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# The Battered Woman and Tort Law: A New Approach to Fighting Domestic Violence

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## THE BATTERED WOMAN AND TORT LAW: A NEW APPROACH TO FIGHTING DOMESTIC VIOLENCE

*I long to hear that you have declared an independency—and by the way in the new Code of Laws which I suppose it will be necessary for you to make I desire you would Remember the Ladies, and be more generous and favourable to them than your ancestors. Do not put such unlimited power into the hands of the Husbands. Remember all Men would be tyrants if they could. If perticular care and attention is not paid to the Ladies we are determined to foment a Rebellion, and will not hold ourselves bound by any Laws in which we have no voice, or Representation. . . . That your Sex are Naturally Tyrannical is a Truth so thoroughly established as to admit of no dispute, but such of you as wish to be happy willingly give up the harsh title of Master for the more tender and endearing one of Friend. Why then, not put it out of the power of the vicious and the Lawless to use us with cruelty and indignity with impunity. Men of Sense in all Ages abhor those customs which treat us only as the vassals of your sex.*<sup>1</sup>

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1. Letter from Abigail Adams to John Adams (Mar. 31, 1776), reprinted in PHYLLIS LEE LEVIN, *ABIGAIL ADAMS* 82 (1987). Abigail Adams was married to John Adams, who helped draft the Declaration of Independence, became the United States' first minister to England and became the first Vice-President and the second President of the United States. *Id.* at xi. Abigail's son, John Quincy Adams, became the sixth President of the United States. *Id.* With her letter, Abigail began the struggle for women's rights in the United States. *Id.* at 81. John's reply reflected the founding fathers' intent that women were not to be equally protected by the laws of the new nation:

As to your extraordinary Code or Laws, I cannot but laugh. We have been told that our Struggle has loosened the bands of Government every where. That Children and Apprentices were disobedient—that schools and Colledges were grown turbulent—that Indians slighted their Guardians and Negroes grew insolent to their Masters. But your Letter was the first Intimation that another Tribe more numerous and powerful than all the rest were grown discontented.—This is rather too coarse a Compliment but you are so saucy, I won't blot it out.

Depend upon it, We know better than to repeal our Masculine systems.

Letter from John Adams to Abigail Adams (Apr. 14, 1776), reprinted in LEVIN, *supra*, at 83. John apparently was shaken enough to write to a friend and colleague explaining his position that only men who owned property should have the right to vote. JOAN HOFF, *LAW, GENDER, AND INJUSTICE: A LEGAL HISTORY OF U.S. WOMEN* 61 (1990). In his letter he equated women with children. *Id.*

But why exclude Women? You will Say, because their Delicacy renders them unfit for Practice and Experience, in the great Businesses of Life, and the hardy Enterprises of War, as well as the arduous Cares of State. Besides, their attention is so much engaged with the necessary Nurture of their Children, that Nature has made them fittest for domestic Cares. And Children have not Judgment or Will of their own.

*Id.*

## I. INTRODUCTION

Battery<sup>2</sup> is the single largest cause of injury to women in the United States.<sup>3</sup> According to a March of Dimes study, domestic violence is the "leading cause of birth defects, more than all other medical causes combined."<sup>4</sup> More than two million women are reported battered every year in the United States.<sup>5</sup> This statistic is believed to be grossly understated.<sup>6</sup> Many women do not report instances of abuse because they are afraid to call the police or seek assistance out of cultural,<sup>7</sup> family<sup>8</sup> or religious pressure,<sup>9</sup> fear of retaliation<sup>10</sup> or lack of protection by the police.<sup>11</sup> Some women do not even identify themselves as being

2. Battery is "[a] harmful or offensive contact with a person, resulting from an act intended to cause the plaintiff or a third person to suffer such a contact, or apprehension that such a contact is imminent." W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 10, at 39 (5th ed. 1984).

3. Karen Tumulty & Stephanie Chavez, *Domestic Abuse Laws, Victims Find Little Safety in System*, L.A. TIMES, Sept. 4, 1989, at I-1, I-26. Fifty percent of all women are battered sometime during their lives. LENORE E. WALKER, *THE BATTERED WOMAN* at ix (1979). "Forty-one percent of all women killed are killed by their husbands." WOMEN AND THE LAW § 9A.02[1][a], at 9A-4 to -5 (Carol H. Lefcourt ed., 1990).

4. Stan Grossfeld, *'Safer' and in Jail: Women Who Kill Their Batterers*, BOSTON GLOBE, Sept. 2, 1991, at 1, 3.

5. GAIL A. GOOLKASIAN, U.S. DEP'T JUSTICE, NATIONAL INST. OF JUSTICE, *CONFRONTING DOMESTIC VIOLENCE: THE ROLE OF CRIMINAL COURT JUDGES 2* (Nov. 1986).

They have had their teeth knocked out, by fists and by hammer. One woman, beaten into a coma, was placed on life support for two months, then released to the man who beat her; another was threatened with having her unborn child cut from her womb. The women have had cigarettes put out on their necks and objects stuck inside them until they bled. They have been bound, raped, tortured and forced to perform sexual acts. Most of them say they felt like killing themselves.

Grossfeld, *supra* note 4, at 1.

6. CAL. WELF. & INST. CODE § 18290 (West 1991) ("[I]nstances of domestic violence are considered to be the single most unreported crime in the state."). Dr. Lenore Walker discovered in her research for her book *The Battered Woman*, WALKER, *supra* note 3, only ten percent of the women interviewed ever called the police. *Id.* at 206.

7. SHEILA JAMES KUEHL ET AL., SOUTHERN CALIFORNIA WOMEN'S LAW CENTER, *USING THE LAW TO EMPOWER IMMIGRANT WOMEN: INFORMATION & RESOURCES FOR SERVICE PROVIDERS TO IMMIGRANT WOMEN IN CALIFORNIA* ch. 2, at 8 (1990).

8. ANGELA BROWNE, *WHEN BATTERED WOMEN KILL* 54 (1987); KUEHL et al., *supra* note 7, at 8.

9. WALKER, *supra* note 3, at 23 (Religious advisors tell women to "become better women, and go home and help their husbands 'become more spiritual and find the Lord.'").

