** @886. Here, the husband was not allowed by his wife to have sexual intercourse with her unless he used contraceptive sheath because she did not want children. He had reluctantly complied as he thought he would not otherwise be allowed to have sexual intercourse at all. Eventually, he sought a decree of nullity on his wife's wilful refusal to consummate the marriage. The House of Lords over ruled at least the first part of **COWEN V COWEN** by holding that the marriage had been consummated notwithstanding the husband's use of a sheath.

It must, however, be noted that any consummation must be after solemnisation of the matrimony. It cannot be retrospective in the sense that you cannot say tha the couple had engaged in copulation before matrimony but does nothing to engage in it after; that does not amount to consummation.

It must also be noted that consummation is only once. It could not fall into a situation where there is refusal sometimes to have sexual intercourse after the marriage. The case for this is **P V P (1964**) where the husband had intercourse with the wife only eight times over an 18yr period. The court held that there had been consummation.

OTHER GROUNDS FOR AVOIDING A MARRIAGE

Duress

An occasion for an annulment may be because there is a flaw in the institution of marriage making it one that no longer subsists and it is that flaw which make the

marriage variable. One such flaw can be duress. There may be cases where there is duress and in such cases, it is a question of the effect of the threat on the party i.e if the party was threatened, what is the effect of that threat or stress that led her into the marriage. It is not necessarily the nature of the threat but the effect of the threat on the other party. The nature of the threat that destroys the party's consent must overtake the will of the individual. This can be seen in the case of **HIRANI V HIRANI (1982**) {Family Law Report252}. However, the courts have said that threat that destroys consent cannot be a fanciful fear but reasonably held.

The court also think it must be honestly held as seen in **SZECHTER V SZECHTER (1971)** where it was said: "in order for the impediment of duress to vitiate an otherwise valid marriage, it must in my judgement be proved that the will of one of the parties, thereto, has been overcome by genuine and reasonably held fear caused by fret of immediate danger for which the party is not himself responsible to life, limb or liberty so that the constraints destroys the reality of consent to ordinary wedlock."

It must be honestly held that fear as was seen in the case of **SCOTT V SELBRIGHT**

Mistake:

Another ground for a marriage to be voidable is mistake. The court recognised that two types of mistake may invalidate consent to marriage. Namely:

- Mistake as tot eh identity of the other party
- Mistake as to the nature of the ceremony

Mistake As To Identity:

This rarely occur s as it involves the petitioner being mistaken not merely over the attributes of the respondent but as to the very identity of the respondent. Illustrations from contract law in cases such as: **CUNDY V LINDSAY (1878) and PHILIPS V BROOKS (1919).**

Mistake As To The Nature Of The Ceremony:

This arises where one party does not realise that the ceremony taking place is a marriage ceremony.

Bars To Annulment:

At common law, the court has the power in certain cases to refuse to grant a decree of nullity although the petitioner has made out one of the grounds. A party to a voidable marriage effectively put it out of his own power to obtain a decree of nullity by his own conduct. There are two (2) bars of general application:

- Approbation
- Coalition

In the case of **G V G (1985)** where Lord Watson stated that even though there may be grounds for annulment of marriage, there would be circumstances which would render it most inequitable and contrary to public policy for a complaining spouse to be allowed to challenge a marriage when he had impliedly recognised its existence

and validity. It is open for the respondent to show that the petitioner who has come before the court asking for a nullity knew that it was opened to him to annul the marriage but did nothing.

In other words, time seems to be of essence. For e.g, where a couple got married in January 2012 and did nothing about it even though he had grounds for annulment and until 2013 before an application was filed for in a court of law. the court would like to know why you sat idly by and did nothing when you know an order of nullity can be granted.

Conduct Of A Party:

Another bar to the decree of nullity is the conduct. It is where a party so conducted himself in such a way to make a respondent reasonably believe that he would not take any steps to annul the marriage. This was seen in the case of **W V W (1952)** 1 AER. Here, there was no consummation because the wife had a particular defect and they had agreed to adopt. The court said that he could not go back on his words.

