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Biagio Andò

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INTERSPOUSAL CLAIMS AT THE CROSSROADS OF TORT LAW AND FAMILY LAW: THE DELICATE BALANCE BETWEEN FAMILY AND INDIVIDUAL

Biagio Andò*

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ABSTRACT

This paper discusses the solutions adopted by Italian law (on which this study is mainly focused) and U.S. law as to the issue of recoverability of non-monetary damages suffered by one spouse for the intentional tortious conduct of the other. These suits are usually raised within the divorce proceeding and are grounded in the Italian law on the breach of conjugal duties.

In Italian law, notwithstanding the absence of specific provisions ruling this issue, and therefore the application of the general provisions on tort law not being barred, there was in the past a sort of immunity of family from the operation of tort law

* Lecturer in Private Comparative Law, Faculty of Political Sciences, University of Catania.

rules, resulting from the almost total absence of lawsuits in this field.

The unfavourable Italian approach towards admitting marital torts had its background in custom, and could be easily explained through the proverb “you shouldn’t wash your dirty linen in public.”

The immunity rule was not only typical to the Italian legal tradition, but was present also in American law. Unlike Italian law, in U.S. the immunity rule was rooted in common law (in accordance with the English legal tradition).

The transformation of the traditional family model occurred in the western world, characterized by a shift from the primacy of the family unit upon the single member to the primary relevance of the individuals within the family, together with a wider recoverability of non-pecuniary losses, paved the way for the acknowledgement of interspousal torts in both the legal systems.

The modern approach to the issue adopted in the Italian legal system will be illustrated mainly through judgments, while in U.S. the overcoming in most states of the traditional immunity rule (occurred through judicial rulings or by legislation) will be explained mainly through references to scholarship.

This survey, rather than suggesting new approaches to interspousal tort liability aims at assessing differences and similarities on the ground of operational rules used in a field—that of family law—which in the past comparative law enquiries did not delve into because of its alleged ‘exceptionalism.’

I. INTRODUCTION

Family law for long time has been placed at the margin by comparative lawyers interested in the processes of unification and harmonization of legal rules aimed at ensuring the functioning of market. It was ‘commonly thought that family law was too much the product of each nation’s distinctive culture and history to be a promising subject for comparison.’¹ Since family was conceived

1. M.A. GLENDON, Introduction; *Family Law in a Time of Turbulence*, in 4 *Int. Enc. Comp. Law*, Tubingen-Leiden-Boston, 2006, at pp. 6-7. On the possibility of comparison of family law regimes, see also H.D. KRAUSE, *Comparative Family Law. Past Traditions Battle Future Trends—and vice versa*, in *The Oxford Handbook of Comparative Law* 1099, 1101 (M. REIMANN & R.

outside the area of 'patrimonial law' grounded on law of the market, family law was considered as 'exceptional,' and not harmonizable. The rise in western legal systems of the ideologies about gender equality and individual rights in family law matters made possible a gradual convergence of family law regimes, and the overcoming of the idea of family as 'exceptional.'²

The operation of tort law in the realm of family may be considered as a significant example of the emergence of the individual within this ambit. Tort law rules may arise within family in different ways: a) the harmful act can be committed within family, but the effects can be suffered at the hands of a third person not belonging to family; b) the act can be committed by a third and fall on a person belonging to the family (in this case, two different specific damages may occur, one suffered by the victim and one by his/her family); c) or it can be committed by a family member against another family member.

In this last group of cases we find: 1) torts committed by parents towards children; 2) torts committed by children towards parents; 3) interspousal torts. In this third case an issue arises as to if and when a spouse should be held liable in tort for conduct that simultaneously constitutes both an infringement of spousal duties³ (with the consequent operation of specific family law remedies)⁴

ZIMMERMANN eds., Oxford, 2006).

2. F.G. NICOLA. *Family Law Exceptionalism in Comparative Law*, 58 *Am. J. Comp. L.* 777 (2010).

3. In this regard it is worth mentioning sec.143, subsec. 2, of the Italian Civil Code (hereinafter, c.c.) which states the spousal duties of fidelity, of moral support and financial aid, cooperation in the interest of family, cohabitation: "dal matrimonio deriva l'obbligo reciproco alla fedeltà, all'assistenza morale e materiale, alla collaborazione nell'interesse della famiglia e alla coabitazione."

4. Sec. 151 subs. 2 c.c. allows separation when living together is unbearable or can cause a prejudice to the bringing up of children ("la separazione può essere chiesta quando si verificano, anche indipendentemente dalla volontà di uno o entrambi i coniugi, fatti tali da rendere intollerabile la prosecuzione della convivenza o da recare grave pregiudizio alla educazione della prole"), and empowers the judge to state if separation can be ascribed to the conduct of one of the spouses ("il giudice, pronunciando la separazione, dichiara, ove ne ricorrano le circostanze, e ne sia richiesto, a quale dei coniugi sia addebitabile la separazione, in considerazione del suo comportamento contrario ai doveri che derivano dal matrimonio"). In this latter case there are two consequences: one, the loss of rights of succession; the other, the loss of the right to maintenance by the spouse to whose fault separation can be ascribed. He (or she) has the only right to alimony when there are the conditions fixed by sec. 439 c.c. There is no express mention in those provisions to the possibility of tort claims for the spouse who had suffered damage for the infringement of the

and a civil wrong. In the Italian legal system, one has to consider the general clause of sec. 2043 c.c., the most important provision among those of Civil Code dealing with tort law, which allows damages when the victim suffers an “unjust damage” from an “intentional or negligent fact” of the wrong-doer.⁵

The cases under c) can be labelled as “intra-family torts.”⁶ In contradistinction to other torts, in which the wrongdoer and the victim have no relationship (prior to damage committal), in the “intra-family torts” damage is strictly tied to family relationship and occurs because there is this kind of relationship.⁷

Also if the topic of marital torts has been tackled in the past,⁸ nowadays it assumes a greater relevance in Italian law for many reasons. Firstly, the area of relevance of non-monetary damages (connected to the subject matter under consideration) has significantly grown;⁹ secondly, statutory hypotheses of tort law

spousal duties by the other.

5. Sec. 2043 c.c. provides that “qualunque fatto doloso o colposo che cagiona ad altri un danno ingiusto, obbliga colui che ha commesso il fatto a risarcire il danno” (“a fact committed with bad faith or negligence producing to someone an unjust damage, obliges the damaging person to compensate the victim for the loss”). Within this general provision, the most significant element is definitely that of unjustness of damage, which in fact can be considered the “architrave” of tortious liability: it is not sufficient that a damage occurs, but it has also to be acknowledged as unjust. This element therefore has the function of “filter” among those damage claims that can be allowed and those that cannot; the meaning of “unjust” is not cleared by the Civil Code, which does not provide a definition of it. The issue of ‘unjustness’ is one of the most controversial since the Italian Civil Code has been enacted. Literature on the topic is immense. A thorough analysis of the issue is not possible in this paper. I will confine myself to remind the two main positions as to the meaning of unjustness of the damage supported by scholars and courts. The first, rooted in the tradition, interprets art. 2043 as a “secondary” provision, in the sense that a damage can be qualified “unjust” only when a provision (other than sec. 2043) acknowledges the right or interest infringed as relevant for law; the second interprets the provision as a primary one (or “general clause”) in the sense that the same sec. 2043 directly selects interests and rights relevant at law (a clear and concise explanation of the differences between these two opinions can be found in C. SCOGNAMIGLIO, *Illecito e responsabilità civile*, I, in *Tratt. dir. priv.*, vol. X, Torino, 2005, pp.1-76.

6. See S. PATTI, “Intra- family torts,” in *Int. Enc. Comp. law*, vol. IV, ch. 9, Tubingen-Leiden-Boston, 3 (1998).

7. G. FERRANDO, *Rapporti familiari e responsabilità civile*, in P. CENDON (ed.), *Persona e danno*, Milano, 2004, 3 at 2780, 2788.

8. *Ex multis*, P. RESCIGNO, *Immunità e privilegio*, in *Riv. dir. civ.*, 1961, 1, p. 415, published also in *Persona e comunità*, Bologna, 1966, p. 414; S. PATTI, *Famiglia e responsabilità civile*, Milano, 1984.

9. I will come back to this topic *infra*.

have been introduced in the field of family law;¹⁰ finally, changes in family behaviour and new ideas about family life have brought about an evolutionary process of “privatization” concerning the interests of the single family member.¹¹

All these factors have played an important role in the upheaval of the traditional opinion¹² which was unfavourable towards admitting the enforcement of tort liability rules in the realm of

10. A clear example of that is the new provision of sec.709ter of the Italian Code of Civil Procedure (c.p.c.) in which it is written that in case of serious breaches or acts causing prejudice to the minor or interfere with the correct performance of the foster care (“in caso di gravi inadempienze o di atti che comunque arrechino pregiudizio al minore od ostacolino il corretto svolgimento delle modalità dell’affidamento”), the judge can admit compensation of damage suffered by children under age and caused by one of their parents, or from one spouse towards the other. The meaning of this statutory hypothesis within the tortious liability system is discussed: according to one opinion, art.709ter can be drawn within the framework of art. 2043 and 2059 of the Italian Civil Code, in the sense that the damage dealt with in the provision of the Code of Civil Procedure has to be treated in the light of the general principles of tort law, whereas according to a different opinion it should be treated as a case in which there is exceptional ground for the relevance of punitive damages (which are not generally acknowledged in Italian law). The difference among these two positions is perceivable on the ground of the conditions for the recoverability of the damage (the first position provides for damage relevant under art.709ter much stricter bounds of relevance of damage than those created by the second one). On the issue of the relationship between of art. 709ter c.p.c. and the general rules of tort liability, see, among many judgements, Trib. Messina, April 5, 2007 in *Fam. dir.*, 2008, I, 60 with a comment of E. LA ROSA; App. Firenze, Aug. 29, 2007 Decr., in *Danno e resp.*, 2008, 7, 799, with a comment of A. FIGONE; Cass. civ., Oct. 21, 2009, n. 22238; Trib. Varese, May 7, 2010, Ord., in www.personaedanno.it/cms/data/articoli/018114.aspx; further informations on the issues raised by this provision can be found in A. GRECO, *Affido condiviso (L. n. 54/2006) e ipotesi di responsabilità civile*, in *Resp. civ. prev.*, 2006, 6, p. 1178; A. D’ANGELO, *Il risarcimento del danno come sanzione? Alcune riflessioni sul nuovo art.709-ter c.p.c.*, in *Famiglia*, 2006, I, p. 1031; G. FERRANDO, *Responsabilità civile e rapporti familiari alla luce della l. n.54/2006*, in *Fam. pers. succ.*, 2007, 7, p. 590; M. PALADINI, *Responsabilità civile nella famiglia: verso i danni punitivi*, *Resp. civ. prev.*, 2007, 10, p. 2005; G. CASABURI, *Art. 709ter c.p.c.: una prima applicazione giurisprudenziale*, in *Giur. merito*, 2007, 10, p. 2528; G. FREZZA, *Appunti e spunti sull’art. 709-ter c.p.c.*, in *Giust. civ.*, 2009, 1, p. 29; G. SPOTO, *Dalla responsabilità civile alle misure coercitive indirette per adempiere agli obblighi familiari*, in *Dir. fam.*, 2010, 2, p. 910; C. MIGHELA, *Il risarcimento del danno derivante dal cd. illecito endofamiliare*, in *Resp. civ. prev.*, 2010, 1, p. 44.