10. Christine A. Littleton, *Women's Experience and the Problem of Transition: Perspective on Male Battering of Women*, 1989 U. CHI. LEGAL F. 23, 36 & n.55. Police intervention tends to be ineffective. WALKER, *supra* note 3, at 26. The abuse usually resumes with "added vigor" when the police leave. *Id.* Consider the case of Lisa Bianco. Ms. Bianco was a battered woman whose ex-husband was sentenced to five years in prison for his abuse. Tumulty & Chavez, *supra* note 3, at 27. Her ex-husband would call her from prison "to tell her what he planned to do to her when he got out." *Id.* Even though Ms. Bianco informed prison officials each time he called, he was released on an eight-hour furlough. During this furlough he went to Ms. Bianco's home, 150 miles away, and bludgeoned her to death with the butt of a gun. *Id.*

11. WOMEN AND THE LAW, *supra* note 3, § 9A.02[1][a], at 9A-4.

battered.<sup>12</sup>

Battered women<sup>13</sup> often endure physical and psychological abuse over a long period of time.<sup>14</sup> Many battered women seek help at some time from family, clergy or the police.<sup>15</sup> Nevertheless, these attempts at obtaining help may be futile and make them feel guilty or ashamed.<sup>16</sup> Consequently, battered women develop certain psychological characteristics making it unlikely they will seek help in the future.<sup>17</sup>

Women who are systematically abused over long periods of time may suffer from Battered Woman Syndrome, a subcategory of Post-traumatic Stress Disorder.<sup>18</sup> It has been used to explain why women display these psychological char-

Many people mistakenly believe that the police provide adequate protection for women who are battered . . .

In fact, the law enforcement system fails to protect women from abuse. The police often fail to respond to domestic disturbance calls. When they do respond, arrest is unlikely . . . [I]n 85 percent of domestic violence cases, the police had been summoned at least once within the two-year period before the homicide occurred. The dead person was usually the woman.

*Id.* (footnotes omitted); *see, e.g.,* Grossfeld, *supra* note 4, at 13.

My husband had just beaten me and I called the police. They came to my driveway and he's standing at the door and I'm covered in blood and I'm screaming, 'Arrest him. Y'know, he just beat me.' I wanted him out of my life. I wanted him out of my house. And they said, 'Well, we didn't see him do it.' People ask why didn't I leave? I did. Why didn't you go into hiding? I did. I did everything I could, and no one would help me. If the cops had helped me, maybe he'd be alive today. I didn't want to kill him. I'm not a killer. It's like he lowered me to his level. It was me or him.

*Id.*; *see also* Sheila James Kuehl, *911 Must Bring Protection, Not Just a Post-Mortem*, L.A. TIMES, Aug. 31, 1989, at II-7 (woman with restraining order against estranged husband shot to death by him when police refused to answer her call for help because he had not yet committed crime). *See* Patt Morrison, *Female Officers Unwelcome—But Doing Well*, L.A. TIMES, July 12, 1991, at A1, for a discussion of police attitudes toward women in the Los Angeles Police Department. Policemen would send messages over the computer advocating the beating of women. *Id.* at A27. Some of the messages relayed over the computer were "If only I could slap her I would be happy." (sent Jan. 7, 1990); "Pound her into submission . . . and then have her make you breakfast." (sent Jan. 22, 1990); and "We got rid of our two lovely young ladies . . . They both need a few rounds with the old baton . . ." (sent Oct. 8, 1990). *Id.* (quoting transcripts reviewed by Christopher Commission).

12. WALKER, *supra* note 3, at 26.

13. Although domestic violence victims may be male or female, 95% of the victims are women. U.S. DEP'T JUSTICE, BUREAU OF JUSTICE STATISTICS, REPORT TO THE NATION ON CRIME AND JUSTICE: THE DATA 21 (1983). Because of this gender disparity, domestic violence is considered a "women's issue." This Comment explores the law's treatment of domestic violence and the Battered Woman Syndrome as it affects women's lives.

14. WALKER, *supra* note 3, at 43.

15. *See supra* notes 8-9, 11.

16. WALKER, *supra* note 3, at 23.

17. *Id.* at 42. Dr. Lenore Walker describes the psychological characteristics as learned helplessness. *Id.* An abused woman isolated by her batterer will feel as though she is helpless and stop trying to escape. *See id.* at 51-52 (how battered women become victimized).

18. LENORE WALKER, TERRIFYING LOVE 48-49 (1989). Post-traumatic Stress Disorder is the term coined for the psychological effects suffered from severe and repeated trauma. *Id.* at 48. Continued and unpredicted traumas render the victim psychologically helpless. *Id.*

acteristics and why they stay in long-term abusive relationships.<sup>19</sup> Although some women are able to break free of violent relationships by seeking refuge in the law,<sup>20</sup> battered women's shelters<sup>21</sup> or divorce,<sup>22</sup> others become trapped until they kill their batterers.<sup>23</sup>

The law in the United States traditionally did nothing to help battered women.<sup>24</sup> In the latter part of the twentieth century, however, there has been a wave of legislation designed to combat the problem of abusive relationships between spouses and live-in partners.<sup>25</sup> For example, spousal abuse is now a crime in some states<sup>26</sup> and battered women who kill their batterers in self-defense may use expert testimony to show the reasonableness of their actions as battered women.<sup>27</sup> Although it is becoming easier to prosecute men who batter women under the criminal codes,<sup>28</sup> many battered women are reluctant to cooperate with prosecutors. There have been several reasons suggested for this: battered women and their children are often economically dependent upon the abuser and need him to work rather than be in jail;<sup>29</sup> battered women are afraid of what might happen to them when the batterer is released from jail; or the battered woman just does not want to see someone she loves and cares about go to jail. Monetary judgments in personal injury actions may therefore be an effective tool

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19. CYNTHIA K. GILLESPIE, JUSTIFIABLE HOMICIDE 158 (1989). See *id.* for a comprehensive look at homicide cases involving battered women who kill in self-defense. Evidence about the Syndrome is admitted through the use of expert testimony. See *infra* notes 80-110 and accompanying text.

