



Summer 1993

## Tort Law - Intentional Infliction of Emotional Distress in the Marital Context: *Hakkila v. Hakkila*

Heather S. Call

### Recommended Citation

Heather S. Call, *Tort Law - Intentional Infliction of Emotional Distress in the Marital Context: Hakkila v. Hakkila*, 23 N.M. L. Rev. 387 (1993).

Available at: <https://digitalrepository.unm.edu/nmlr/vol23/iss2/15>

TORT LAW—Intentional Infliction of  
Emotional Distress in the Marital Context:  
*Hakkila v. Hakkila*

I. INTRODUCTION

In *Hakkila v. Hakkila*,<sup>1</sup> the New Mexico Court of Appeals for the first time confronted the issue of the propriety of an action for intentional infliction of emotional distress brought within a divorce proceeding. Although the court refused to permit recovery in this case, it recognized the tort of intentional infliction of emotional distress brought within a marital setting.<sup>2</sup>

II. STATEMENT OF THE CASE<sup>3</sup>

On October 29, 1975, E. Arnold Hakkila and Peggy J. Hakkila were married. Throughout the marriage, Mr. Hakkila assaulted and battered Mrs. Hakkila. On one occasion, he locked her out of the house overnight. He insulted her publicly and demeaned her through remarks regarding her sexuality and competence. Mr. Hakkila also refused to engage in normal marital sexual activity with Mrs. Hakkila.<sup>4</sup>

In February 1985, the couple permanently separated. One month later, Mr. Hakkila filed a petition for dissolution of marriage. Mrs. Hakkila counterclaimed for intentional infliction of emotional distress. The district court entered a judgment for dissolution of marriage and ruled in favor of Mrs. Hakkila on the tort claim.<sup>5</sup> On appeal, the court of appeals reversed the district court's award for the tort claim.<sup>6</sup> The court of appeals held that the husband's conduct lacked the outrageousness required to establish liability for intentional infliction of emotional distress.<sup>7</sup> On June 4, 1991, the of New Mexico Supreme Court denied certiorari.<sup>8</sup>

---

1. 112 N.M. 172, 812 P.2d 1320 (Ct. App.), *cert. denied*, 112 N.M. 77, 811 P.2d 575 (1991).

2. *Id.*

3. See *infra* text accompanying notes 68-72 for a discussion of the appellate court's possible adoption of two versions of facts. Without a reversal of the district court's findings of fact, Judge Hartz possibly developed a different set of facts upon which he based his ruling.

4. *Hakkila*, 112 N.M. at 173, 812 P.2d at 1321.

5. *Id.* The district court found that the "[wife's] emotional and mental health, especially since the parties' separation, has been shown to have been characterized by acute depression and one psychotic episode." *Id.* One psychologist diagnosed the wife "as subject to a borderline personality disorder pre-dating the parties' marriage." *Id.* Another psychologist diagnosed her as "an intellectualizing personality in the early years of her marriage and as suffering from acute depression since approximately 1981." *Id.*

6. *Id.* at 173, 812 P.2d at 1321. The district court also awarded the wife \$26,587.70 for attorney's fees in the divorce proceeding. *Id.* On appeal, the court held that there was an insufficient amount of evidence of misconduct in the litigation that could justify the amount awarded and remanded the issue of attorney's fees. *Id.*

7. *Id.* at 179, 812 P.2d at 575.

8. *Id.* N.M. at 77, 811 P.2d at 575 (1991).

### III. DISCUSSION

#### A. *Intentional Infliction of Emotional Distress in New Mexico*

In 1972, the New Mexico Court of Appeals first recognized the tort of intentional infliction of emotional distress. In *Mantz v. Follingstad*,<sup>9</sup> the court discussed the legal theory of intentional infliction of severe mental suffering or anguish. The plaintiff-patient in *Mantz* filed claims against defendant physician for assault, battery, and negligent medical malpractice.<sup>10</sup> Although the plaintiff stated a legal theory of intentional infliction of severe mental suffering or anguish in the pre-trial order, the district court refused to submit the theory to the jury. The patient appealed.<sup>11</sup>

The court of appeals began its discussion of this new tort theory by referring to the state of Oregon's recognition of this tort.<sup>12</sup> In *Rockhill v. Pollard*,<sup>13</sup> a patient sued a doctor for outrageous conduct which caused her severe emotional distress.<sup>14</sup> The Supreme Court of Oregon adopted the position of the Restatement of Torts on intentional infliction of emotional distress which states: "(1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm."<sup>15</sup>