11. In the past a well-established opinion was that family cannot be ruled from law (according to A.C. JEMOLO, *La famiglia e il diritto*, in *Ann. Fac. Giur. Catania*, 1948, 2, at p. 38, “family is an island which the ocean of the law barely touches;” in this sense, P. STEIN–J. SHAND, *Legal values in Western society* Edinburgh, 1974, p. 23.

12. On this issue I will come back *infra*.

family.¹³

This study is organised as follows: chapter 2 analyses the traditional approach followed in Italy and England unfavourable to the protection in tort of the spouse for the wrongful conduct of the other due to the existence of an ‘immunity’ rule; chapter 3 examines the progressive relinquishment of this immunity rule under Italian and U.S. law; chapter 4 focuses on the current approach to interspousal torts adopted in some recent Italian cases urged by the application of the doctrine of fundamental rights of the individual in the realm of family. In chapter 5, some conclusions will be outlined with reference to the respective ambits of operation of family law remedies and tort law rules. Furthermore, on public policy ground, the suitability of tort law as a general remedy for the protection of individuals within the family unit will be discussed.

II. TORT LIABILITY RULES AND FAMILY BETWEEN IMMUNITY AND PRIVILEGE. THE TRADITIONAL RATIONALE IN CASE OF INFRINGEMENT OF INTERSPOUSAL DUTIES: COMPARISON OF ITALIAN AND AMERICAN SOLUTIONS

According to the traditional view, the family and liability in tort cannot be intermingled. The family was to be considered a separate area characterized by immunity and privilege and dominated by *pater familias*, who was the guardian of family unity. The background to this view is to be found in the traditional conception of the family. Notwithstanding the absence of special rules or of a different *modus operandi* of the rules in tort liability, tort law was simply not applied because lawsuits were not even started when the damaging and the damaged persons were part of the same family unit. This was because there was widespread resistance to the penetration of tort law general rules within the realm of the family, whose harmony would have been put at risk by the Courts. The unity of the family was valued higher than the interests of the single members of the family and was to be protected from intra-

13. See P. MOROZZO DELLA ROCCA, *Violazione dei doveri coniugali: immunità o responsabilità?*, in *Riv. crit. dir. priv.*, 1988, at 605, who placed family “tra il pubblico ed il privato, tra la sfera della morale e quella del diritto, tra la spontaneità dei sentimenti e la giuridificazione dei rapporti.”

family law suits.¹⁴ Therefore the immunity operated *de facto*, not being provided for *de iure*.

Some scholars did not find persuasive this explanation of the reasons of the immunity of family from tort liability rules rooted on social culture.¹⁵ The operation of an immunity rule in the case of harmful conduct producing financial harm could be explained with the fact that the victim was otherwise protected.

The duty of the husband to maintain his wife was, in the past, wide enough to cover every financial need of the latter and included all the costs, such as medical expenses, of a damage caused by his wrongful conduct. Compensation was thereby unnecessary. Furthermore, it was stressed that holding the wrongdoer liable for a sum of money would not make sense since the wrongful conduct did not cause damage only to the person directly affected, but also to the whole family including the wrongdoer when the victim of the tort could not work within the family because of the harmful conduct.¹⁶

The ‘hierarchical’ model lay at the basis of this approach.

For this model (that has been called ‘institutional’),¹⁷ the family was the basic “cell” of society, based on the status of its

14. D. BARBERO, *Sistema del diritto privato italiano*, Torino, 1962, at p.566, supports this position when he states that family law has “una funzione ultraindividuale, ultraegoistica ed eminentemente sociale, in cui lo stesso dato egoistico viene assunto e tutelato non per sé, ma per essere elevato a strumento di utilità e di benessere per tutti.” According to this author, however, Family law is not “una branca dello stesso *diritto pubblico*, ma tutt’al più, e questo sì, un sistema di norme preminentemente *di ordine pubblico*” (at 568).

15. See P. RESCIGNO, *Immunità e privilegio*, *supra* note 8, at 415: “l’esigenza di non turbare la pace familiare non giustifica il rifiuto dell’azione proposta dopo il divorzio per un danno subito durante il matrimonio.”

16. *Id.* at 416-417.

17. This model lies at the basis of the Italian Civil Code of ‘42. These provisions are the same of those included in Civil Code of 1865, notwithstanding the relevant social changes occurred between the two codes. Infact, the “Relazione sul progetto preliminare” admits that “pur modificati in certa misura i costumi e mutate le condizioni sociali, non si è ravvisata l’opportunità di modificare in alcuna guisa la fondamentale disciplina dei rapporti fra coniugi [...]. Ogni particolare atteggiamento che sia più confacente ai bisogni ed ai costumi dei tempi, e soprattutto le conseguenze del fenomeno del lavoro della donna, è perfettamente compatibile con questa fondamentale disciplina della famiglia, e senza una precisa necessità non sono da modificare le formule che hanno ormai il prestigio e la forza di una tradizione” (this passage is quoted in A. SPANGARO, *La responsabilità per violazione dei doveri coniugali*, in M. SESTA ed., *La responsabilità nelle relazioni familiari*, Torino, 2008, p. 81 fn. 17).

members.¹⁸ This latter served as a link between the family and the legal system, in that it had the function to govern rights and duties among family members. From this premise many corollaries follow.¹⁹ Family bonds could not be ruled through agreements, the only cause of marital dissolution could be death and the interests of single family members were considered as subordinate to the “public” interest of the unity of family.²⁰ The principle of the unity of the family and the dominance of the *pater familias* aimed at satisfying the need of protection of family patrimony.

This immunity rule historically represented an obstacle to the enforcement of general principles of law, or rather private law,²¹ while the operation of criminal law rules was admitted,²² and, consequently, of tort liability rules.

Scholars have looked for some theoretical arguments appropriate to lending a somewhat legal grounding to the immunity rule.²³ It has been said that family and liability in tort have two

18. M.R. MARELLA, *La contrattualizzazione delle relazioni di coppia. Appunti per una rilettura*, in *Riv. crit. dir. priv.*, 2003, 1, p. 57: “lo status costituiva una cerniera fondamentale fra famiglia ed ordinamento, assicurando a quest’ultimo lo strumento attraverso il quale modellare la struttura della prima. Nella logica dello status diventava centrale la posizione di un soggetto nei confronti di altri soggetti considerati non come singoli, ma come appartenenti ad una collettività organizzata, una posizione che viene intesa non tanto come somma di poteri che l’ordinamento riconosce al singolo, ma come presupposto di tutta una serie di diritti, obblighi e rapporti che possono crearsi fra i componenti della collettività” (at 74, fn. 16).

19. See A. ZOPPINI, *L’autonomia privata nel diritto di famiglia. Sessanta anni dopo*, in *Riv. dir. civ.*, 2002, 2, at p. 215.

20. A. CICU, *Principii generali del diritto di famiglia*, in *Riv. trim. dir. proc. civ.*, 1955, p. 1. For a different view on these issues, P. BARCELLONA, *Famiglia (dir. civ.)*, in *Enc. dir.*, XVI, 1967, at pp. 785-86.

21. A. CICU *supra* note 20, at 12; P. POLLICE, *Il difficile rapporto nel diritto di famiglia tra istanza individuale e interesse “pubblico”*, in *Riv. dir. pubbl. sc. pol.*, 2000, 2, p. 203; S. PATTI, *Famiglia e responsabilità civile*, *supra* note 8, at 3, observes that the existence of a family bond has been seen as a hurdle to the enforcement of commonly applied rules and an incentive to the creation of specific rules: “tenui dati normativi e, soprattutto, decisioni più o meno numerose [...] inducono [...] a pensare che l’appartenenza dei protagonisti dell’illecito ad un gruppo familiare determini un diverso modo di operare delle regole sulla responsabilità civile, o la disapplicazione delle regole stesse o, ancora, l’applicazione di una regola particolare.”

22. S. PATTI, *Famiglia e responsabilità civile*, *supra* note 8, at 32 remembers that criminal law applied to family when “la gravità del fatto faceva prevalere l’interesse pubblicistico alla repressione ed alla punizione del responsabile rispetto all’interesse [...] alla tutela della sfera privata della famiglia.”

23. On this issue, see P. CENDON, *Profili generali degli illeciti tra familiari: famiglia e responsabilità*, in R.TORINO (ed.), *Illeciti tra familiari*,

distinct languages;²⁴ that family law remedies do not admit the enforcement of tort liability rules, since the first are alternative to the second according to the Roman law principle ‘*inclusio unius, exclusio alterius*’; that spousal duties do not have the nature of legal obligations; that liability would be an incentive to actual family breakdown. However, these arguments look like attempts to find *ex post* a rationale to immunity rule.