20. Restraining orders may be obtained under civil codes. *E.g.*, CAL. CIV. PROC. CODE §§ 540-553 (West Supp. 1992).

21. CALIFORNIA ATTORNEY GENERAL, WOMEN'S RIGHTS HANDBOOK 122 (Sept. 1990).

22. Many tort actions for spousal abuse are brought at the time of divorce. See, *e.g.*, *Massey v. Massey*, 807 S.W.2d 391 (Tex. Ct. App. 1991).

23. GILLESPIE, *supra* note 19, at 22.

24. See *infra* notes 52-67 and accompanying text.

25. For a complete bibliography of domestic violence legislation in the United States, see NATHAN AARON ROSEN, NATIONAL CTR. ON WOMEN AND FAMILY LAW, BATTERED WIVES: A COMPREHENSIVE ANNOTATED BIBLIOGRAPHY OF ARTICLES, BOOKS AND STATUTES IN THE UNITED STATES OF AMERICA 77-84 (1988) [hereinafter BIBLIOGRAPHY].

26. See, *e.g.*, CAL. PENAL CODE § 273.5 (West 1988 & Supp. 1992).

27. See, *e.g.*, *State v. Kelly*, 478 A.2d 364, 375-82 (N.J. 1984). The use of expert testimony about the Battered Woman Syndrome developed as a result of sex bias in the court system. WOMEN AND THE LAW, *supra* note 3, § 9A.03[1], at 9A-18 (women viewed as unreasonable; sex bias in self-defense law; misconceptions about battered women). For example, a man is usually justified in killing to protect his "home, his family, or the chastity of his wife" or to "fight[] off an assailant." *Id.* § 9A.02[2][b], at 9A-9. Women, however, historically have not been allowed to use deadly force to protect themselves to the same extent as men. *Id.* at 9A-9 to -10. For example, a man can use "deadly force to prevent forcible sodomy between males" but a woman cannot "use deadly force to repel a rape." *Id.* at 9A-10 (footnotes omitted) (citing *People v. Collins*, 189 Cal. App. 2d 575, 11 Cal. Rptr. 504 (1961); *State v. Robinson*, 328 S.W.2d 667 (Mo. 1959); *Commonwealth v. Lawrence*, 236 A.2d 768 (Pa. 1968)).

28. See Julie A. Lipsman, *Criminal Law: Domestic Violence*, in 1985 ANNUAL SURVEY OF AMERICAN LAW 839 & n.1 (legislatures recognizing domestic violence is serious crime).

29. Because women often earn less than men, many women cannot afford to leave the "community" even if they themselves work outside the home. Littleton, *supra* note 10, at 54.

in the fight against violence toward women.<sup>30</sup>

Civil laws are making it easier for women to obtain the cooperation of police and obtain temporary restraining orders.<sup>31</sup> Women have also sued domestic partners<sup>32</sup> for personal injuries suffered during violent relationships, but with little success.<sup>33</sup> At first, women were barred from recovery by judicially created interspousal tort immunity.<sup>34</sup> Even though the doctrine of interspousal tort immunity has been virtually eliminated in many jurisdictions,<sup>35</sup> judges are making exceptions to its abrogation in some cases when a woman sues her husband for abuses suffered during marriage.<sup>36</sup> Put another way, men are not held to the same standard of care toward spouses as they are to strangers.<sup>37</sup> As a result, some battered women are not able to obtain the monetary damages for abuse suffered even though society has declared domestic violence a crime.<sup>38</sup>

After the abrogation of interspousal tort immunity, other barriers were placed in front of battered women. In some cases, battered women were barred from recovery because the typical one- or two-year period of limitations for tort

30. See *Mogford v. Mogford*, 616 S.W.2d 936, 940 (Tex. Civ. App. 1981).

31. See *infra* note 70.

32. The terms spouse, domestic partner and mate are used interchangeably in this Comment and all refer to a partner in an intimate and long-term domestic relationship.

33. See *infra* notes 111-254 and accompanying text for discussion of cases.

34. Interspousal tort immunity prevents one spouse from suing the other in tort. It is based on the common law concept that husband and wife are one legal identity. See *infra* notes 111-63 for a discussion of interspousal tort immunity and battered women.

35. *Penton v. Penton*, 135 So. 481 (Ala. 1931); *Cramer v. Cramer*, 379 P.2d 95 (Alaska 1963); *Leach v. Leach*, 300 S.W.2d 15 (Ark. 1957); *Klein v. Klein*, 58 Cal. 2d 692, 376 P.2d 70, 26 Cal. Rptr. 102 (1962); *Rains v. Rains*, 46 P.2d 740 (Colo. 1935); *Brown v. Brown*, 89 A. 889 (Conn. 1914); *Brooks v. Robinson*, 284 N.E.2d 794 (Ind. 1972); *Brown v. Gosser*, 262 S.W.2d 480 (Ky. 1953); *MacDonald v. MacDonald*, 412 A.2d 71 (Me. 1980); *Hosko v. Hosko*, 187 N.W.2d 236 (Mich. 1971); *Noone v. Fink*, 721 P.2d 1275 (Mont. 1986); *Imig v. March*, 279 N.W.2d 382 (Neb. 1979); *Gilman v. Gilman*, 95 A. 657 (N.H. 1915); *Merenoff v. Merenoff*, 388 A.2d 951 (N.J. 1978); *Maestas v. Overton*, 531 P.2d 947 (N.M. 1975); *State Farm Mut. Auto. Ins. Co. v. Westlake*, 324 N.E.2d 137 (N.Y. 1974); *Crowell v. Crowell*, 105 S.E. 206 (N.C. 1920); *Fitzmaurice v. Fitzmaurice*, 242 N.W. 526 (N.D. 1932); *Shearer v. Shearer*, 480 N.E.2d 388 (Ohio 1985); *Courtney v. Courtney*, 87 P.2d 660 (Okla. 1938); *Hack v. Hack*, 433 A.2d 859 (Pa. 1981); *Pardue v. Pardue*, 166 S.E. 101 (S.C. 1932); *Scotvold v. Scotvold*, 298 N.W. 266 (S.D. 1941); *Davis v. Davis*, 657 S.W.2d 753 (Tenn. 1983); *Price v. Price*, 732 S.W.2d 316 (Tex. 1987); *Stoker v. Stoker*, 616 P.2d 590 (Utah 1980); *Freehe v. Freehe*, 500 P.2d 771 (Wash. 1972), *overruled on other grounds by Brown v. Brown*, 675 P.2d 1207 (Wash. 1984); *Coffindaffer v. Coffindaffer*, 244 S.E.2d 338 (W. Va. 1978); *Wait v. Pierce*, 209 N.W. 475 (Wis. 1926); *Tader v. Tader*, 737 P.2d 1065 (Wyo. 1987).