The New Mexico Court of Appeals, in *Mantz*, recognized the Restatement's version of the tort of intentional infliction of emotional distress but found no facts which proved that the defendant intentionally engaged in extreme and outrageous conduct which caused severe emotional distress to the plaintiff.<sup>16</sup> Thus, the court held that the district court properly refused to submit instructions to the jury on this theory.<sup>17</sup> Despite a denial of liability on that particular party's claim, the court of appeals introduced the tort of intentional infliction of emotional distress into New Mexico law.<sup>18</sup>

#### B. *Intentional Infliction of Emotional Distress Situations Recognized in New Mexico*

New Mexico has taken a cautious approach in applying the tort of intentional infliction of emotional distress by permitting recovery of the claim only under a limited number of circumstances. In *Richardson v.*

9. 84 N.M. 473, 505 P.2d 68 (Ct. App. 1972).

10. *Id.* at 476, 505 P.2d at 71.

11. *Id.* at 479-80, 505 P.2d at 74-75.

12. *Id.* at 479, 505 P.2d at 74.

13. 485 P.2d 28 (Or. 1971).

14. *Id.* Plaintiff, her ten month old daughter, and her mother-in-law were injured in an automobile accident. Defendant, the treating physician, failed to examine plaintiff and her mother-in-law, despite visible physical injuries. Defendant also failed to examine the child adequately. In addition to defendant's overall rudeness, he subjected the three patients to sub-zero temperatures when he refused to allow them to wait in his office for a ride. *Id.* at 29-30.

15. *Id.* at 29 (citing RESTATEMENT (SECOND) OF TORTS § 46 (1965)).

16. *Mantz*, 84 N.M. at 480, 505 P.2d at 75.

17. *Id.*

18. *Id.*

*Rutherford*,<sup>19</sup> a ranch owner filed suit against the ranch manager and his family. The manager's wife counterclaimed for intentional infliction of emotional distress, assault, and false imprisonment, claiming that she and her husband were forced to enter into a debt settlement agreement and forced to live in their car because the owner ejected them from the ranch. The court awarded the wife compensatory and punitive damages. However, the damages were unspecified as to whether they were awarded for intentional infliction of emotional distress, assault, or false imprisonment.<sup>20</sup> In *Trujillo v. Puro*,<sup>21</sup> a patient sued her doctor for intentional infliction of emotional distress, claiming that the doctor intentionally made false entries into hospital records.<sup>22</sup> The court of appeals denied the defendant's motion to dismiss for failure to state a claim, thus recognizing her intentional infliction of emotional distress claim as valid.<sup>23</sup>

In several cases, New Mexico courts (and courts applying New Mexico law) have refused to equate a defendant's conduct with extreme and outrageous conduct. For example, in *Dominguez v. Stone*,<sup>24</sup> the defendant made derogatory statements to the plaintiff during a public meeting and asserted that plaintiff was not qualified for her position as director of the town's senior citizen program because she was a Mexican.<sup>25</sup> In *Salazar v. Furrs, Inc.*,<sup>26</sup> defendant terminated the employment of a pregnant employee just short of the vesting of her pension benefits based upon her marriage to a competitor's employee.<sup>27</sup> In *Newberry v. Allied Stores, Inc.*,<sup>28</sup> the employer's agent terminated plaintiff for dishonesty and shouted in the presence of customers that he did not trust plaintiff.<sup>29</sup> In *Sanders v. Lutz*,<sup>30</sup> the defendant provoked the plaintiff in their dispute over an easement despite the defendant's alleged knowledge of plaintiff's stress disorder.<sup>31</sup> In none of these case was outrageous conduct found. These cases illustrate that, although intentional infliction of emotional distress is a recognized tort theory in New Mexico, the courts have refused to apply it liberally, thereby greatly limiting its scope.

### C. Analysis

Prior to *Hakkila*, New Mexico had never recognized the tort of intentional infliction of emotional distress within a marital context. The court followed a logical path of New Mexico law and addressed policy concerns in order to reach its conclusion that the tort of intentional

---

19. 109 N.M. 495, 787 P.2d 414 (1990).

20. *Id.* at 496-97, 787 P.2d at 415-16.

21. 101 N.M. 408, 683 P.2d 963 (Ct. App.), *cert. denied*, 101 N.M. 362, 683 P.2d 44 (1984).

22. *Id.* at 413-14, 683 P.2d at 968-69.