The unfavourable approach towards the operation of tort law in this field, and in particular within the marital relationship, adopted in the past times is not an Italian peculiarity. To realise that, it is sufficient to compare the restrictive solutions adopted in past times in Italy as to the operation of tort law rules in the field of family with the very similar ones experienced in legal traditions under many aspects significantly different, such as the English and the American one.²⁵

This similarity among legal systems that are deeply different could find an easy explanation in the fact that they share the same social model of family. Although it could be true, this apparent similarity, however, needs to be more carefully considered.

If an immunity rule could be found in common law systems, the rationale for it in these latter seems to be different from that lying at the basis of the Italian rule.

It was in fact rooted in law, rather than in social culture.²⁶ There were several legal hurdles to the the operation of tort liability in the domain of the ‘interspousal’ relationship, flowing, as it will be clarified, by the special regime concerning property and legal capacity of married women.²⁷ In the common-law systems, in fact, in the past a spouse could not seek reparation for the prejudice suffered as a result of the illegal acts of the other because of the

violenza domestica e risarcimento del danno, 6-8, Milano, 2006.

24. *Id.* at 6: “refrattaria già di suo al tocco spigoloso del diritto, la famiglia costituirebbe [...] una sorta di isola nel mare, poco adatta a sopportare il contatto con presenze invasive come quella dell’illecito. Troppo grande la distanza fra il carattere (lieve, vaporoso) degli intrecci domestici e il taglio (pragmatico, semplificatorio) della responsabilità civile.”

25. References to English law will be limited as to the origins of the immunity rule.

26. On this point, see S. PATTI, *supra* note 6.

27. In this regard, for references in Italian literature, see S. PATTI, *supra* note 9 at 26-30; S. PATTI, *supra* note 8; R. TORINO, *Responsabilità per illeciti tra familiari e rimedi contro la violenza domestica in Inghilterra*, in *Illeciti tra familiari*, cit., 151; CLERK & LINDSELL, *On Torts*, London, 2000, p. 187.

doctrine of *unity of spouses*. According to this doctrine, marriage produced a merger of the legal identity of spouses, who were considered at law as one entity, “and that ‘one’ was the husband who acted as ‘guardian’ for the wife.”²⁸ Since the doctrine of unity is of the highest importance for the understanding of the rationale of the immunity from tortious conducts perpetrated against the spouse, brief considerations have to be done as to it.²⁹ With marriage, women lost their legal capacity to act,³⁰ and their properties in favour of the husband. This means that neither could wives sell their properties, nor could they sue, or be sued.³¹

Consequently, women could not claim damages deriving from any wrongful conduct on the part of their husband. Since a married woman could not act on her own, in a tort suit the husband would have been simultaneously plaintiff and defendant (with the paradoxical consequence that he could have been condemned to

28. J. DE WITT GREGORY-P. N. SWISHER-S.L. SCHEIBLE, *Understanding Family Law*, Matthew Bender, 1995, p. 55.

29. This doctrine has been clearly framed in the famous passage by W. Blackstone, who in his *Commentaries on the Laws of England*, 1770, Vol.I, p.442 (quoted by S.CRETNEY, *Family law in the twentieth century. A history*, 2005, p. 91, wrote: “the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and *cover*, she performs every thing; and is therefore called in our law-french a *feme-covert*, *femina viro co-operta*; is said to be covert-baron or under the protection and influence of her husband, her baron, or lord; and her condition during her marriage is called her *coverture*. Upon this principle, of an union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by the marriage.”).

30. For a detailed analysis of the issue of womens’ capacity during marriage. W. MC CURDY, *Torts Between Persons in Domestic Relations*, 43 *Harvard L. Rev.*, 1030, 1031-1035 (1930).

31. According to O. KAHN FREUND, *Inconsistencies and injustices in the law of husband and wife*, 15 *Mod. L. Rev.*, 133, 137 (1952).

This rule belonged to the law of procedure, not to the substantive law. It followed not only from the general doctrine of unity, but also from the more special doctrine that a married woman could, exceptions apart, neither sue nor be sued without the husband being made joint plaintiff or joint defendant.

See also *Phillips v. Barnes* [1876] 1 Q.B.D. 436, per Lord BLACKBURN: “the objection to the action [among spouses] is [...] founded upon the principle that husband and wife are one person [...] the objection to the action is [...] because husband and wife cannot contract with or convey to each other;” in a later case of 1877, *Abbot v. Abbot*, the Court followed the solution adopted in *Phillips*, but it added that the bar to the recourse to the private law remedies is justified by the fact that it was possible to enjoy of protection afforded by criminal law, and that damages suffered during marriage can be compensated through alimony in a divorce proceeding.

award damages to himself!). The fact that law considered spouses as one entity did not make possible any distinction, in the case of intra-family torts, between the wrongdoer and the victim. It is also true that these common law disabilities concerning married women were ameliorated by Courts of Equity, during the eighteenth century, which allowed specific property to be held in trust (usually created by the wife's father) for the wife's 'sole and separate use.' This case of trust was known as the '*feme sole* estate.' This doctrine began to be accepted by American Courts later and gained considerable popularity in statutory law by the mid-nineteenth century with the enactment in several states of Married Women's Property Acts.³²

Furthermore, the victim could not sue the husband/tortfeasor not even after dissolution of the spousal bond. The English *Matrimonial Causes Act* 1857 ruled only that a judicially separated woman should be considered a *feme sole* in relation to any property she bought subsequently to the marriage, and also for the purposes of contracts, torts, and legal actions against third parties, but it did not allow the possibility for women to sue the husband in tort. It seemed that women did not have the possibility to sue even if the tortfeasor and the victim married after the tort had been committed.³³ The doctrine of unity of spouses was so embedded in the English system as to resist legal reforms introduced at the end of nineteenth century³⁴ with the aim of allowing the retention of a woman's property after marriage and the possibility to keep her own earnings. The *Married Women's Property Act* 1870

32. See J. DE WITT GREGORY-P. N. SWISHER-S.L.SCHEIBLE, *supra* note 28, at 56:

Although the Married Women's Property Acts varied in detail from one state to another, in general, they extended further than the *feme sole* estate. The Acts not only granted wives the rights to acquire, own, and transfer all types of real and personal property to the same extent as unmarried women, but many Acts further allowed married women to enter into contracts in their own names, to engage in business or employment and retain their own earnings, to make wills, to sue and be sued, and to be fully responsible for their own tortuous and criminal conduct. Typically, the married women's Property Acts shielded the woman's assets from the creditors of the husband.

33. On this issue, see E. HALL WILLIAMS, *Wife Suing Husband For Antenuptial Tort*, 12 *Mod. L. Rev.*, 93-95 (1949).

34. See *Married Women's Property Acts* enacted between 1870 and 1893, and modified during the twentieth century from the *Bankruptcy Act of* 1914, *Law of property Act of* 1925, and the *Law Reform Act of* 1935.

acknowledged to “married women the legal right to property earned and to keep sums received on intestacy, small legacies, and saving deposits,” while that of 1882 gave “the right to hold all the property belonging to her at the time of the marriage or acquired by her thereafter as her *separate property*.”³⁵ Therefore, the common law rules as to women’s incapacity were not reversed, but to some extent limited, in the sense that they did not operate for the case of women’s separate property being considered. While, however, the spousal immunity doctrine was overcome for property torts, it was not for personal torts.³⁶

However, one can find, as early as the first decade of last century, some exceptions to the immunity principle, as in the case of car accidents which occurred among spouses, that *ex post* have to be considered relevant in promoting the trend towards the abrogation of immunity.

The breaches into the wall of the immunity rule were aimed at making possible that a married woman could sue her husband for the protection of her property. In this period, personal injuries and damages for emotional distress (that have become common in the United States) were not considered.

The doctrine of unity will be overtly overruled in England only after 1962, when the *Law Reform (Husband and wife) Act* provided wives with the power to sue the other “as if they were not married.” This power could be limited from Courts if “no substantial benefit would accrue to either party from the

35. S. CRETNEY, *Supra* note 29, at 97. The concept of ‘separate property’ of husbands and wives will be removed by *Married Women and Tortfeasors Act* 1935.

36. In this regard, see J. SINGER, *The Privatization of Family Law*, *Wis. L. Rev.* 1444, 1463 (1992), who, towards the U.S writes that: “interspousal tort immunity persisted in a majority of states until mid-1970s [...] Since 1971, at least twenty-five states have abolished interspousal tort immunity, thus allowing spouses to sue each other for negligent and other tortuous behavior.” According to this author, the overcoming of this immunity is the result of the fact that married persons are seen as individuals, and represents a significant example of the privatization of family law, which produced a shift from public to private control over the definition and structure of family relationships. On the shift from public to private choice, and the progressive disappearance of morals from the field of family law (due to several legal and cultural factors, such as the ‘legal tradition of noninterference in family affairs’, the ‘ideology of liberal individualism’, ‘American society’s changing moral beliefs, and the ‘rise of “psychologic man”’), see C.E. SCHNEIDER, *Moral Discourse and the Transformation of American Family Law*, 83 *Mich. L. Rev.* 1803 (1985).

continuation of the proceedings.” However, also after this important legal change, the Courts showed a certain degree of resistance in leaving aside the ‘interspousal’ immunity doctrine and continued to stress the importance of protecting family harmony and domestic peace.³⁷ The operation of the immunity rule was made possible by a narrow construction of statutes by courts. While laws removed women’s incapacity of concluding contracts and of suing, they did not provide anything as to the possibility for spouses to sue in tort.³⁸

The immunity rule kept a very strong influence also when divorce was introduced, notwithstanding the fact that divorce was based on fault, and this latter is the natural ground on which tortious conducts can be evaluated.

In case of dissolution of the spousal bond, the damages suffered from one spouse during the marriage were not taken in account on the ground of liability in tort, but on that of distribution of property and of alimony.