36. See *infra* notes 393-406 and accompanying text.

37. Earle S. Lilly & Pamela E. George, *Recovery of Intentional Infliction of Emotional Distress upon Divorce*, 9 FAIRSHARE, Jan. 1989, at 26, 27; see Deborah L. Rhode, *Women's Rights and Social Wrongs*, 14 HARV. J.L. & PUB. POL'Y 14, 15 (1991) (courts trivialize sexual harassment and domestic violence as "'dalliances'" and "'flirtation'" (quoting *Vinson v. Taylor*, 760 F.2d 1330, 1330 (D.C. Cir. 1985) (Bork, J., dissenting from denial of rehearing) (dalliances) and *Sand v. Johnson Co.*, 33 Fair Empl. Prac. Cas. (BNA) 716, 717 (E.D. Mich. 1982) (flirtation)).

38. See *infra* notes 68-74 and accompanying text.

actions had expired before they were finally induced to act.<sup>39</sup> In other cases, women were barred from tort causes of action on the basis of *res judicata* because they did not allege the tort cause of action during divorce proceedings.<sup>40</sup> Even in successful tort actions, women who suffered abuse over a long period of time were denied full recovery because they did not leave the relationship after the first act of violence. This view, however, does not recognize the effects of systematic abuse over long periods of time. Commentators have criticized traditional tort law for not taking into account the experiences of women in battering relationships.<sup>41</sup>

In spite of these legal handicaps, four women have recently won large jury awards against their batterers.<sup>42</sup> In separate cases, expert testimony about the Battered Woman Syndrome was presented to educate the jury about the psychological effects of an intimate battering relationship.<sup>43</sup> This Comment argues that expert testimony about the effects of the Battered Woman Syndrome can be used to overcome the handicaps faced by women when recovery is sought under traditional tort law.

Before bringing a tort action against a batterer for infliction of spousal abuse, several procedural obstacles must be overcome. First, interspousal tort immunity must have been abrogated in the state where the suit is filed.<sup>44</sup> Second, if divorce proceedings have not yet commenced, or if they have and are not yet final, it must be decided whether the tort action should be joined with the divorce action.<sup>45</sup> If divorce proceedings are over, it must be decided whether the tort claim is barred by *res judicata*.<sup>46</sup> Third, are there other possible bars to the action, such as the statute of limitations?<sup>47</sup> Finally, in a claim for spousal abuse, the Battered Woman Syndrome should be used to show that the tort is of a continuous nature and as evidence of emotional distress.<sup>48</sup>

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39. See *infra* notes 301-39 and accompanying text.

40. See *infra* notes 232-41 and accompanying text.

41. Littleton, *supra* note 10, at 26. Littleton adds, "[i]t is often said that rape victims are raped twice—once by the rapist and once by the legal system. If that is so, then battered women are battered three times—once by the batterer, a second time by society and finally by the legal system." *Id.* at 29. See generally Rhode, *supra* note 37, at 13-14 (arguing that equality in legal status does not necessarily mean social equality because law does not take into account daily experiences of women).

42. See *Gladish v. Simmons*, 11 Fam. L. Rep. (BNA) 1323 (Colo. Dist. Ct. 1985) (\$100,000), *rev'd on other grounds sub nom. Simmons v. Simmons*, 773 P.2d 602 (Colo. Ct. App. 1988); *Massey v. Massey*, 807 S.W.2d 391 (Tex. Ct. App. 1991) (\$362,000); *Twyman v. Twyman*, 790 S.W.2d 819 (Tex. Ct. App. 1987) (writ granted Dec. 19, 1990) (\$15,000); *Spotlight: Victim of Battered Woman's Syndrome Recovers in a Civil Action for Battery and Emotional Distress*, 33 ASS'N TRIAL LAW. AM. 314, 314 (1990) (*Curtis v. Curtis*, No. 14,514 (Idaho Dist. Ct. May 18, 1990) (unreported case) (\$1,000,000)) [hereinafter *Spotlight*].

43. See *Gladish*, 11 Fam. L. Rep. (BNA) at 1323; *Spotlight*, *supra* note 42, at 314.

44. See *infra* notes 111-63 and accompanying text.

45. See *infra* notes 164-254 and accompanying text.

46. See *infra* notes 164-254 and accompanying text.

47. See *infra* notes 301-39 and accompanying text.

48. See *infra* notes 422-33 and accompanying text.

This Comment traces the development of domestic violence legislation and the use of expert testimony about the Battered Woman Syndrome in the United States.<sup>49</sup> It analyzes the recent tort litigation involving domestic violence and how expert testimony on the Battered Woman Syndrome can help women break the cycle of violence by helping them become economically independent.<sup>50</sup> Finally, this Comment suggests that the courts and legislatures should recognize a new tort of spousal abuse which would facilitate compensating women for mental and physical injuries inflicted by battering domestic partners.<sup>51</sup>