One situation where approbation may arise is where a wife whose husband is impotent allows herself to be artificially inseminated by a donor with her husband's consent. This was emphasised in **SLATER V SLATER (1953) 1** AER @pg346. Here, the parties were married in 1945 but the marriage was never consummated owing to the husband's incapacity. In 1949, the wife underwent treatment by way of artificial insemination from a donor other then the husband and that same month, the parties took a 2yr old boy to live with them with the view to adopting him. In1951, the wife sought a decree of nullity on the ground that at the time of the ceremony of marriage, the husband was and had ever since being incapable of consummating the marriage. While the court was satisfied that incapacity was proved, it arrived at the conclusion that the wife by her actions had approbated the marriage and that therefore, she was not entitled to the relief sought.

Injustice Of The Decree:

It is not sufficient that the petitioner has had the respondent to believe that he will not seek to have the marriage avoided but the latter must also show that it would be unjust to him/her to grant the decree. The case for this is **D V D (1979)** 2 AER @337.

Here, the parties had been married and adopted two children before the husband left to stay with another woman. The court had to consider whether there had been an acceptance of the situation and had agreed to adopt. But in effect, if they declared a decree of nullity, it would be an injustice to the woman as she would lose consortium and she would be left with two adopted children.

Agreement:

Where there had been an agreement between the parties to the marriage, the decree of nullity would not be available.

PETIT V PETIT (1962) 3 AER.

Here, the husband had always been impotent and the wife had to have a child by artificial insemination. She kept the house going during the years of the war. Twenty (20) years later, because the husband had had another woman, he declared the decree of nullity in that there had been no consummation.

3) VOID MARRIAGE

In the eyes of the law, a void marriage is one where the marriage existed but technically it was void at all times even when the court had not so declared. But where a party believes the marriage is void, it is safest to get an order from the court. That was what was explained in **WINSTON V WINSTON (1995)** {Family Law Reports 268}. So, what would happen in a situation where a child is born as the product of a void marriage? Because the marriage is void, the child would be illegitimate.

Any of the parties are at liberty to ask for a declaration. Such marriages covers a wide range like same sex marriage. In our society, such marriage is void. It has been very complex in other jurisdiction. In England, for e.g, same sex marriage is allowed. In the U.S.A. it is not allowed in some States but n some, it is allowed. In Europe, it is still debated and we seek the decision of the courts. In CASEY V UNITED KINGDOM when one of the parties underwent a sex change operation and later asked that the marriage be declared void, the decision of the court was that it was void because the right to family life and marriage under the European Convention for the Protection of Human Right was being violated.

The ECPHR considered the right to marry in the communities i.e the traditional forms of marriage with the opposite sex. In other words, marriage had been with the opposite sex that is why gay marriages are foreign in Africa.

Grounds On Which A Marriage Is Void

A marriage will be void in any of the grounds set out:

- That the parties are related within the prohibited degrees of consanguinity
- That either of them is under the age of 18yrs.
- That either of them is already married.
- That they are not respectively male and female: here, it was held in **CORBETT V CORBETT**. In September 1953, the parties went through a ceremony of marriage. At that time, the petitioner knew that the respondent had been registered at birth as of the male sex and in 1960 had undergone a sex change operation and had since then lived as a woman. After 14 days, the petitioner filed a petition for a declaration that the marriage was null and void because the respondent was a person of the same sex, or alternatively for a decree of nullity on the grounds of non-consummation. It was held that the petitioner was entitled to decree of nullity declaring that the marriage in fact celebrated between himself and the respondent was void ab initio.
- Also, lack of consent in the part of one of the parties makes a marriage void in which case a marriage celebrated that is affected by lack of consent will remain void.
- Also, where formal defects may make a marriage void, whether failure to comply with the formal requirements relating to the marriage ceremony will make the marriage void must be determined by reference to the....meaning the ‘law of the place’ where

the marriage is celebrated. A case of reference is **GENESIS V YAGOUB (1997)**. This was a Coptic orthodox church but they did not go through the formalities. The priest advised the parties that it would be better for them to have a civil marriage but they did not do so. They went on to co-habit until there was a breakdown. The learned judge who sat on the matter in his view said that the marriage had all the marks of an ordinary Christian marriage and the parties regarded themselves as married and went on to consummate the marriage. However, he held that the marriage was void because the parties had wilfully disregarded the formalities.

So a marriage can be void on several grounds: capacity, consanguinity, male or female, married before, lack of consent, failure to comply to formalities determined by the laws of the land where the marriage was celebrated.

Termination Of A Marriage:

Divorce:

Quite apart from nullity in the termination of a voidable marriage, a valid marriage itself can be terminated in one of two ways:

- By death
- By dissolution by the courts: divorce.