III. THE OVERCOMING OF IMMUNITY RULE THROUGH THE SOCIAL CHANGES CONCERNING FAMILY

With time, the model on which the family unit is based has transformed itself radically from an authoritarian model, characterized by the predominance of the *pater familias* over the other family members and therefore linked to the notion of *status*, to a more flexible model in which the other individuals in the family unit are no longer annihilated in the superior interests of the family group.³⁹ The family becomes, therefore, a place in which the personality—or subjectivity—of each individual member is completed and enriched. The emancipation and economic independence of women has significantly influenced this evolution.⁴⁰ This evolution produced as a result an increase under

37. S. PATTI, *supra* note 6, at 9.

38. In this regard, among U.S. scholars, M. L. EVANS, *Wrongs Committed During a Marriage: The Child that no Area of the Law Wants to Adopt*, 66 *Wash. & Lee L. Rev.* 465, 478 (2009).

39. D. MESSINETTI, *Diritti della famiglia e identità della persona*, in *Riv. dir. civ.*, 2005, 2, at p. 146.

40. In the Italian legal system, scholarship stressed the transition from *family-institution* (which was the kind of family ruled by Civil Code of 1942), to

Italian law in the search for judicial relief in the case of intra-family damages, without, however, bringing about any significant growth as to the recoverability of intra-family damages. Consider that as late as the 1990s the Italian highest court did not recognise liability in tort for damage suffered within the family.⁴¹ An important distinction has to be made between cases involving the award of monetary damages and those concerning non-monetary damages. I will start dealing with the first group.

In one case, the Court declared that the damage suffered by the family member could not be considered unjust, since the infringed interest could not be described properly as a right.⁴² In another, the personal separation of the spouses was considered a “fundamental” right, in the sense that it can be considered among those aimed at protecting the liberty of the person, and “autonomous,” in the sense that family law did not provide in this regard the enforcement of tort law. The lack of an express provision, allowing tort claims in that field, would lead, inevitably, to the exclusion of this remedy.⁴³

The rationale of those pronouncements has to be searched for beyond the statements of Court, focusing on the specific kind of damage suffered from the plaintiff. In both cases, the damage suffered was an economic loss consequent to the separation (the diminution of value of the house where the spouses lived; loss of economic advantages flowing from the sharing of incomes and expenses), and not in an autonomous loss distinguishable from those closely connected to separation. The actual principle of law fixed by Court seemed to be that economic losses consequent to

family - community, in which the interests of single members have relevance and protection. In 1984 S. PATTI, *supra* note 9, at 10 pointed out relevant changes in family consisting in a “minore enfasi nell’identificazione della famiglia come struttura unitaria,” and in the acknowledgement of the “autonoma individualità di ciascun familiare all’interno del gruppo” (at 10). On the issue of damage to person within family, A. QUERCI, *Responsabilità per violazione dei doveri familiari*, in *Danno e resp.*, 2007, 1, p. 13; V. PILLA, *La responsabilità civile nella famiglia*, Bologna, 2006, at pp. 175-196; M. SESTA, *L’evoluzione delle relazioni familiari e l’emersione di nuovi danni*, in *La responsabilità nelle relazioni familiari*, cit., at XXI.

41. Cass. Civ., March 22, 1993, n.3367; Cass. Civ., April 6, 1993, n.4108, in *Mass. giust. civ.*, 1993, at 624.

42. Cass. Civ., March 22, 1993, n. 3367 *supra* note 41.

43. Cass. Civ., April 6, 1993, n. 4108, *supra* note 41: “dalla separazione personale dei coniugi può nascere [...] solo un diritto ad un assegno di mantenimento [...]. Tale diritto esclude la possibilità di richiedere, ancorché la separazione sia addebitabile all’altro, anche il risarcimento dei danni a qualsiasi titolo risentiti a causa della separazione stessa.”

marriage dissolution were not recoverable.⁴⁴ But this did not mean that one spouse can never sue in tort the other for damages incurred before the dissolution of marriage and different from those caused by dissolution. One senses the chasm existing between the apparent breadth of maxims of Court (the rule seems to be that liability in general is never admitted within family) and the actual rule embedded in them, according to which one spouse can sue in tort but only in certain cases and for specific kinds of damage. It is necessary to verify if this operational rule is or is not generally applied. Therefore I will consider some judgements pronouncing on the possibility of awarding pecuniary and non-pecuniary losses related to the infringement of spousal duties.

In a case of 1975, the *Corte di Cassazione* stated that the spouse who violates the duty of fidelity may cause a pecuniary loss to the other, implicitly admitting for the victim a remedy in tort against the disloyal spouse.⁴⁵ The view that the infringement of marriage duties can be relevant in tort was followed by lower courts.

In a case in the late eighties, the Tribunal of Rome dealt with a lawsuit filed by a husband, after legal separation, from his wife against wife's lover for compensation of two kinds of damage: moral damage, flowing from the fact that the defendant took part in the adultery committed by the plaintiff's wife and therefore caused to him the loss of social respect, and financial damage, resulting from loss of income allegedly consequential to the negligent conduct at work of the wife's lover who was the plaintiff's employee.⁴⁶ Although the facts of this judgement differ from those

44. See Cass. Civ., May 26, 1995, n.5866, in *Giur. it.*, 1997, 1, 843, with a comment by A. AMATO, *Giudizio di separazione: l'addebito; il tenore di vita; l'indennità per le opere di miglioramento dell'immobile in cui è stabilita la residenza familiare; il diritto di ritenzione*. In this case, the damage suffered after the dissolution of the marriage by a wife was the cost of the rent of a new house. The Supreme Court requires for tort liability to be acknowledged a damage different from the one consequent to separation. Therefore, the damage suffered from the wife has not been awarded.

45. Cass. Civ., June 19, 1975, n. 2468, in *Mass. Foro it.*, 1975, at 591: "la violazione da parte del coniuge dell'obbligo di fedeltà, a parte le conseguenze sui rapporti di natura personale, può anche costituire, in concorso di determinate circostanze, fonte di danno patrimoniale per l'altro coniuge."

46. Trib. Roma, Sept. 17, 1988, in *Giur. Merito*, 1991, 754, with a comment by F. LATTANZI, *Dovere di fedeltà e responsabilità civile e coniugale*, in *Nuova giur. civ. comm.*, 1989, 1, at p. 559, with a comment by V. PALETTO.

of the cases considered above, in that the liability of a third was invoked, the liability of the defendant is claimed under the heading of the infringement of conjugal duties, or more precisely of the complicity in their violation.

The Court rejected the claim for moral damage since adultery was no longer a crime. Therefore, it did not find in favour of the plaintiff on the basis of sec. 2059 of the Italian Civil Code, ruling the matter of non-monetary losses resulting from a tortious conduct. The solution adopted by the court can be understood only if one bears in mind that until recent times recovery of moral damages was awarded only when these were consequent to crimes. This narrow interpretation of this provision was the result of the strict wording of it, stating that non-pecuniary losses have to be compensated only in cases fixed by law, and of the fact that when the Civil Code was enacted in 1942, the only instance in which law expressly provided the compensation of non-pecuniary loss was that of art. 185 of the Criminal Code, providing the duty for the persons who are guilty for a crime to compensate monetary and non-monetary damages.⁴⁷

The court then went on to consider the main problem of compensation of pecuniary losses which the plaintiff allegedly suffered at the hands of the defendant.

The plaintiff complained that his company, during his absence for other work commitments and temporarily managed by the defendant, had an unjustified loss of income.

The court decided the case on the ground of violation of conjugal duties. First, the court considered if the duties cited in sec. 143 C.C. were relevant merely on the ground of morals (in the sense that their infringement does not give remedies at law) or of law; secondly, if damages provoked by a third extraneous to the family unit can be awarded under the heading of the infringement of conjugal duties.

As to the first issue, the court recognised that conjugal duties are legally binding as they have the nature of obligations.⁴⁸ The court asked itself if the conduct that has to be taken in the

47. The Italian text of sec. 2059 reads: "Il danno non patrimoniale deve essere risarcito solo nei casi determinati dalla legge." For an in-depth analysis of the issue of the construction of this provision, see next chapter.

48. Sec.1174 c.c. requires for the existence of a legal obligation that the act of the obliged must have an economic value.

fulfilment of these duties has an intrinsically economic value.

The court stated that since the duty of fidelity has the substance of an obligation (therefore, it is enforceable), its infringement can give rise to a pecuniary loss. The court however rejected the claim because the plaintiff was not able to give evidence of the damage suffered.

As to the issue of whether a third person can be held liable for having concurred in a violation of a spousal duty, the Court went through the issue of whether the requirements of the so-called “wrongful inducement (by a third person) to the breach of an obligation” were or not satisfied.⁴⁹ According to Tribunal of Rome, the wife’s lover would have been liable for inducement to the infringement of the duty of fidelity, only if evidence could be given that his conduct increased the probability that such an infringement can occur.⁵⁰ In this case, the judge rejected the claim because the plaintiff was not able to give evidence of the causal link between the third party’s conduct and the adultery of his wife.

This judgement is relevant because the court admitting the evidence of the inducement of the third to the infringement of the spousal duties implicitly acknowledges the enforceability of tort liability rules in the case of violation of spousal duties.

More recently, in 2002, the Tribunal of Milan, pronouncing on a case very similar to that decided from Tribunal of Rome (also in this case the plaintiff claimed the liability of a third person),⁵¹

49. The ‘wrongful inducement (by a third person) to the breach of an obligation’ (in Italian, ‘*induzione all’inadempimento*’) is a doctrinal framework set to deal with the issue as to if a third party can be held liable in tort for having wrongfully driven the debtor to the breach of an obligation arising from contract.

50. The Tribunal of Rome requires for third’s liability a conduct “che determini un ampliamento delle probabilità che si verifichi violazione dell’obbligo di fedeltà.” Among the scholars, against the possibility for the third to be held liable for having induced a married person to the infringement of spousal duties, G. FACCI, *I nuovi danni nella famiglia che cambia*, Milano, 2004, at p. 28.