## II. DOMESTIC VIOLENCE AND THE LAW

### A. *Wife-Beating Historically Condoned*

Violence by men toward their families has been tolerated and even condoned throughout history.<sup>52</sup> In at least one anthropologist's view, the creation of the patriarchal society began with man's practice of warfare, his mastery of weapons and the use of sex to nurture aggressive personalities.<sup>53</sup> Religion and the law sanctioned wife beating for centuries, with the church encouraging men to beat their wives into obedience.<sup>54</sup> The Judeo-Christian belief in male dominance over women is rooted in the theory of creationism wherein God created man first, and woman as an afterthought only to keep man company.<sup>55</sup> The theory further ingrains misogyny into western culture by the belief that it is woman, in the form of Eve, who is responsible for the introduction of sin into the world and the fall of the human race.<sup>56</sup> These notions carried over into western culture the idea "[m]arriage for her was to be a condition of bondage, maternity a period of suffering and anguish, and in silence and subjection, she

49. See *infra* notes 52-110 and accompanying text.

50. See *infra* notes 111-433 and accompanying text.

51. See *infra* notes 434-72 and accompanying text.

52. Laura Crites, *A Judicial Guide to Understanding Wife Abuse*, JUDGES' J., Summer 1985, at 5, 6.

53. MARVIN HARRIS, *CANNIBALS AND KINGS* 81 (Vintage Books ed. 1991).

54. Crites, *supra* note 52, at 6. For a thorough look at how religions have condoned wife beating and its effect on the law, see Kathleen A. McDonald, *Battered Wives, Religion & Law: An Interdisciplinary Approach*, 2 YALE J.L. & FEMINISM 251 (1990); see also UNITED STATES COMM. ON CIVIL RIGHTS, UNDER THE RULE OF THUMB 1 (1982) [hereinafter RULE OF THUMB] (church men encouraged to beat wives). For a woman's interpretation of *The Bible*, see ELIZABETH CADY STANTON, *THE WOMAN'S BIBLE: THE ORIGINAL FEMINIST ATTACK ON THE BIBLE* (abr. ed., Polygon Books 1985) (New York, European Publishing Co. pt. I 1895, pt. II 1898).

55. *Genesis* 2:18-22; STANTON, *supra* note 54, at 20; McDonald, *supra* note 54, at 267.

56. *Genesis* 3:1-24; STANTON, *supra* note 54, at 23-27; Crites, *supra* note 52, at 6. It has been suggested that Eve was superior to Adam and Adam aided and abetted the serpent. STANTON, *supra* note 54, at 26-27. It was Adam, not Eve, who was given the commandment not to eat the forbidden fruit, for Eve had not been yet formed. *Id.* at 26. It was Eve who intelligently debated with the serpent while Adam stood by doing nothing. *Id.* Adam is portrayed as a "dastardly" soul who hides behind Eve, whining when confronted by God. *Id.* at 27. See also CHERIS KRAMARAE & PAULA A. TREICHLER, *A FEMINIST DICTIONARY* 145 (1990), for alternate views of Eve as a "strong, courageous, innovative" woman.

was to play the role of a dependent on man's bounty for all her material wants."<sup>57</sup>

The first marriage law in Roman times proclaimed that wives should "conform themselves entirely to the temper of their husbands and the husbands to rule their wives as necessary and inseparable possessions."<sup>58</sup> The middle ages saw a barbaric acceptance of extreme cruelty to women for as much as scolding their husbands in public.<sup>59</sup> These misogynistic views were incorporated into British common law where a man was allowed to beat his wife with a "rod no thicker than his thumb."<sup>60</sup> Not until the late nineteenth century was the right to wife beating explicitly withdrawn.<sup>61</sup> Wife-beating, however, was still not a crime.<sup>62</sup>

Even though women were theoretically protected by law from crimes like assault, battery and rape,<sup>63</sup> violence in the home was not afforded the same significance.<sup>64</sup> Men who abused their wives were not prosecuted.<sup>65</sup> Commentators attribute this to several factors including gender bias, lack of an understanding of the psycho-dynamics of crime and lack of awareness of the seriousness of the crime.<sup>66</sup> Judges also lacked understanding of the seriousness of domestic violence and tended to trivialize and demean the complaints of battered women.<sup>67</sup>

57. STANTON, *supra* note 54, at 7; *see also* McDonald, *supra* note 54, at 271 (adding that "force is a necessary corollary" to subjugation of women).

58. McDonald, *supra* note 54, at 254 (quoting R. Emerson Dobash & Russell P. Dobash, *Wives: The 'Appropriate' Victims of Marital Violence*, 2 *VICTIMOLOGY* 426, 427 (1977-78)).

59. *Id.* at 255.

When you see your wife commit an offense, don't rush at her with insults and violent blows. . . . Scold her sharply, bully and terrify her. And if this still doesn't work . . . take up a stick and beat her soundly, for it is better to punish the body and correct the soul than to damage the soul and spare the body. . . . Then readily beat her, not in rage but out of charity and concern for her soul, so that the beating will redound to your merit and her good.

RULE OF THUMB, *supra* note 54, at 1 (footnote admitted) (quoting TERRY DAVIDSON, *CONJUGAL CRIME* 99 (1978) (passage attributed to Friar Cherubino of Siena's *RULES OF MARRIAGE* compiled between 1450 and 1481)).

60. Crites, *supra* note 52, at 6.

61. *Id.*

62. *Id.*

63. *Id.*

64. McDonald, *supra* note 54, at 257.

65. Crites, *supra* note 52, at 6; *see* McDonald, *supra* note 54, at 279 (citing *State v. Oliver*, 70 N.C. 60, 61-62 (1874) (discussing North Carolina statute allowing men to beat their wives)). Current domestic violence legislation recognizes that abuse can occur between household members other than husband and wife, such as unmarried couples or family members. *See* CAL. CIV. PROC. CODE §§ 540-542 (West Supp. 1992).

66. Crites, *supra* note 52, at 7.

67. *Id.* at 6-7 (citing ATTORNEY GEN. TASK FORCE REP. ON FAMILY VIOLENCE: FINAL REPORT 12 (1984)); Sheila James Kuehl, *Achieving Equal Justice for Victims of Domestic Violence*, in ADMINISTRATIVE OFFICE, JUDICIAL COUNCIL OF THE COURTS OF CALIFORNIA, *ACHIEVING EQUAL JUSTICE OF WOMEN AND MEN IN THE COURTS: THE DRAFT REPORT OF THE JUDICIAL COUNCIL ADVISORY COMMITTEE ON GENDER BIAS IN THE COURTS* 5 (Draft 1990); Rhode, *supra* note 37, at 15.