23. *Id.* at 414, 683 P.2d at 969.

24. 97 N.M. 211, 638 P.2d 423 (Ct. App. 1981).

25. *Id.* at 212, 638 P.2d at 424.

26. 629 F. Supp. 1403 (D.N.M. 1986).

27. *Id.* at 1406.

28. 108 N.M. 424, 773 P.2d 1231 (1989).

29. *Id.* at 429, 773 P.2d at 1236.

30. 109 N.M. 193, 784 P.2d 12 (1989).

31. *Id.* at 194, 196, 784 P.2d at 13, 15.

infliction of emotional distress brought in a marital setting, although restricted, is not barred in New Mexico.<sup>32</sup>

Other jurisdictions which have addressed this issue have failed to come to a consensus in their positions.<sup>33</sup> Neighboring states, such as Texas and Colorado, have adopted the position that the existence of a marital relationship does not preclude one spouse from bringing a suit for intentional infliction of emotional harm against the other.<sup>34</sup> Some jurisdictions confronted with this issue have refused to recognize the tort by setting the threshold of outrageousness so high as to bar all suits.<sup>35</sup> The *Hakkila* court acknowledged that this issue has produced a split of authority.<sup>36</sup>

*Hakkila* presented a case of first impression in New Mexico which required the court either to recognize or reject the emotional distress tort in a marital setting.<sup>37</sup> The court successfully sought a compromise between the two extremes by refusing to bar all suits, yet limiting the scope of the tort. The court wisely handled the standard to be applied, yet may have created confusion by including two variant statements of the facts of this case in its application of the facts to the standard. While identifying policy concerns restricting the tort in this context, the court, possibly unintentionally, failed to address adequately the strong policy in support of the recognition of the tort in this context. Yet, the court sufficiently discussed the problem confronted when joining a no-fault divorce proceeding with an action for an intentional tort and suggested that a solution to this dilemma is bifurcation of the claims.<sup>38</sup>

## 1. Standard

The *Hakkila* court initially reviewed the law of intentional infliction of emotional distress outside of the marital context. New Mexico has attempted to clarify the "extreme and outrageous" element of intentional infliction of emotional distress. In *Sanders v. Lutz*,<sup>39</sup> the supreme court

---

32. *Hakkila*, 112 N.M. at 175-77, 812 P.2d at 1323-25.

33. *Id.* at 181, 812 P.2d at 1329.

34. See *Simmons v. Simmons*, 773 P.2d 602 (Colo. Ct. App. 1988) (court allowed spouse to bring a cause of action for intentional infliction of emotional distress but required bifurcation of the tort claim and the marriage dissolution); *Twyman v. Twyman*, 790 S.W.2d 819 (Tex. Ct. App. 1990) (court held that interspousal tort immunity did not bar a separate cause of action for negligent infliction of emotional distress in a divorce suit and refused to follow *Chiles v. Chiles*, 779 S.W.2d 127 (Tex. Ct. App. 1989), which barred a spouse from bringing an action for intentional infliction of emotional distress in a divorce proceeding).

35. See *Whittington v. Whittington*, 766 S.W.2d 73 (Ky. Ct. App. 1989) (court concluded that ordinary fraud and adultery can never rise to the level of outrageousness required for the tort); *Pickering v. Pickering*, 434 N.W.2d 758 (S.D. 1989) (court held that an action for intentional infliction of emotional distress can not be maintained when predicated upon the conduct which led to the dissolution of the marriage).

36. *Hakkila*, 112 N.M. at 178, 812 P.2d at 1326.

37. *Id.* at 175, 812 P.2d at 1323.

38. *Id.* at 178, 181-82, 812 P.2d at 1326, 1329-30.

39. 109 N.M. 193, 784 P.2d 12 (1989).

looked to *Mantz* and the Restatement of Torts for guidance in defining "extreme and outrageous."<sup>40</sup> The court stated that in order to recover for intentional infliction of emotional distress, the plaintiff must show that defendant's conduct was extreme and outrageous as well as done with the intent to cause severe emotional distress.<sup>41</sup> The court used the Restatement of Torts to define extreme and outrageous conduct as "beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable as a civilized community."<sup>42</sup>

Next, the *Hakkila* court identified policy restrictions on the liability for the tort of intentional infliction of emotional distress outside of the marital context.<sup>43</sup> The court acknowledged that intentionally causing emotional harm to another may be justified under certain circumstances<sup>44</sup> and that protected liberty interests preclude otherwise tortious conduct from being actionable.<sup>45</sup> Finally, the court emphasized that requiring that the conduct be extreme and outrageous provides for a greater likelihood that the injury and causation elements of the tort will be met.<sup>46</sup>