51. Trib. Milano, Sept. 24-Nov. 22, 2002, in *Resp. civ. prev.*, 2003, at p. 465, with a comment by G. FACCI, *L’infedeltà coniugale e l’ingiustizia del danno*; in NGCC, 2003, 1, 761, with a comment by D. CHINDEMI, *Il tradimento del coniuge non è fonte di responsabilità extracontrattuale per l’amante, ma può esserlo per il coniuge infedele*. There is an important difference between the pronouncements of the Tribunal of Rome and the Tribunal of Milan, as to the possibility for the third party to be held liable for the violation of the duty of fidelity, which was excluded by the Tribunal of Milan on the grounds that this duty only concerns spouses.

recognized that the breach of spousal duties can give rise to tort liability.⁵²

The two decisions state the principle that the violation of a conjugal duty may be relevant in tort, but this effect is not automatic.⁵³ If the recovery of monetary damages is admitted in marital torts, the award of non-monetary damages is more difficult.

In another case the Tribunal of Milan ruled on a claim following separation due to the conduct of the husband (“*separazione con addebito*”).⁵⁴ Namely, the wife claimed to have suffered a moral damage because her husband neglected her during pregnancy,⁵⁵ was involved in a love affair and finally definitively abandoned the matrimonial domicile (after repeated absences during the period of gestation). In addition to the quantification of money for maintenance, the Tribunal of Milan had to decide the issue of compensation for moral damage claimed by the wife for the misconduct of the husband. The Tribunal, as in the previous cases discussed, based the judgement on two preliminary issues: a) the judicial or merely moral nature of marital duties;⁵⁶ b) the possibility of an action in damage in addition to family law remedies.

It is worth considering at first the preliminary question under b). At the outset, the court emphasised the low efficiency of remedies provided for by family law. Second, the court underlined that family law is a set of rules open to the enforcement of liability in tort; the construction of family law as an exhaustive and self-sufficient system would infringe upon sec. 2 of the Italian

52. In this case, however, the Tribunal of Milan required for liability in tort of the wife the evidence of a “serious” breach of the duty of fidelity, whilst a simple breach is not enough. The rejection of the tort liability claim towards the unfaithful spouse certainly influenced the rejection of the claim towards the wife’s lover.

53. For this position see also Cass. Civ., May 26, 1995, n.5866 *supra* note 44.

54. Trib. Milano, June 4, 2002, in *Giur. it.*, 2002, at p. 2291, with a critical comment by O.B. CASTAGNARO, *Osservazioni sul tema della responsabilità civile da violazione di doveri coniugali*; in *Guida al diritto*, 2002, 24, p. 40, with a critical comment by M. FINOCCHIARO, *La ricerca di tutela per la parte più debole non deve “generare” diritti al di là della legge*.

55. On the infringement of the duties of moral support and financial aid in a case of a serious illness of the spouse, see Trib. Firenze, June 13, 2000, in *Fam. dir.*, 2001, 2, p. 161, with a comment by M. DOGLIOTTI.

56. On the issue of the nature of marital duties see V. PILLA, *La responsabilità civile nella famiglia*, *supra* note 40, at 10-12.

Constitution, which provides the protection of “inviolable rights” of the individual within the social bodies (like family) to which he or she takes part.⁵⁷ However, this does not mean that responsibility will be enacted for every infringement of spousal duties, but only when infringement is serious.⁵⁸

The seriousness has to be evaluated at the light of the conduct of both the spouses, and secondly of the causal link between the violation of spousal duties and the crisis of marriage.

The first criterion has been particularly significant in directing some other decisions.

A decision of the Tribunal of Milan rejected the claim for compensation of a damage suffered by the wife/plaintiff (‘biological damage and damage to social life’) for alleged violation of spousal duties affecting the sphere of “affection and sexual relation.”⁵⁹ The rejection of claim was based on the circumstance that the impotence of the husband was well known since the beginning of the marriage—which lasted for twenty years—and therefore had to be regarded as accepted by the wife. The court did not accept wife’s claim that she tolerated the impotence of the husband because of pressure put on her by her mother and mother in-law while these latter were alive.

On the same basis, a judgement pronounced by the Tribunal of Savona.⁶⁰ A wife complained of the fact that the husband, after having refused to have children, broke the spousal bond and started another relationship with a woman with whom he, in fact, had a child. The Tribunal of Savona rejected the claim of the wife because the marriage went on for many years during which the wife failed to lodge a complaint, and during which she could have

57. Sec. 2 Constitution reads: “La Repubblica riconosce e garantisce i diritti inviolabili dell’uomo sia come singolo sia nelle formazioni sociali ove si svolge la sua personalità.” This provision is the cornerstone of the recent debate concerning non pecuniary damage in tort. On this issue, see next chapter.

58. Among scholars, A. ZACCARRIA, *L’infedeltà: quanto può costare? Ovvero, è lecito tradire solo per amore*, in *Studium iuris*, 2000, 5, 524, thinks that tort liability rules are not enforceable in case of infringement of spousal duties (except when it has been committed fraudulently).

59. Trib. Milano, Feb. 10, 1999, in *Dir. Fam.*, 2001, 988; in *Fam. dir.*, 2001, p.185, with a comment by M. BONA, *Violazione dei doveri genitoriali e coniugali: una nuova frontiera della responsabilità civile?*.

60. Trib. Savona, Dec. 5, 2002, in *Fam. dir.*, 2003, 3, 248, with a comment by F. LONGO, *Famiglia e responsabilità civile: rapporti tra i coniugi e danno risarcibile*.

indeed chosen to break the bond herself. In addition to this, she failed to inform the court that she had suffered from a psychopathological state which rendered her dependant on the will of her husband.

The criteria which oriented the two decisions unfavourable to the plaintiff were the acquiescence of the wives to the misconduct of husbands. For that reason the conduct of the defendants cannot be qualified as serious violation of spousal duties.

From the Italian decisions considered above, several rules can be inferred. Tort liability, in the family sphere, is, in abstract, possible. However, not only does recovery of damages require a particularly serious violation of conjugal duties (especially when non-monetary damages are involved),⁶¹ but also the damage must be autonomous and distinct from the one that derives from dissolution of marriage. These statements are generally accepted by scholars.⁶²

It has to be clarified however that in Italian law the overcoming of the immunity of spouses from the operation of tort law has not lead to the opposite situation of making relevant in tort conducts that are not ordinarily relevant under this heading. It just means that conducts that are relevant *outside* the family under a tortious liability heading can now be relevant also if they occur within the family unit.

Also in common-law systems the immunity rule has been overcome and the admissibility of tort law rules within the field of

61. A violation 'una tantum' is not enough. The case dealt by App. Brescia, March 7, 2007, in *Resp. civ. prev.*, 2008, p. 2073, with a comment by S. CATERBI, *Infedeltà coniugale e responsabilità civile*, is interesting. In this judgement it is discussed if a homosexual relation is a serious breach of the duty of fidelity *per se*. The answer is negative: "la particolarità dell'infedeltà, concretatasi in una relazione di tipo omosessuale, non può considerarsi intrinsecamente grave e tale da far ritenere presunta la lesione del diritto all'integrità personale dell'altro coniuge [...] il parametro di valutazione risulta estremamente soggettivo e può portare a valutazioni [...] tali da far ritenere che una relazione omosessuale possa rivelarsi anche meno dolorosa e dannosa dell'altra." This position has been confirmed by the same Court some months later: App. Brescia, June 5, 2007, in *Resp. civ.*, 2008, 8, p. 616 with a comment by L. BOCCADAMO, *Torto endofamiliare e risarcibilità del danno esistenziale per violazione di doveri coniugali: una duplice conferma*.

62. Adverse to that position is M. FINOCCHIARO, *supra* note 54, who thinks that violation of spousal duties "trova la propria disciplina in via esclusiva negli articoli 84 e seguenti del c.c. dedicati al matrimonio" (at 52).

family is nowadays a widely accepted general principle.⁶³ This evolution was influenced by the shift from a fault-based divorce to a non-fault based divorce. Tort law plays the role of giving relevance to faulty conduct held during the marriage which cannot give grounds to divorce. In the past, the harmfulness of some marital conduct were relevant as statutory grounds for divorce and were used, once that interspousal immunity doctrine had been abolished, to affect the distribution of the property or the alimony award.⁶⁴

This, however, does not mean that at present the gates of extracontractual liability in the family ambit are open without restrictions. In the U.S., for example, the *Restatement (Second) of Torts* of 1977 provides that “a husband or wife is not immune from tort liability to the other solely by reason of that relationship.” However, the *Restatement* does not make clear which requirements have to be proved for the tortious liability to be enacted. In fact, if it is clear that the overcoming of the immunity does not mean *ipso facto* that a ‘interspousal’ conduct is relevant in tort law, when it is not if occurring among strangers; things become less clear when one asks himself which are the conditions to be met for a tort lawsuit among spouses to be upheld. It is evident that not all the possible harms can be considered relevant. Courts have to ascertain if they are or are not the normal result of “the ebb and flow of

63. One of the the U.S. landmark cases in which the overcoming of immune rule is tied to the enactment of womens’ emancipation Acts is *Self v. Self*, 58 Cal. 2d 683 (Cal. 1962).

64. Even nowadays this approach is followed by some scholars. Among the others, Harry D. KRAUSE, *Propter Honoris Respectum: On the Danger of Allowing Marital Fault to Re-Emerge in the Guise of Torts*, 73 *Notre Dame L. Rev.* 1355 (1998).