Some states have recently passed legislation making domestic violence a crime.<sup>68</sup> In California all law enforcement agencies are required to implement written policies regarding their response to domestic violence calls.<sup>69</sup> California also provides for stay-away orders under the penal code.<sup>70</sup> The penal code provides protection from continuing abuse by a spouse or cohabitant of the opposite sex.<sup>71</sup> The statute covers spouses, cohabitants of the opposite sex and co-parents.<sup>72</sup> However, the criminal statutes are still for the most part ineffectively enforced<sup>73</sup> and provide the battered woman with little or no redress.<sup>74</sup>

In recent years, state legislatures have enacted civil laws to help prevent recurring acts of violence between spouses or household members.<sup>75</sup> These civil laws provide a battered woman with the means to obtain restraining orders in order to keep the batterer away from her.<sup>76</sup> Restraining orders, however, may not be enough protection because there is the danger of provoking an abusive husband to further violence.<sup>77</sup> Restraining orders provide no physical protection and cannot be enforced until the person they are supposed to restrict violates the order.<sup>78</sup> The woman holding the restraining order then must telephone the police and wait for assistance. The primary problem, however, is that even though informed that a threat has been made on the victim's life, or even that a crime is occurring, the police may not respond until after it is too late.<sup>79</sup>

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68. See Linda Lengyel, *Survey of State Domestic Violence Legislation*, 10(1/2) LEGAL REFERENCE SERVICES Q. 59 (1990).

69. California added its statutes in 1984. See CAL. PENAL CODE §§ 13700-13731 (West Supp. 1992) (setting domestic violence policy).

70. CAL. PENAL CODE § 136.2 (West 1988 & Supp. 1992). A stay-away order is available under the criminal codes. Like a restraining order, the person against whom the stay-away order is obtained must refrain from coming into contact with the person holding the order. A stay-away order is available if it is likely that the defendant will use intimidation to dissuade the victim or witness from cooperating with the authorities. Stay-away orders may restrict access to the family residence and bar any communication with the victim by the defendant or his agent. *Id.*

71. CAL. PENAL CODE § 273.5 (West 1985 & Supp. 1992). Requirements for prosecution under this law are: (1) willful infliction on a spouse or cohabitant of the opposite sex; and (2) bodily injury resulting in traumatic condition. *Id.*; see *People v. Thompson*, 160 Cal. App. 3d 220, 206 Cal. Rptr. 516 (1984) (husband convicted under Penal Code § 273.5 for corporeal injury to spouse).

72. This law does not apply to same sex partners, parents of offenders, children, former cohabitants and other members of the household such as relatives or roommates. Punishment for a misdemeanor is up to one year in county jail and a fine of up to \$6000. If prosecuted as a felony, punishment is two, three or four years in state prison. CAL. PENAL CODE § 273.5 (West 1985 & Supp. 1992).

73. See WOMEN AND THE LAW, *supra* note 3, § 9.05, at 9-14 to -17 (police reluctant to make arrests; prosecutors fail to prosecute with same vigor as stranger-stranger cases; court employees and judges insensitive or give misinformation).

74. *Id.* § 9.01, at 9-3.

75. See, e.g., CAL. CIV. PROC. CODE §§ 540-553 (West Supp. 1992).

76. *Id.* §§ 545-549.

77. See KUEHL et al., *supra* note 7, ch. 2, at 9-10.

78. See *id.* ch. 2, at 27.

79. For example, when Maria Navarro called the Los Angeles police on August 28, 1989

### B. Development of Battered Woman Syndrome

Many battered women suffer from a form of the debilitating Post-traumatic Stress Disorder known as Battered Woman Syndrome.<sup>80</sup> The characteristics of a battered woman were first described by psychotherapist Lenore Walker in her book, *The Battered Woman*.<sup>81</sup> The Syndrome is characterized by psychological effects from repeated physical and psychological abuse over a period of time. A pattern of behavior between the batterer and his victim develops, during which he manipulates his victim in order to fulfill his needs for power.<sup>82</sup>

This pattern of behavior is known as the cycle of violence.<sup>83</sup> Walker describes it as a three-stage, endless pattern of escalating violence.<sup>84</sup> When combined with certain social factors, the psychological effect on the victim renders

to tell them her ex-husband was on his way over to kill her, the response was "what can we do?" Kuehl, *supra* note 11, at II-7. As pointed out by Kuehl, if Navarro had been a celebrity or political candidate, something would have been done to protect her. *Id.*

80. The disorder has been widely recognized by the psychiatric community. *E.g.*, *State v. Allery*, 682 P.2d 312, 315-16 (Wash. 1984) (expert testimony about Battered Woman Syndrome admissible to help understand battered woman's behavior).

81. WALKER, *supra* note 3.

82. KUEHL et al., *supra* note 7, ch. 2, at 5.

83. *Id.*

84. *Id.* at 5. Domestic abuse is progressive and spiralling in nature, escalating over time and increasing in frequency and seriousness. *Id.* The relationship begins with an initial honeymoon phase in which the batterer obtains a commitment from his victim. *Id.* at 6; WALKER, *supra* note 3, at 55.

The cycle of violence begins with a tension phase. *Id.* at 56-59.

During the tension phase, the victim walks on eggshells. She may appease the batterer in order to prevent escalation of the tension. She believes that by accommodating him, she can make things better.

The emotional abuse usually starts after she has made a commitment to him. The batterer interprets every little failure by her as an attack on him. Regardless of what the victim does, her partner goes to the explosion phase.

The victim comes to recognize in this phase that something is going to happen. She picks up his verbal cues. He may say something like "I need to teach you a lesson." The victim may seek help at this stage, but it is difficult to get because no violence has yet occurred. She will experience depression, anxiety, and helplessness. Physical symptoms will appear, including headache, upset stomach, and an increasing sense of worthlessness and loss of control.

KUEHL et al., *supra* note 7, ch. 2, at 6.

The tension phase escalates into the explosion phase. WALKER, *supra* note 3, at 59-65.