Prior to the application of any tort to the marital context, the ability of a spouse to initiate such an action must be addressed. In 1973, New Mexico abolished interspousal immunity for intentional torts in *Flores v. Flores*.<sup>47</sup> In *Flores*, a wife brought an action against her husband for intentionally wounding her with a knife.<sup>48</sup> The *Flores* court began its analysis by stating that New Mexico has no statute which precludes one spouse from bringing suit against the other.<sup>49</sup> The court then went on to hold that one spouse is not immune from liability for torts intentionally committed against the other.<sup>50</sup>

In the 1975 case of *Maestas v. Overton*,<sup>51</sup> the New Mexico Supreme Court abolished interspousal immunity for negligently inflicted torts. The court found no reason to distinguish between interspousal torts intentionally inflicted and those negligently inflicted.<sup>52</sup> Thus, New Mexico

---

40. *Id.* at 196, 784 P.2d at 15.

41. *Id.*

42. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 46 (1965)).

43. *Hakkila*, 112 N.M. at 176, 812 P.2d at 1324.

44. *Id.* Debt collection, cross-examination at trial, and basic training are examples of intentional conduct which causes emotional distress to another, yet is justified. *Id.* (quoting Daniel Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 COLUM. L. REV. 42, 57 (1982)).

45. *Id.* Protected liberty interests include expressing unflattering opinions of others which cause emotional distress. *Id.* (quoting William Prosser, *Insult and Outrage*, 44 CAL. L. REV. 40, 44 (1956)). Likewise, engaging in an extramarital relationship is protected on the basis of liberty interests. *Cf.* *Browning v. Browning*, 584 S.W.2d 406 (Ky. Ct. App. 1979).

46. *Hakkila*, 112 N.M. at 176, 812 P.2d at 1324. Confirmation of each element is the basis of the court's concern. If the conduct does in fact meet the threshold standard, then it will likely also meet these other two elements of the tort.

47. 84 N.M. 601, 506 P.2d 345 (Ct. App. 1973).

48. *Id.* at 602, 506 P.2d at 346.

49. *Id.*

50. *Id.* at 603-04, 506 P.2d at 347-48.

51. 87 N.M. 213, 531 P.2d 947 (1975).

52. *Id.* at 214, 531 P.2d at 948.

provides no immunity from tort liability between spouses for personal torts intentionally or negligently inflicted.<sup>53</sup>

Despite the reaffirmation that spousal immunity is abolished, the *Hakkila* court identified additional concerns which warrant restrictions on the application of the tort to the marital context.<sup>54</sup> Unfortunately, intentional conduct of a spouse which may cause emotional distress to the other is prevalent in our society.<sup>55</sup> Additionally, the bulk of conduct within a marriage is privileged.<sup>56</sup> Not only is interspousal conduct often acceptable despite its destructive impact, but this conduct is in many cases considered private and protected from disclosure.<sup>57</sup>

The court distinguished the tort of intentional infliction of emotional distress within a marital context from other torts that one spouse may bring against the other.<sup>58</sup> For example, an action for battery or a suit for an automobile accident is unlikely to require an inquiry into personal marital matters.<sup>59</sup> Yet an action for intentional infliction of emotional distress against a spouse will invade marital privacy.<sup>60</sup> Furthermore, the causation element of the tort of intentional infliction of emotional distress is extremely difficult to prove because the underlying conduct of the tort is often privileged.<sup>61</sup> In other interspousal tort actions, the causal connection is not as difficult to meet.<sup>62</sup> Lastly, the scope of the tort within a marital context warrants limitations due to the public policy which accompanied New Mexico's adoption of no-fault divorce on the grounds of incompatibility.<sup>63</sup>

Despite some courts' recognition of the emotional distress tort within a marriage, they have failed to articulate a clear standard for liability.<sup>64</sup> New Mexico is no exception to this failure. New Mexico precedent illustrates that courts have been reluctant to define clearly what constitutes

53. *Id.*

54. *Hakkila*, 112 N.M. at 176-77, 812 P.2d at 1324-25.