Originally, the ecclesiastical courts never tolerated divorce because of the doctrinal teaching that the union of a man and woman is indissoluble. The union is permanent for life. Later on, it became acceptable for a divorce to be granted if parliament approved and of course, it was not available to the wife but the husband. But as time progressed, the wife was eligible to be heard and granted divorce. Later, it was extended to the courts as they were given a free hand to grant dissolution of marriage when Matrimonial Clauses Act 1859 was enacted.

Legal grounds for divorce:

In all jurisdictions, a divorce can only be granted in one of three grounds:

- Adultery
- Cruelty
- Desertion

Judicial Separation:

This is a situation which is not a divorce as the marriage in still subsisting, but the parties do not cohabit. The marriage is still intact but the court will order the parties to live apart, which ties down the English law that the marriage has broken down irretrievably and therefore, the parties cannot continue to live together.

Some people would, rather than go in for a divorce, go for a judicial separation because of their religious beliefs as the ecclesiastical marriage has to be for life.

Where the marriage has broken down and cannot be mended, the court will order the parties to live apart. That is judicial separation.

Grounds For Divorce:

- **Adultery:**

A simple definition of adultery would be 'voluntary or consensual intercourse between a married person and a person (whether married or unmarried) of the opposite sex not being the other's spouse'.

Adultery is provided for in Sierra Leone Laws under Section 5 of Cap 102 and it is where there is a voluntary sexual intercourse between two persons either one or both of them not being married to each other but to someone else.

What is sexual intercourse for this purpose? With regards to nullity, it was said that there had to be normal and complete sexual intercourse to consummate a marriage. In adultery, however, the petitioner does not have to prove such a complete act. There must be some penetration of the female by the male organ. Although as in the cases of rape, any degree of penetration, however slight, will suffice.

The act must be voluntary: in order to be guilty, a person must have had sexual intercourse voluntarily. Hence, if a married woman is raped, she does not commit adultery.

In **REDPATH V REDPATH (1950)**, the wife's defence to an allegation of adultery was that she had been raped. The petition was dismissed because the courts thought that the onus of proof on the husband was not discharged until he had proved an act of intercourse in which his wife was a willing participant.

The principle applies equally if a woman's consent is negative by force or fear. If the respondent is under the influence of drugs, there will not be a case of adultery.

Also, a defective mind or insanity would negative consent. But in the case of insanity, it would be required to prove that the parties did not know the nature and quality of the act, or if the party knew, he/she was ignorant that it was blameworthy or wrong or culpable. Such was the reasoning in the case of **YARROW V YARROW (1832)**. The same reasoning was applied in the case of **S V S**. Here, the respondent was ignorant of the act because of a defective reasoning of the mind and so, he was discharged.

One must, however, note that if a party is the doer of the act, he cannot be absolved. For example, if Mr. A, who is married, raped Mrs B, Mrs B would be absolved from a charge of adultery but Mr. A would be liable for adultery. In Mrs B's case, she did not consent while in Mr. A's case, he was voluntary.

It has also been asked whether foreplay amounts to adultery. It has been that that would still not be a case for adultery as there has been no penetration of the female by the male organ- **DENNIS V DENNIS (1995).**

It has also been asked what would be the case if a condom were used, and it has been held that as long as there is penetration, that would be adultery. In **DENNIS V DENNIS (1995) 2 AER pg51**, the man was impotent and could not make a

penetration. It was held that there was no adultery.

Locally also, there is the case of **TUBOKU-METZEBER (1967).** Here, the woman wrote letter to a love stating that she thought of him. The court said that masturbation was not sufficient for adultery and that masturbation is just a state of mind. However, the letters found that she had an inclination for sex.

Features Of Adultery

Inclination and Opportunity:

In order to prove adultery, a party must prove that there was inclination and opportunity. It is never easy to catch adulterers red-handed. Hence, inclination and opportunity must be proved.

In the case of **ROSS V ELLISON**, the husband and wife were living apart but make visits to each other occasionally. The co-respondent in this matter was met in America when the husband was visiting. He behaved affectionately with the co-respondent and he was a friend of the lady's family. They both travelled to Africa and shared the same bed in a hotel. In this case, it was held that there was no inclination for adultery.