Among the recent judgments following this approach, *Leskun v. Leskun* [2006] S.C.J. n. 25. The court looked at the emotional distress suffered by the wife for the infidelity of the husband as a cause for her incapacity after the breakdown of the marriage to achieve post-separation economic sufficiency and on this basis found the plaintiff to be entitled to economic support. The interesting point raised by this judgement is that the emotional trauma was considered as a relevant ground (although it was not the only one: also her advanced age, her health problems, and her limited skill set were considered) for the economic support order on behalf of the husband. On this judgement and other previous decisions sharing the same approach, F. Kelly, *Private Law Responses to Domestic Violence: The Intersection of Family Law and Tort*, (2009) 44 *S.C.L.R.* 321, where the focus is on the economic effects of domestic violence, i.e. affecting the earning capacity of the victim).

married life.⁶⁵

The most frequent cases in which the issue of tortious liability among spouses arises are assault and battery, infliction of venereal disease, interference with child custody, fraud, and emotional distress.⁶⁶

Whereas tortious liability is more easily accepted in the cases of physical injury, the case of emotional distress is much more controversial.⁶⁷

Among the elements necessary for emotional distress, the *Restatement* provides that the conduct has to be 'outrageous,' but it does not provide any standard for the courts to state the presence or not of this requisite.⁶⁸

Notwithstanding whether the relevance of tort law rules in the field of family law is admitted as a general principle, the practical operation of tort law rules can be made difficult by the existence of procedural and substantive hurdles, such as in the United States,⁶⁹

65. Leonard KARP & Cheryl L. KARP, *Beyond the Normal Ebb and Flow... Infliction of Emotional Distress in Domestic Violence Cases*, 28 *Fam. L. Q.* 389 (1994-95).

66. On this point, J. KRISTYN KROHSE, *No Longer Following the Rule of Thumb—What to Do with Domestic Torts and Divorce Claims*, 1997 *U. Ill. L. Rev.* 923 (1997).

67. Among U.S. scholars critical towards the relevance in tort of emotional distress in the marriage, H. KRAUSA, *On the Danger of Allowing Marital Fault*, *supra* note 64. According to this writer, allowing tort claims may lead to seriously unfair financial distribution of the assets among the spouses.

68. Unfavorable towards admitting the protection in tort for intentional or negligent emotional distress are Ira Mark ELLMAN & Stephen D. SUGARMAN, *Spousal Emotional Abuse a Tort*, 55 *Md. L. Rev.* 1268, 1280-84 (1996). They endorse the restrictive approach followed by courts in some states awarding emotional distress only in some specific cases.

As to the approach to 'outrageousness' set by courts, a fixed standard for the evaluation of marital conduct does not seem to have been reached. In two cases, in which facts were very similar regarding physical and moral violence to wives, the judgements given by the courts were completely opposite because of the different meaning given to 'outrageous.' See *Simmons v. Simmons*, 773 P.2d 602 (Colo. Ct. App. 1988); *Hakkila v. Hakkila*, 812 P.2d 1320 (N.M. Ct. App. 1991). For an in-depth analysis on these cases, see Robert G. SPECTOR, *Marital Torts: The Current Legal Landscape*, 33 *Fam. L. Q.* 745 (1999-2000). In some cases, courts considered physical injuries and emotional distress on the grounds of the distribution of marital property. This way of deciding was typical to the regime of divorce based on fault: see in this regard, *Havell v. Islam*, 751 N.Y. S.2d 449, 455 (App. Div. 2002).

69. According to M.L. EVANS, *Wrongs Committed During a Marriage*, *supra* note 38, at 481-489, examples of procedural hurdles can be found on the ground of statutes of limitations, joinder of the claims (of tort and divorce), and *res judicata*. As to joinder, an issue could rise when specialised family law courts handle divorce claims. This occurs when a legal system acknowledges the

or by the dearth of cases of tort law suits brought by one spouse against the other, such as in England. The possible reasons for this latter situation could be the length of civil cases, the knowledge that the defendant is not able to pay damages, and/or the inexperience of family law barristers in the personal injury area.⁷⁰

In Italian law the main hurdle to the development of interspousal claims nowadays regards non-monetary damages. Therefore general conditions for recovery of these latter will be focused in the next chapter to understand the most recent developments in the field of marital torts.

IV. FROM THE PROTECTION OF THE FAMILY UNITY TO THE DEFENSE OF INVIOLEABLE RIGHTS OF SINGLE FAMILY MEMBERS

The issue of the conditions of relevance of damage to person has therefore to be examined to better understand the Italian situation. This is the last step of a process that produced as a result a wider protection of non-financial interest of the individual. In Italian law, the protection of each individual is no more limited to pecuniary losses than in the past when infringements upon the private sphere not causing either bodily or pecuniary harm were in general not relevant.⁷¹

Due to restrictions to the compensation of non-monetary damages fixed by sec. 2059, recovery was admitted only in a few cases; among them, the most significant was that of moral damage suffered from the victim of a crime. These limits, concerning the

dichotomy between courts of equity and courts of law. In this case, against the possibility of joinder three main arguments are used: 1) joinder among these claims would be contrary to the legislative intent for the evident inconsistency of 'tort action' (based on fault) and 'no-fault divorce'; 2) joinder would be not possible because of the different aims lying at the basis of the two actions. This conclusion does not seem to be accepted by Benjamin SHMUELI, *Tort Litigation between Spouses: Let's Meet Somewhere in the Middle*, 15 *Harv. Negot. L. Rev.* 195, 206-08 (2010), according to whom the goals of family law and tort law being different, tort suits would allow a more effective protection to the weaker spouse; 3) joinder would be a disadvantage for the claimant because this latter would be deprived of the right to a jury trial (allowed for tort claims, but not for divorce actions).

70. See SPECTOR, *supra* note 68, at 761-763.

71. A thorough analysis of the issues related to non pecuniary losses can be found in the book by M. BARCELLONA, *Il danno non patrimoniale*, Milano (2008).

recoverability of damage to person, were loosened in 1986. The Constitutional Court admitted, taking conjointly into account the general clause of sec. 2043, that requires for compensation, as we have already seen, unjustness of damage and sec. 32 of the Italian Constitution which recognizes in health the nature of inviolable right of the individual,⁷² the compensation of damage to health (“*danno biologico*”), notwithstanding its nature of non-pecuniary loss.⁷³

In this judgement the fundamental distinction is between damage as wrongful event (the so called “*danno-evento*”) and damage as negative economic effect flowing from the wrongful action (the so called “*danno-conseguenza*”). Damage to health is a “*danno-evento*,” because it is an injury to an interest relevant to the Constitution, and is recoverable *per se*; that means that the plaintiff does not have the burden of proving that he suffered an economic loss, or anguish. Moreover, damage does not need to be committed through a crime to be recoverable. Therefore, the strictures provided by sec. 2059 can apply to injury to psycho-physical integrity only in the case in which evidence of a moral damage consisting in pain or anguish due to injury to psycho-physical integrity is admitted.

Since 1986, damage to person was compensated in the cases of injury to psycho-physical integrity (recoverable under sec. 2043) or anguish suffered by victims of a crime (recoverable under sec. 2059). This approach is called ‘dualistic,’ because the compensation of the damage to person is drawn from two different sections among those that regulate tort liability depending on the kind of harm suffered.

In the above-cited decision of the Tribunal of Milan of 2002,⁷⁴ the judge of first instance identified damage suffered by the defendant wife in that her own ‘personal sphere’ had deteriorated. The ‘personal sphere’ consists of the “complex of activities, but

72. Sec. 32 of the Constitution provides that “la Repubblica tutela la salute come fondamentale diritto dell’individuo e interesse della collettività.”

73. Corte Cost., June 30, 1986 n.184, in *Foro it.*, 1986, I, cc. 2976 (see also, Corte Cost., July 12, 1979 n. 88, that qualified right to health “come un diritto primario ed assoluto [...] da ricomprendere tra le posizioni soggettive direttamente tutelate dalla Costituzione”). The issue was if injury to health not affecting the capacity of working (and earning money), i.e. not causing pecuniary losses for the victim, could be redressed.

74. Trib. Milano, June 4, 2002, *supra* note 54.

also of affective, emotional experiences, in which the individual expresses personality;" the injury to the personal sphere is "more serious than the mere damage caused by the marriage breakdown itself."⁷⁵ The plaintiff alleges the violation of sec. 29, subsec. I and II,⁷⁶ and sec. 31 subsec. II of the Constitution,⁷⁷ in that the conduct of the husband constitutes the violation of the 'legitimate expectations' of the wife to "equal well-being and equal personal realisation in conjugal life, also in relation to various privileges and experiences linked to the role of each spouse, and the indispensable protection of maternity."

According to the Tribunal of Milan, the damage claimed by the defendant wife should be covered by sec. 2043 of the Civil Code, the application of which is not limited to financial loss, while—according to the court—sec. 2059 applies only to moral damage. Sec. 2043 covers, however, all the injuries to the person different from moral damages.⁷⁸ This judgement is directly affected by the decision handed down in 1986 by the Constitutional Court.

A further step towards the general relevance of damage to person was done in 2003 through a wider interpretation of sec. 2059 given in the judgments handed down by the Supreme Court via the so-called "twin decisions" no. 8827 and 8828.⁷⁹ With these

75. The passages cited between inverted commas are an abridged translation of the Italian version. The definition of 'personal sphere' given from the Court must be also cited in Italian: "complesso di attività, ma anche di vissuti affettivi, emozionali e relazionali, in cui il soggetto esplica la sua personalità, ben più grave del mero disagio comunque conseguente alla frattura dell'unione coniugale."

76. Sec. 29 provides that: "1. La Repubblica riconosce i diritti della famiglia come società naturale fondata sul matrimonio. 2. Il matrimonio è ordinato sulla eguaglianza morale e giuridica dei coniugi, con i limiti stabiliti dalla legge a garanzia dell'unità familiare."

77. Sec. 31 provides that: "la Repubblica [...] protegge la maternità, l'infanzia e la gioventù, favorendo gli istituti necessari a tale scopo."

78. According to the Court, sec. 2043 would provide protection to the person not only "nella sua proiezione economica, ma anche soggettiva, e, quindi, della lesione di diritti primari."