55. *Id.* at 176, 812 P.2d at 1324. The court recognized that marriages are a common place for intentional infliction of emotional distress. Spouses often argue and one spouse may perceive the other's conduct as reaching the level of extreme and outrageous when in actuality it is not of this degree. *Id.*

56. *Id.* at 177, 812 P.2d at 1325. A spouse's entitlement to engage in free and open communication within a marriage is evidenced by statutory protection from requiring disclosure of this communication if one spouse is a witness in a proceeding. N.M. STAT. ANN. § 38-6-6 (Repl. Pamp. 1987).

57. *Hakkila*, 112 N.M. at 177, 812 P.2d at 1325.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* The difficulty of proving the causal connection in an intramarital action for intentional infliction of emotional distress is contrasted with the manageable task of connecting the underlying conduct of battery of a spouse and the harm inflicted. *Id.* In the battery case, the physical injury may be evident. Yet in the emotional distress case, it may be difficult to determine the cause of the emotional trauma suffered. For example, the emotional injury may have resulted either from the conduct at issue or merely from the divorce itself.

63. *Id.* at 178, 812 P.2d at 1326 (citing N.M. STAT. ANN. § 40-4-1(A) (Repl. Pamp. 1989)); see also *infra* text accompanying notes 75-83.

64. Constance Ward Cole, *Intentional Infliction of Emotional Distress Among Family Members*, 61 DENV. U. L. REV. 553, 562 (1984).

extreme and outrageous conduct.<sup>65</sup> It may be dangerous and unwise to define precisely terms which are more functional if left ambiguous. Pinpointing a definition for extreme and outrageous may broaden or narrow the scope of the tort too much. Whether the facts of a case reach the level of extreme and outrageous must be determined on a case-by-case basis.<sup>66</sup> Thus, the *Hakkila* court's failure to articulate clearly a standard which would provide guidance for subsequent cases may have been purposeful, adhering to the New Mexico precedents in the area of the tort of intentional infliction of emotional distress.

The *Hakkila* court recognized the tort of intentional infliction of emotional distress brought within a divorce proceeding yet precluded recovery in that case.<sup>67</sup> An explanation of the court's refusal to deem the husband's conduct extreme and outrageous may lie in the fact that the court looked not at one set of facts, but at two. In the opinion, the court reprinted some of the district court's findings.<sup>68</sup> The court then reprinted portions of evidence from the record on which the district court based its finding of intentional infliction of emotional distress.<sup>69</sup>

The court essentially took the trial court's findings of fact and diminished their impact. For example, the district court found that "[Husband] on occasions throughout the marriage and continuing until the separation[:] a. assaulted and battered the [wife]."<sup>70</sup> Judge Hartz then reprinted the evidence supporting this finding as summarized in the husband's brief-in-chief: "In late 1984, when wife was pushing her finger in husband's chest, he grabbed her wrist and twisted it severely."<sup>71</sup>

The court then concluded, contrary to the district court's conclusion, that the facts of this case did not reach the level of extreme and outrageous conduct. Yet the inclusion of the two versions of facts creates confusion as to which set of facts the court used. If the court used the trial court's findings of facts, as it should have, critics may suggest that denying recovery was inappropriate. Yet if the court based its ruling upon the version of facts as developed in the husband's brief and as Judge Hartz reprinted, it did so improperly without reversing the district court's findings of fact under the clearly erroneous standard.<sup>72</sup>

---

65. See *supra* text accompanying notes 19-31 for a discussion on New Mexico's treatment of the tort of intentional infliction of emotional distress. Rather than giving a precise definition to "extreme and outrageous," the courts have developed a case-by-case approach.

66. *Id.*

67. *Hakkila*, 112 N.M. at 179, 812 P.2d at 1327.

68. *Id.* at 173, 812 P.2d at 1321. The court began by stating: "Finding No. 22 summarized husband's intentional misconduct . . ." *Id.*

69. *Id.* at 174, 812 P.2d at 1322. The court stated:

The evidence supporting the various findings is summarized in husband's brief-in-chief. Because the summaries are not challenged in the answer brief, we have not independently listened to the multitude of tape recordings of the hearing to check the accuracy of the summaries.

*Id.* at 174 n.1, 812 P.2d at 1322 n.1.

70. *Id.* at 173, 812 P.2d at 1321.

71. *Id.* at 174, 812 P.2d at 1322.