During the explosion phase, the abuse occurs. The incidents which set off the explosion may be trivial or unknown. The victim is purposefully kept off balance; what is pleasing behavior one day may be the trigger of violence the next. The man feels out of control and thinks that by abusing the woman he can regain his feelings of power and control.

Both realize he is out of control. She simply tries to survive.

If help arrives, the abuser may appear more rational than the victim. He has the greater emotional control. Often, the police report reflects her difficulty: she may appear confused, hysterical, uncommunicative.

KUEHL et al., *supra* note 7, ch. 2, at 6-7.

Finally, there is a return to the honeymoon phase. WALKER, *supra* note 3, at 65-70.

The cycle returns to the honeymoon phase and begins again. There is love, tearful apologies, reconciliation, promise, hope of change and minimization of the

her psychologically paralyzed.<sup>85</sup> Walker likens this effect to learned helplessness.<sup>86</sup> She theorizes that when a woman believes she cannot get help, she will stop trying, and therefore has no alternative but to stay with the batterer.<sup>87</sup> Walker uses learned helplessness to attempt to answer the question, "why didn't she leave?"<sup>88</sup>

Although expert testimony can be used to explain to the judge and jury why she didn't leave, it can also show that the issue is not that a woman did not leave, but the batterer himself has committed a wrong as well as the nature of his

violence. This can be very isolating for the woman . . . Her helpers or friends may encourage her to overlook the violence. She will find fewer friends for support.

The batterer will make excuses, such as "it was the alcohol." However, she should realize that he chose to hit *her*, not a neighbor or some other person out on the street.

The woman will be loving and nurturing. She will try to meet all the abuser's anticipated needs out of fear of his violence. She may believe she can control him. But he sees her behavior as rewarding or condoning his violence.

The abuser knows he has done wrong and makes every effort to be forgiven by the victim. He buys her gifts and flowers. He promises never to hurt her again. She wants to believe him. However, it doesn't matter what she does to please him, he will find fault and excuses to be abusive again.

KUEHL et al., *supra* note 7, ch. 2, at 7.

The cycle then repeats itself. WALKER, *supra* note 3, at 69.

At the center of the cycle are denial and minimization—survival techniques used by battered women and their abusers. KUEHL et al., *supra* note 7, ch. 2, at 4; see WALKER, *supra* note 3, at 56, 62-63, 67-69. If she can minimize the violence or deny its tragic consequences, she can continue to believe that her marriage can work. For the batterer, there are excuses. KUEHL et al., *supra* note 7, ch. 2, at 4-5. He may try to deny the seriousness of abuse by saying things like "I only pushed her," "I was drunk," or "I had an argument with the boss." *Id.* at 5.

85. WALKER, *supra* note 3, at 43.

86. See *id.* at 45-54. Walker's theory is based on the experiments of psychologist Martin Seligman. *Id.* at 45. Seligman administered electrical shocks to dogs in cages. *Id.* at 46. No matter how the dogs responded, the shocks did not cease. *Id.* After a short period of time, the dogs stopped trying to escape the shocks. *Id.* Littleton criticizes Walker's analogy of women with dogs and points out that Walker's theory places the "fault" with the women instead of with the batterers who caused—through random, uncontrolled violence—the women to react in this way. Littleton, *supra* note 10, at 38-42. These women should not be stereotyped as helpless because of the enormous courage and strength in their ability to continue to survive in extremely dangerous situations. *Id.* at 42. In Littleton's view, the focus should be "explicitly and continuously placed where it belongs—on the intolerable conditions under which women live." *Id.*

87. *Id.*

88. WALKER, *supra* note 18, at 47.

The question most often asked about battered women is, "Why don't they leave?" The underlying assumption is that then the battering would stop. Years of research have proved that assumption to be untrue; the abuse often escalates at the point of separation and battered women are in greater danger of dying then. The apparent passivity and immobility of battered women is difficult for most people to understand. But some important research in the field of human behavior, and several important theories that have evolved out of that research, are helpful in making the battered woman's behavior understandable.

*Id.*

victim's injuries. Furthermore, evidence shows that even if a woman leaves a battering relationship the batterer's behavior does not change—judges and juries must understand she is not the cause of the problem.<sup>89</sup>

Expert testimony is opinion evidence given by a specialist regarding areas of expertise not commonly understood by the average layperson.<sup>90</sup> Although ultimately excluded from trial, expert testimony on the Battered Woman Syndrome was first recognized in *Ibn-Tamas v. United States*.<sup>91</sup> Beverly Ibn-Tamas was convicted of second-degree murder for killing her husband after a battering incident.<sup>92</sup> In order to support her claim of self-defense, the defense offered the testimony of Dr. Lenore Walker.<sup>93</sup> Dr. Walker's testimony described the "phenomenon of wife battering," and gave her opinion as to whether Mrs. Ibn-Tamas's personality matched that of a battered woman.<sup>94</sup>

The trial court excluded the testimony for three reasons.<sup>95</sup> First, the court held that the testimony pertained to prior acts of the victim which the jury was not entitled to hear.<sup>96</sup> Second, the court held that expert testimony would invade the province of the jury, which judges the credibility of the witnesses.<sup>97</sup> Third, the court held that Dr. Walker's conclusion that the decedent was a batterer was irrelevant because he was not on trial.<sup>98</sup>

The District of Columbia Court of Appeals reversed and remanded the case on the issue of admissibility of expert testimony.<sup>99</sup> The court of appeals found that the expert testimony, if admissible, would have enhanced the defendant's credibility during cross-examination and also supported her testimony regarding her belief of imminent danger at the time of the shooting.<sup>100</sup> The court of appeals also determined that the probative value of the testimony would outweigh the risk of its "engender[ing] vindictive passions within the jury."<sup>101</sup> The court reasoned that identifying Mrs. Ibn-Tamas as a battered wife would have a substantial bearing on her perceptions and behavior at the time of the killing.<sup>102</sup>

The court of appeals found that the trial court did not clearly state its find-

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89. REV. MARIE M. FORTUNE & DENISE HORMANN, MSW, FAMILY VIOLENCE: A WORKSHOP MANUAL FOR CLERGY AND OTHER SERVICE PROVIDERS 56 (1980) (National Clearinghouse on Domestic Violence, Domestic Violence Monograph Series No. 6, Apr. 1981).