79. Cass. Civ., May 31, 2003 n. 8827; Cass. Civ., May 31, 2003 n. 8828 (in these cases the tortfeasor caused the death of a person, and was sued by the relatives of the victim: these latter suffered a moral damage flowing from the death of victim, in Italy called 'da perdita del congiunto'). These judgments have been commented in all the most important law journals. See among others, *Danno e resp.*, 2003, 8-9, 816, with a comment by F. D. BUSNELLI, *Chiaroscuri d'estate. La Corte di Cassazione e il danno alla persona*, and by G. PONZANELLI, *Ricomposizione dell'universo non patrimoniale: le scelte della Corte di cassazione*.

two decisions the Supreme Court reconstructed in a different way the respective ambits of application of sec. 2043 and 2059. According to the previous approach, the first provision (sec. 2043) would concern financial harm, the second (sec. 2059) non-pecuniary losses. This dualistic approach was set aside in favour of a new one, that we could call, in contradistinction to the former, “unitary.” According to the latter, sec. 2059 rules all the cases of non-pecuniary loss.

In accordance with the “twin decisions,” sec. 2059 operates not only in the presence of moral damage suffered, but also in the presence of violation of constitutional rights, causing a non-financial damage.

The Court of Cassation interprets the sentence of sec. 2059 “in the cases in which [the compensation of non-financial losses] is provided by law,” from which depends the possibility to recover a non-financial loss, in a meaning wider than that obtained through literal interpretation. Compensation is admitted not only when law expressly provides this result, but also when, notwithstanding the lack of an express provision, the judge can infer from the Constitution that the right injured was “inviolable” in the sense of sec. 2 of the Constitution. It is worth noting not only that, since sec. 2 does not include a catalogue of inviolable rights, it is the duty of Courts to decide if a right is or is not inviolable, but also that sec. 2 does not provide the remedy of compensation in case of injury to inviolable rights. The argument used by the Court to give grounds to the remedy of compensation for the infringement of inviolable rights is that insofar as the Constitution recognizes inviolable rights (not having economic value), it implicitly also allows their protection. Since compensation represents the essential way of protecting rights, this protection is not to be limited, otherwise a refusal of protection would occur in cases where recovery is not expressly provided by law.⁸⁰ Furthermore, as an

80. The passage sketched in the text reads: “ritiene il Collegio che, venendo in considerazione valori personali di rilievo costituzionale, deve escludersi che il risarcimento del danno non patrimoniale che ne consegue sia soggetto al limite derivante dalla riserva di legge correlata all’art.185 c.p. Una lettura della norma costituzionalmente orientata impone di ritenere inoperante il detto limite se la lesione ha riguardato valori della persona costituzionalmente garantiti. Occorre considerare [...] che nel caso in cui la lesione abbia inciso su un interesse costituzionalmente protetto la riparazione mediante indennizzo [...] costituisce la forma minima di tutela, ed una tutela minima non è assoggettabile a

additional argument the Court states that in case of harm to interests enjoying a constitutional rank, recovery has to be admitted because the reference made from sec. 2059 to the ‘cases provided by law’ must be interpreted, after the enforcement of the Constitution, also in light of its provisions, since the acknowledgement of ‘inviolable rights’ inherent to the person implicitly, and necessarily, calls for their protection, and in this way represents a case provided by law, at the highest level, of recovery of non-pecuniary loss.

Non-pecuniary loss, however, does not constitute an autonomous category of damage in itself (that is an autonomous injury compensable *per se*), but, as it is consequential damage, can be recovered only if the victim gives adequate evidence of it.

This means that the violation of personal rights is not enough for the victim to enjoy compensation (in contradistinction to the finding of the Constitutional Court in 1986), but the offended party must indeed prove the negative effects suffered as a consequence of the violation.

In the footsteps of the judgements of 2003, it is worth mentioning a decision of the Court of Cassation of 2005.⁸¹ The circumstances regard a case in which the wife, after having already been granted the divorce for the omitted consummation of marriage, claimed damage for the fact that she was not informed prior to marriage of her husband’s ‘*impotentia coeundi*,’ and in addition that her husband had refused, after the wedding, to seek a cure for his pathology.

The damage alleged by the plaintiff concerns the loss of a chance to express her sexuality and her wish to be a mother. The Supreme Court incorporated this chance within the inviolable rights guaranteed under sec. 2 of the Constitution, and found in favour of compensation of this type of damage under sec. 2059.⁸²

specifici limiti, poiché ciò si risolve in rifiuto di tutela nei casi esclusi” (Cass. Civ., May 31, 2003, n.8828, *supra* note 79, at 817).

81. Cass. Civ., May 10, 2005, n. 9801, in *Fam. dir.*, 2005, 4, p. 365, with a comment by M. SESTA, *Diritti inviolabili della persona e rapporti familiari: la privatizzazione “arriva” in Cassazione*, and by G. FACCI, *L’illecito endofamiliare al vaglio della Cassazione.*; in *Corr. giur.*, 2005, 7, p. 928, with a comment by G. DEMARZO.

82. The Court describes the damage suffered by the plaintiff as a “violazione della persona umana intesa nella sua totalità, nella sua libertà-dignità, nella sua autonoma determinazione al matrimonio, nelle sue aspettative

Sec. 2059 of the Civil Code could be invoked—according to the Supreme Court—not only in the case of moral damage consequential to a crime, but also in the hypothesis in which the fundamental rights of the personality have been harmed, and would apply also in the specific context of the family when a duty related to the position of spouse has been seriously infringed. The character of the seriousness of the infringement has to be referred to those conducts whose harmfulness cannot be tolerated within family. The fundamental passages of the reasoning of the Court are the following: a) the shift from the ‘family-institution’ model to the ‘family-community’ one;⁸³ b) the recent enforcement of laws that emphasize the relevance of the individual within family (such as Law no. 154/ 2001, dealing with violent conducts within family); c) the operation within the family unit of sec. 3 and 29 of the Italian Constitution, dealing respectively with the principle of equality of all individuals in general and, with specific reference to family, with the ethical and legal equality of spouses. On the basis of the principle of equality, spouses—as all the other members of the family—have to enjoy protection in respect to every harm to their dignity and the personality, since these have the status of

di armonica vita sessuale, nei suoi progetti di maternità, nella sua fiducia in una vita coniugale fondata sulla comunità, sulla solidarietà e sulla piena esplicazione delle proprie potenzialità nell’ambito di quella peculiare formazione sociale costituita dalla famiglia, la cui tutela risiede negli artt. 2, 3, 29 e 30 Cost.” This passage is worth being translated: “violation of the person wholly considered, in her freedom-dignity, in her autonomous decision of marrying, in her expectations of harmonious sexual life, in her plans of being mother, in her trust on a conjugal life founded on community, on support and on the full development of her potential within that peculiar social group called family, protected by sec. 2, 3, 29, 30 of the Italian Constitution.”

83. The ‘family-community’ model is clearly explained by the Court in this way: “la famiglia si configura quindi non già come un luogo di compressione e di mortificazione di diritti irrinunciabili, ma come sede di autorealizzazione e di crescita, segnata dal reciproco rispetto ed immune da ogni distinzione di ruoli, nell’ambito della quale i singoli componenti conservano le loro essenziali connotazioni e ricevono riconoscimento e tutela, prima ancora che come coniugi, come persone, in adesione al disposto dell’art. 2 Cost.” On this issue, see G. FACCI, *I nuovi danni*, *supra* note 50, at 91. The protection of the individual within family is the main theme in App. Torino, 21 febbraio 2000, in (2000) 5 *Fam. dir.*, 475, with a comment by R. C. DELCONTE ed. in (2000) I *Foro it.*, 1555, with a comment by L. DE ANGELIS. In this case the spouse – victim does not sue the other in damages, but claims only separation. The judgement is interesting because the Court of Torino applies the concept of mobbing used in work claims. In this case, infact, there was evidence that the husband , among the other conducts, made pressures on his wife to go away from their house (this conduct has been characterized as mobbing).

‘inviolable rights’ by the effect of sec. 2 of the Italian Constitution, regardless of the facts that infringement is made by family members or third parties; d) family law remedies enforceable in case of the breach of spousal duties do not bar *a priori* the recourse to the protection afforded by tort law, since family law cannot be considered as a closed and thorough system. The same conduct can give rise, when seriously harmful and affecting inviolable rights of the person, to the operation of both remedies.

However, the plaintiff has to give specific evidence of the prejudice coming from the injury to her fundamental rights in accordance with the principles laid down by the twin judgments of 2003.

The repercussions of this favourable orientation toward compensation for damage to person in the family sphere, under sec. 2043 of the Civil Code, are evidenced in a decision of the Court of Appeal of Milan,⁸⁴ in which the qualification ‘*danno esistenziale*’ is explicitly used. It granted the claim for damages submitted by the husband (plaintiff) who found that he was not, in fact, the father of a child born to his wife within their marriage (marriage subsequently declared null and void on the basis of sec. 122, subsec. 3, no. 5 Civil Code). The claim was based on the pain and suffering caused by the wife who lied to him as to paternity of her child in order to marry the plaintiff. The damage suffered was considered “*danno-evento*,” and for this reason recoverable without requiring any evidence (the Court does not follow the principles stated by the Supreme Court in 2003 as to the recoverability of damage to person).

The Constitution-oriented interpretation of sec. 2059 adopted in 2003 by the *Corte di Cassazione* found further confirmation in four important decisions given by its United Chambers on November 11, 2008, that extended the principles laid down by the former sentences of 2003 to the case of non-financial damage consequent to a breach of contractual duties.⁸⁵ According to the

84. App. Milano, Apr. 12, 2006, in *Fam. Dir.*, 2006, 5, p. 509, with a comment by G. FACCI, *L'illecito endofamiliare tra danno in re ipsa e risarcimenti ultramilionari*.

85. Cass. Civ., United Chambers, November 11, 2008 n. 26972-26973-26974-26975. These judgments have been analysed by many scholars; among others, see P. G. MONATERI, *Il pregiudizio esistenziale come voce del danno non patrimoniale*, E. NAVARRETTA, *Il valore della persona nei diritti inviolabili e la*

United Chambers, the recoverability of non-pecuniary damage to be recoverable depends on the infringement of an interest relevant on the grounds of the Italian Constitution. The list of interests which can be qualified ‘inviolable’ is not closed. The Court states that due to the ‘open text’ of sec. 2 of the Constitution, protection is not limited to those inviolable rights expressly acknowledged at the present, but also to other interests surfacing in the social situation and to be considered in the light of indications which can be found in the Constitution, related to inviolable aspects of human person.⁸⁶ The judgement no. 26972 considers among the examples of non-pecuniary damages whose recoverability has to be admitted, besides the case of loss of a relative, the harm of the inviolable rights (art. 2-3 of the Constitution) of the individual within the family.⁸⁷ These examples show that a right to be considered ‘inviolable,’ must be strictly inherent to the person.