72. N.M. R. Crv. P. 52(B). New Mexico courts have construed the rule to allow an appellate



Reservations in recognizing this tort within the marital context may be justified by the policy concerns articulated by the court. Courts are generally more willing to condemn intrafamilial physical abuse than emotional abuse.<sup>73</sup> The *Hakkila* court sufficiently addressed concerns which warrant restrictions on the tort as applied in this context. Yet the court may have failed to give an equal voice to the countervailing policy concerns which preclude courts from shielding a spouse from liability for harm intentionally inflicted upon the other. For example, Judge Hartz listed the need to protect the privacy interests of the accused spouse as a justification for limiting the scope of the tort in marital contexts.<sup>74</sup> Although fully acknowledging the privacy right of the accused spouse, Judge Hartz failed to acknowledge the right of the abused spouse to use tort law to protect herself from abuse. The court would have benefitted from a more compassionate approach to the topic due to the sensitivity of an action brought by one spouse against the other.

## 2. No-Fault Divorce/Community Property

Additional policy concerns justifying a reluctant recognition of the emotional distress tort brought within a divorce proceeding find root in the adoption of New Mexico's no-fault divorce and community property law.<sup>75</sup> Historically, divorce was grounded in some form of fault on behalf of one or both partners of the marriage.<sup>76</sup> In 1933, New Mexico was the first state to adopt incompatibility as a ground for divorce.<sup>77</sup> Today, New Mexico's statute lists incompatibility first as a ground for dissolution of a marriage.<sup>78</sup>

Although incompatibility is identified as a ground for divorce, actually defining the term is difficult.<sup>79</sup> Irreconcilable differences have been iden-

---

court to reverse a district court's findings of fact only if the appellate court determines that the findings were not supported by substantial evidence. See *Getz v. Equitable Life Assur. Soc. of United States*, 90 N.M. 195, 561 P.2d 468 (N.M.), cert. denied, 434 U.S. 834 (1977).

73. Cole, *supra* note 64, at 559.

74. *Hakkila*, 112 N.M. at 177, 812 P.2d at 1325.

75. See N.M. STAT. ANN. § 40-4-1 (Repl. Pamp. 1992); *id.* § 40-3-8(B).

76. Walter Wadlington, *Divorce Without Fault Without Perjury*, 52 VA. L. REV. 32, 36 (1966).

77. 1933 N.M. Laws ch. 54, § 1(8) (amending 1901 N.M. Laws ch. 62, § 22).

78. N.M. STAT. ANN. § 40-4-1(A) states:

Dissolution of marriage.

On the petition of either party to a marriage, a district court may decree a dissolution of marriage on any of the following grounds:

- A. incompatibility;
- B. cruel and inhumane treatment;
- C. adultery; or
- D. abandonment.

N.M. STAT. ANN. § 40-4-1(A) (Repl. Pamp. 1992). Although New Mexico offers alternatives to incompatibility as grounds for divorce, once the issue of incompatibility is determined, a decree must be entered. See *infra* text accompanying note 82. Thus, in practicality, the remaining grounds play a diminished role to incompatibility.

79. The statute states: "Incompatibility exists when, because of discord or conflict of personalities, the legitimate ends of the marriage relationship are destroyed preventing any reasonable expectation of reconciliation." *Id.* § 40-4-2.

tified as a major factor in determining incompatibility.<sup>80</sup> Nevertheless, "a husband or wife may secure a divorce for incompatibility regardless of whether either, both, or neither were at fault."<sup>81</sup> Additionally, once incompatibility is determined to exist, discretion on the part of the judge no longer plays a role in his decision to grant a divorce.<sup>82</sup> Furthermore, the finding of incompatibility eliminates the right of either party to interject any notions of fault, because fault is of no significance.<sup>83</sup>

Also, New Mexico is one of the nine community property states.<sup>84</sup> Its statute defines community property as "property acquired by either or both spouses during marriage which is not separate property."<sup>85</sup> Upon dissolution of marriage, community property is to be divided as equally as possible.<sup>86</sup> Community property is to be divided fifty-fifty, without regard to fault.<sup>87</sup>

Accordingly, it is inconsistent to join an action for an intentional tort, specifically the tort of intentional infliction of emotional distress, with a no-fault divorce. New Mexico's no-fault divorce statute and rules of community property division preclude inquiry into fault in the marriage.<sup>88</sup> Yet an action for an intentional tort necessarily probes conduct in search of fault. The bases of these two actions are simply inharmonious.