Another case is **WILLIAMS V PINEDALEY 1961 1 SLLR @pg92**. Here, the court found there was evidence of opportunity but doubted if there was inclination. In this case, the co-respondent was found leaving the room where the woman was with his flack unbuttoned and what looked like semen was seen on the flack of his trousers. The respondent admitted that there had been sexual intercourse but the co-respondent denied. The court said that that may be the case but the burden of proof was on the petitioner. The court said though there was no evidence of inclination, there was opportunity and followed what was stated in **GOWER V GOWER** that an inference can be drawn from the circumstances.

Proof Of Adultery:

The onus is on the petitioner to prove that the respondent had committed adultery and the standard required is proof on a balance of probabilities. Unless the adulterer confesses, the problems of proof may be difficult. Adultery is usually not committed in front of witnesses and so it must be inferred from evidence of opportunity and inclination.

However, adultery may be proved in certain cases by the birth of a child. But practically, in all contested cases, the court would have to infer adultery from circumstantial evidence. In **GOWER V GOWER**, the parties had been separated with the wife living with another man and sharing the same bed. Here, there is opportunity but there should be evidence of inclination. The court said it could be inferred.

Section 6(1) of Cap 102 of the Laws of Sierra Leone provides that the co-respondent must always be given an opportunity to clear himself or herself because the question of opportunity and inclination are rebuttable. The argument may come up that there was inclination but no opportunity. It may all depend on the circumstances of the case.

Rebuttal Of Opportunity And Inclination:

Opportunity can be rebuttable. For example, where you are staying next door to

somebody that you have an inclination for but there was no opportunity for sex. But where you find the parties in the same bed, there is opportunity but you must have evidence of inclination. Inclination is state of mind and it is difficult to prove or rebut.

Opportunity I whether the circumstances which one found oneself is such that it is possible to have sex. It is rebuttable because you can deny it. The question of inclination and opportunity is invariably presumptive and was depicted in the case of **TENGBEH V TEGBEH & OTHER (1987).** In this case, there was evidence that whenever the husband travelled, the other party visited the house in his absence. The husband did not know the other party and the wife used to carry food for the other party in his absence. Words got to the husband that there was an illicit affair between the wife and the other party. The husband took divorce proceedings against the wife for adultery. The watchman gave evidence that on a particular night when the husband was away, he happened to go upstairs where he found the respondent and co-respondent watching pornography. The judge said that there was adultery.

Another school of thought disagrees with the decision of the judge because watching pornography does not necessarily implies that sex could follow.

Another case is **GEORGE V GEORGE (1970-1971)** AER SL Series @pg1. The court in that case said that in adultery cases, the evidence of the petitioner need to be corroborated by a witness or witnesses, or should be strong evidence. Here, the petitioner was suspicious of an adulterous conduct. The respondent and co-respondent were in a room. The petitioner took a table, stood on it and was able to see through a gap between the ceiling and wall and found that the respondent and co-respondent were having sex. The court found that there was adultery.

Damages For Adultery:

What happens in adultery cases lead to damages on the part of the co-respondent. This would be damages for the breach of contract but the award of damages is not punitive but compensatory.

This was established in the case of **JAFFA V JAFFA (1966).** There is a similar concept in customary marriages where the defendant pays what is known as 'Woman Damages'. The local court would summon the co-respondent for woman damage for he has trespassed on the property right of the woman as customarily, the woman is regarded as the property of the husband.

Birth Of Child: Evidence Of Adultery:

There may be instances of which the birth of a child would be evidence of adultery because at common law, a child born to a couple is their child. But it is rebuttable because proof of paternity is conclusive as to it being their child. But prima facie, a child born to a couple is their child.

The case for this is **PRESTON-JONES V PRESTON-JONES (1951) AC** 391. The husband was abroad for a period of 6-12 months before the wife had a child. The court considered the medical standards and looked at the period of gestation. There was no evidence that the wife had extra-marital relationship. She was known to be hardworking and responsible but medical evidence led to the conclusion that the husband could not be the father.

In the case of **JACKSON V JACKSON (1960**), the wife had refused to enter the name of the husband or even the co-respondent's who had been cited on the birth

certificate. The court decided that that was evidence of adultery. However, this decision could be questionable as there may be situations where the relationship had gone sour with the husband so much so that the wife would not want the husband's name on the child's birth certificate. But this could create room for suspicions.