The difficult theoretical issue dealt with by Court of Cassation is whether the requirement of unjustness provided by sec. 2043

complessità dei danni non patrimoniali, in *Resp. civ. prev.*, 2009, 1, p. 56; C. CASTRONOVO, *Danno esistenziale: il lungo addio*, M. FRANZONI, *Il danno non patrimoniale del diritto vivente*, A. PROCIDA MIRABELLO DI LAURO, *Il danno non patrimoniale secondo le Sezioni Unite. Un “de profundis” per il danno esistenziale*, S. LANDINI, *Danno biologico e danno morale soggettivo nelle sentenze della Cass.Sez.Un. 26972, 26973, 26974, 26975/2008*, C. SGANGA, *Le sezioni unite e l’art. 2059 c.c.: censure, riordini e innovazioni del dopo principio*, in *Danno e resp.*, 2009, 1, p. 5. On the way marked out by the United Chambers of the Corte di Cassazione, it is worth citing Trib Venezia, May 14, 2009, in *Danno e resp.*, 2010, 2, p. 187, with a comment of A. D’ANGELO, *Un’infedeltà coniugale oltraggiosa della dignità della persona ed i suoi risvolti aquiliani all’indomani delle sezioni Unite del 2008*. Trib Prato, Febr. 18, 2010, in *Dir. Fam. Pers.*, 2010, 3, p. 1269, with a comment of A. LOMBARDOA, *L’illecito endofamiliare trova un ulteriore riconoscimento nella giurisprudenza*.

86. The passage reads in Italian: “Il catalogo dei casi in tal modo determinati non costituisce numero chiuso.

La tutela non è ristretta ai casi di diritti inviolabili della persona espressamente riconosciuti dalla Costituzione nel presente momento storico, ma, in virtù dell’apertura dell’art. 2 Cost., ad un processo evolutivo, deve ritenersi consentito all’interprete rinvenire nel complessivo sistema costituzionale indici che siano idonei a valutare se nuovi interessi emersi nella realtà sociale siano, non genericamente rilevanti per l’ordinamento, ma di rango costituzionale attenendo a posizioni inviolabili della persona umana.”

87. The passage summarized in the text from the judgment no. 26.972 reads: “in assenza di reato, e al di fuori dei casi determinati dalla legge, pregiudizi di tipo esistenziale sono risarcibili purchè conseguenti alla lesione di un diritto inviolabile della persona. Ipotesi che si realizza, ad esempio, nel caso dello sconvolgimento della vita familiare provocato dalla perdita di congiunto (c.d. danno da perdita del rapporto parentale), poichè il pregiudizio di tipo esistenziale consegue alla lesione dei diritti inviolabili della famiglia (artt. 2, 29, 30 Cost.).”

regards only pecuniary losses or also non-pecuniary ones. The answer is that the requirement of unjustness covers also non-pecuniary losses. In the case of non-pecuniary losses, damage is unjust when there is harm to inviolable rights according to Constitution. If this kind of harm is lacking, there is no way to compensation.

The harm of inviolable rights is not sufficient *per se* to uphold the claim for the recovery of non-pecuniary loss. As this latter has to be seen as a result of the infringement of the right, it has to be specifically proved. In particular, the victim has to give objective elements in support of the claim for the recovery. On the basis of these elements, the Court may resort to presumptions for the quantification of the sum because it also has to take account of any future repercussion of the infringement.

The discussion concerning the issue of non-pecuniary losses has to be linked with that of the breach of spousal duties. According to one approach recently suggested, the harmful conduct of one spouse against the other should be ordered in three concentric circles.

Within the inner circle, there would be conduct which, though harmful, do not produce liability, because they represent the ordinary risk in a marriage (for example, non-serious quarrelling); in the intermediate circle, conduct that could legitimate the recourse to family remedies (for example, an isolated infidelity); in the external circle, conduct that is so seriously harmful that they could give rise to actions in tort (for example, reiterated infidelities).

There has been objection to this opinion in that the second and the third hypothesis are not clearly distinguishable.⁸⁸ A different criterion has been proposed to separate conducts that are not relevant for the enforcement of legal remedies from those which are relevant only for the application of family law remedies and those which are relevant not only on the ground of family law remedies, but also in tort. The criterion is that of 'accepted risk,' used also in the case of damages incurred in the sporting

88. GAUDINO, *La responsabilità civile endofamiliare*, in *Resp. civ. prev.*, 2008, 6, 1238, at 1262-1264.

practice.⁸⁹

This criterion does not seem however to be able to give more certain solutions than the other.⁹⁰

It is, however, evident, notwithstanding the fact that at present liability in tort between spouses is admitted, that its constituents are not sufficiently clear.

V. CONCLUSION

The process above summarised concerning interspousal torts in Italian and American legal systems may be described as an evolution. This evolution has in part followed similar paths, and in part was different. In the past, in all the legal systems considered there was an immunity rule which barred the operation of tort law among spouses. However, this rule was grounded on a different rationale. In the common law systems, the immunity rule was rooted in the doctrine of the unity of spouses, from which the status of legal incapacity of married women stemmed.

In Italy the immunity rule was grounded on custom. Notwithstanding the absence of provisions stating marital immunity, tort claims within the family were not even started because of the conception, which was deeply rooted within society, of the family as an environment extraneous to law. In the superseding of this rule a major role was played by the profound social transformation of the family, with the replacement of the model based on *pater familias* authority with one based on the

89. *Id.* at 1264-65.

90. Recently, P. VIRGADAMO, *Rapporti familiari e danno non patrimoniale: la tutela dell'individuo tra diritti personali a inviolabilità strutturale e interessi familiari a inviolabilità dinamica*, in *Dir. fam. pers.*, 2006, 4, 1894 as to the relevance of tortious liability in the field of family has proposed to distinguish three hypothesis. The first would deal with pecuniary losses consequent to breaches of spousal duties recoverable under the heading of art. 2043, the second, with non pecuniary losses flowing from the infringement of inviolable rights relevant also outside the family unit, and that for this characteristic are defined "rights inviolable as to their structure" ("diritti a struttura inviolabile"), while the third with non pecuniary losses suffered as a result of serious violations of familial interests protected by spousal duties. In this case the interests infringed cannot be qualified as 'inviolable rights,' because their ambit of relevance is within family, but recovery would be admissible for the special seriousness of the infringement (for this reason they are qualified by the author as 'interessi a inviolabilità dinamica,' i.e. 'interest prospectively inviolable').

acknowledgement of the equality of spouses, which paved the way for the central role of individuals within the family. Given that the family is now recognised as a place of self-realisation and enrichment of individuals, there is no *a priori* hurdle to the compensation of damage consequent to wrongful conducts hampering the individual's self-realisation, notwithstanding the fact that the damaging person is or is not a family member.

In all the systems considered, however, some limits are put to the possibility of making recourse to tort liability within the area of the family. In the United States, procedural and substantive hurdles have set strict boundaries to tort claims. *Res judicata* can be considered a good example for the first since, according to one opinion, the facts alleged in tort claims and in divorce claims are the same. The two claims, then, should be joined in one suit. Tort suits could not then be filed separately after the divorce proceeding has been concluded.⁹¹

The case of emotional distress may be taken as a significant example of hurdles set by substantive law. Damages flowing from emotional distress are recoverable only if the conduct of the wrongdoer may be qualified as 'outrageous.' On a practical ground, protection against emotional distress is made difficult from the fact that for courts the meaning of this requirement is still highly controversial. It is therefore easy to understand why, whereas courts are more willing to uphold interspousal tort claims as to monetary damages, they are much less willing to do so when non-monetary damages are involved. Lastly, possible financial limitations of the tortfeasor have to be considered as they may render useless the recourse to tort law suits.

In Italy, the upholding of interspousal tort claims depends on the preliminary issue as to if the breach of spousal duties could be relevant not only on the ground of specific family law remedies, but also on that of the recovery of damages. The award of non-pecuniary damages is difficult because of the express provision of sec. 2059 Civil Code, which admits recoverability of them only in the cases expressly provided by law. Courts however went beyond this textual stricture in the case of the infringement of the

91. Andrew SCHEPARD, *Divorce, Interspousal Torts, and Res Judicata*, 24 *Fam. L. Q.* 127 (1990-1991).

fundamental rights of the individual, acknowledging the possibility to the victim of harmful conduct to claim for damages notwithstanding the lack of an express provision.⁹² The current trend sketched above as to interspousal torts has to be commended in so far individuals are more protected within the family unit than they were in the past.

However, several reasons militate for clear boundaries to liability in tort to be set in the realm of family. Firstly, the remedy of damages, whose main aim is of restoring the economic resources destroyed by the harmful conduct and whose general field of operation is the suit involving two strangers, are not always the most appropriate instrument to deal with the infringement of non-patrimonial interests. Secondly, tortious liability is focused on the protection of individuals, whereas family has a kernel that cannot be reduced to the individuals who form it. Moreover, since the intimate relationship created by marriage increases the risk for the spouses of reciprocal harmful conduct in everyday life, a higher degree of tolerance has to be expected by them than in the case in which damage flows from the wrongful conduct of a stranger. Interspousal tort law suits have to be admitted, but they have to be assessed in the broader context of family. Therefore, a set of criteria must be still found which can achieve a balance between the protection of the interests of the individual (an area developing under a flow of judgements as to non-monetary damages) and that of the family as a whole. The history of conjugal tort has still a long way to go before reaching a satisfactory conclusion.

92. In this sense, Cass. Civ, May 10, 2005, n. 9801, *supra* note 81, at 368, which excludes that 'diritti definiti come inviolabili ricevano diversa tutela a seconda che i loro titolari si pongano o meno all'interno di un contesto familiare.'