The *Hakkila* court addressed this inherent incompatibility of the joinder of the two claims. Although Judge Hartz, writing the opinion of the court, limited his discussion of this topic, the concurrence addressed this matter more thoroughly.<sup>89</sup> Judge Donnelly recognized that "[t]he problems are compounded where a jury trial is demanded in the trial of the tort claim and where the action for dissolution of marriage also involves a claim of alimony."<sup>90</sup> The concurrence also pointed out that in this particular case, the alimony award appeared to duplicate in part the compensatory damage award for the tort claim.<sup>91</sup> A tort claim may result

---

80. See *State ex rel. DuBois v. Ryan*, 85 N.M. 575, 577, 514 P.2d 851, 853 (1973).

81. *Id.*

82. *Garner v. Garner*, 85 N.M. 324, 512 P.2d 84 (1973). "Our Legislature, acting properly within its powers, has established 'incompatibility' as a ground for divorce and . . . once such a finding is made that it exists, a divorce decree must be entered." *Id.* at 327, 512 P.2d at 87.

83. *DuBois*, 85 N.M. at 577, 514 P.2d at 853.

84. N.M. STAT. ANN. § 40-3-8(B) (Repl. Pamp. 1992). The remaining eight community property states are Arizona, California, Idaho, Louisiana, Nevada, Texas, Washington, and Wisconsin. 15A AM. JUR. 2D, *Community Property*, §§ 1-115 (1978).

85. N.M. STAT. ANN. § 40-3-8(B) (Repl. Pamp. 1992).

86. See *Mitchell v. Mitchell*, 104 N.M. 205, 215, 719 P.2d 432, 442 (Ct. App.), *cert. denied*, 104 N.M. 84, 717 P.2d 60 (1986).

87. *Hakkila*, 112 N.M. at 178, 812 P.2d at 1326 (citing N.M. STAT. ANN. § 40-3-8(B) (Repl. Pamp. 1989)).

88. *Id.* at 177-78, 812 P.2d at 1325-26.

89. *Id.* at 182-83, 812 P.2d at 1330-31. Interestingly, Judge Chavez concurred with Judge Donnelly's opinion rather than the majority opinion written by Judge Hartz. Thus, the concurrence has the effect of the majority. The majority and concurrence are fundamentally the same, with slight deviations primarily in Judge Donnelly's stress on the incompatibility of the joinder of the two suits and the procedure involved.

90. *Id.* at 182, 812 P.2d at 1330.

91. *Id.*

in the award of compensatory damages which collide with the marriage dissolution settlement.<sup>92</sup> The *Hakkila* case illustrates the overlapping of the awards of alimony and compensatory damages.<sup>93</sup> A solution to this dilemma may lie in a bifurcation of the tort claim and the divorce proceeding.<sup>94</sup>

### 3. Procedural Problems

Judge Donnelly suggested that the solution to the problem of bringing the two actions in one suit is bifurcation of the claims.<sup>95</sup> Acknowledging that the rules of civil procedure provide for compulsory and permissive joinder of claims,<sup>96</sup> the concurrence perceived the joinder of a tort claim with an action for dissolution of marriage as permissible.<sup>97</sup> Yet the rules also provide for separate trials through the bifurcation of claims.<sup>98</sup> The concurrence also cited the Colorado approach in handling the tort of emotional distress arising out of the conduct within a marriage.<sup>99</sup> The Colorado Court of Appeals concluded that "sound policy considerations preclude either permissive or compulsory joinder of interspousal tort claims, or non-related contract claims, with dissolution of marriage proceedings," and that bifurcation is necessary.<sup>100</sup>

Although the filing of the tort claim separate from and after the divorce proceeding will not likely produce *res judicata*,<sup>101</sup> the conservative option of filing a compulsory counterclaim is advised. After filing the counterclaim, the spouse should either note that bifurcation is preferred,<sup>102</sup>

92. *Id.* If the tort claim and the divorce action are brought in one suit, the award of compensatory damages may be confused with the award of alimony. The community property would have to be divided prior to the award of damages for a tort claim to ensure that the spouse prevailing in the tort action is not awarded damages from a portion of his or her own community property.

93. *Id.* The district court awarded the wife alimony of \$1,050 per month based upon the court's finding that this amount would meet the wife's economic needs. *Id.* Yet "[t]he alimony award appears to duplicate in part the compensatory damage award granted to wife on her claim of intentional infliction of emotional distress." *Id.* The district court also awarded the wife \$5,000 for future medical expenses and awarded damages for her loss of earnings during the marriage. *Id.* Under community property law, however, the earnings of a spouse are presumed to be community property. *Id.*

94. *Id.* at 183, 812 P.2d at 1331.

95. *Id.* (Donnelly, J., concurring).

96. See N.M. R. Civ. P. 1-013(A), (B), & 1-018(A).

97. *Hakkila*, 112 N.M. at 181, 812 P.2d at 1329.

98. N.M. R. Civ. P. 1-042(B).

99. *Hakkila*, 112 N.M. at 181, 812 P.2d at 1329 (citing *Simmons v. Simmons*, 773 P.2d 602 (Colo. Ct. App. 1988)).

100. *Simmons*, 773 P.2d at 605.

101. New Mexico identifies the elements of *res judicata* as: (1) parties same or in privity; (2) cause of action same; (3) final judgment; (4) on the merits. See *Three Rivers Land Co. v. Maddoux*, 98 N.M. 690, 694, 652 P.2d 240, 244 (1982); *Board of City Commissioners v. City of Las Vegas*, 95 N.M. 387, 388, 622 P.2d 695, 696 (1980); *C & H Constr. & Paving Co. v. Citizens Bank*, 93 N.M. 150, 160, 597 P.2d 1190, 1200 (Ct. App. 1979). Under this test, the tort action will not likely be barred for failure to bring it in the divorce proceeding because the two do not constitute a convenient trial unit and the causes of action are not the same. *RESTATEMENT (SECOND) OF JUDGMENTS* § 24(2) (1982).

102. *Hakkila*, 112 N.M. at 183, 812 P.2d at 1331.

or should seek a dismissal without prejudice and file later without fear of *res judicata*.<sup>103</sup> If faced with the uncertainty of potential *res judicata* impact, the spouse should file the counterclaim.

If a spouse files for divorce and then later attempts to bring an intentional tort action without previously having sought a bifurcation of the claims, the party will not likely be troubled with issue preclusion. Issues will likely escape collateral estoppel.<sup>104</sup> A concession of no-fault in a divorce proceeding by the spouse initiating a tort action will not shield the other spouse from liability because the issue of fault was not actually litigated in the divorce proceeding. Thus, collateral estoppel does not appear to be a problem if a tort claim arising out of the conduct of a marriage is initiated subsequent to the divorce proceeding, regardless of whether the party sought a bifurcation of the claims.<sup>105</sup> Nevertheless, bifurcation of the claims appears to resolve many of the problems which arise in bringing these two incompatible claims together.

#### IV. CONCLUSION

Although the *Hakkila* court allowed for emotional distress claims to be brought within the marital setting, it may have precluded future claims with similar facts from recovery by barring recovery under these facts. This may be inappropriate if the court based its conclusion upon its version of facts as summarized in the husband's brief. Furthermore, the court's confusing use of the facts may cause variant results in all intentional infliction of emotional distress actions which are on appeal. Appellate opinions may follow the example of this case and feel free to review the district court's findings of fact in addition to its own interpretation of these facts without reversing the former. Still, the court eloquently introduced the tort of intentional infliction of emotional distress into New Mexico while adhering to New Mexico courts' treatment of this tort in other contexts.

HEATHER S. CALL

---

103. New Mexico courts have recognized an exception to the application of *res judicata* through their adoption of the RESTATEMENT (SECOND) OF JUDGMENTS section 26, which allows the judge in the first action to "expressly [reserve] the plaintiff's right to maintain the second action." *Three Rivers Land Co.*, 98 N.M. at 696, 652 P.2d at 246 (quoting the RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(b) (1982)).

104. New Mexico identifies the elements of the modern approach to collateral estoppel as: (1) non-mutual party or privity; (2) different cause of action; (3) issue actually determined in the first suit; (4) issue necessarily determined in the first suit; (5) judgment/decision final in the first suit. See *Silva v. State*, 106 N.M. 472, 745 P.2d 380 (1987).

105. Dissolution of marriage, community property, and alimony may all be granted without inquiry of fault and do not require actual litigation. See N.M. STAT. ANN. § 40-4-1 (Repl. Pamp. 1989); N.M. STAT. ANN. § 40-3-8(B) (Cum. Supp. 1992); *Brister v. Brister*, 92 N.M. 711, 715, 594 P.2d 1167, 1171 (1979). Yet determination of child custody may require litigation of issues and the court may issue some findings. See N.M. STAT. ANN. § 40-4-9 (Repl. Pamp. 1989). These findings may potentially have collateral estoppel impact upon a tort claim arising out of the marriage which is litigated subsequent to the divorce and child custody proceedings. Thus, collateral estoppel escape is not guaranteed.