90. BLACK'S LAW DICTIONARY 579 (6th ed. 1990).

91. 407 A.2d 626 (D.C. Cir. 1979); see GILLESPIE, *supra* note 19, at 171-74 (discussing *Ibn-Tamas*).

92. *Ibn-Tamas*, 407 A.2d at 628, 630-31.

93. *Id.* at 631.

94. *Id.* (comparing Ibn-Tamas's personality to 110 battered women Walker studied).

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 628.

100. *Id.* at 634.

101. *Id.* at 639 (quoting *United States v. Green*, 548 F.2d 1261, 1268 (6th Cir. 1977)).

102. *Id.*

ings of admissibility under the threefold test used by the District of Columbia Court of Appeals for determining admissibility of expert testimony.<sup>103</sup> The court held it could not as a matter of law affirm or reverse the decision of the trial court to exclude the testimony.<sup>104</sup> On remand, the trial court found that the defendant failed to establish the general acceptance of the methodology used by Dr. Walker in her study and therefore failed to meet the third prong of the admissibility test.<sup>105</sup> The court of appeals then affirmed these findings.<sup>106</sup>

Even though Dr. Walker's testimony regarding battered women ultimately was excluded from Mrs. Ibn-Tamas's defense, the case was a landmark decision.<sup>107</sup> It was the first time an appellate court found such testimony beyond the ken of the average juror.<sup>108</sup> The door was opened for the use of expert testimony about the Battered Woman Syndrome.

In 1984 the Washington Supreme Court held that scientific understanding of the Battered Woman Syndrome was sufficiently developed to allow the Syndrome to be admitted as evidence of self-defense.<sup>109</sup> Today it is recognized as evidence of self-defense in a growing number of states.<sup>110</sup> As this evidence becomes widely accepted by criminal courts, it follows that it could be helpful to battered women in other contexts, including tort cases.

### III. POTENTIAL BARS TO INTERSPOUSAL TORT LITIGATION

Before a battered woman can recover in tort against her batterer for injuries suffered, there are several factors to consider. First, if the couple was married at the time of the battering incidents, could any tort claims be barred by the doctrine of interspousal tort immunity? Second, if tort claims are filed against the batterer, should they be joined with a divorce action if the parties are married? Third, if the parties are already divorced, will the tort actions be barred by res judicata? Fourth, what torts should be alleged and are most likely to succeed?

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103. *Id.* at 632-39 (citing *Dyas v. United States*, 376 A.2d 827, 832 (D.C.), *cert. denied*, 434 U.S. 973 (1977)).

104. *Id.* at 640. The test given by the court is as follows:

(1) [T]he subject matter "must be so distinctively related to some science, profession, business or occupation as to be beyond the ken of the average layman"; (2) "the witness must have sufficient skill, knowledge, or experience in that field or calling as to make it appear that his opinion or inference will probably aid the trier in his search for truth"; and (3) expert testimony is inadmissible if "the state of the pertinent art or scientific knowledge does not permit a reasonable opinion to be asserted even by an expert."

*Id.* at 632-33 (quoting *Dyas v. United States*, 376 A.2d 827, 832 (D.C.), *cert. denied*, 434 U.S. 973 (1977)).

105. *See id.* at 640.

106. *See id.* (refusing to overrule trial court as matter of law).

107. GILLESPIE, *supra* note 19, at 174.

108. *Ibn-Tamas*, 407 A.2d at 635; GILLESPIE, *supra* note 19, at 174.

109. *State v. Allery*, 682 P.2d 312, 315 (Wash. 1984).

110. *See, e.g.*, *State v. Stewart*, 763 P.2d 572 (Kan. 1988); *Commonwealth v. Stonehouse*, 555 A.2d 772 (Pa. 1989); *State v. Allery*, 682 P.2d 312 (Wash. 1984); *see also* GILLESPIE, *supra* note 19, at 179 (discussing admission of Battered Woman Syndrome).

Finally, will existing tort law adequately compensate the battered victim for her injuries? This Comment argues that a new tort of spousal abuse is needed because existing tort law does not adequately compensate battered women for injuries suffered during abusive relationships.

### A. Interspousal Tort Immunity

Interspousal tort immunity prohibits one spouse from seeking tort damages from the other.<sup>111</sup> This doctrine was "first recognized in the United States during the 1860s"<sup>112</sup> and remained the majority rule until the 1970s.<sup>113</sup> Because of this tort immunity, a woman could not seek civil damages from a man who beat her if he was her husband.<sup>114</sup>

The rationale underlying the immunity between spouses was the common law notion that a husband and wife were one legal identity.<sup>115</sup> Unfortunately for the wife, this legal identity was the man's and he maintained control over her life and property.<sup>116</sup> As Blackstone phrased the idea, "[b]y marriage, the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of her husband, under whose wing, protection, and cover, she performs everything."<sup>117</sup> This reasoning extended to the physical chastising of a wife by the husband.<sup>118</sup> Therefore, a wife could not bring a lawsuit against her husband for abuse suffered during marriage, except in a divorce action.<sup>119</sup>

Because of this merger fiction, the first reported assault case against a husband by his wife apparently was not until 1863.<sup>120</sup> In *Longendyke v. Longendyke*,<sup>121</sup> the plaintiff-wife based her action on New York's Married Woman's Property Acts.<sup>122</sup> The court held that a married woman could not sue

111. Carl Tobias, *Interspousal Tort Immunity in America*, 23 GA. L. REV. 359, 359 (1989); see also KEETON et al., *supra* note 2, § 122, at 901-04 (discussing interspousal tort immunity).

112. Tobias, *supra* note 111, at 359.

113. *Id.*

114. See *id.* at 371 ("[N]ature and connection between [husband and wife is] such that no [battery] can give either a right of action to recover damages." (quoting T. REEVE, *THE LAW OF BARON AND FEMME* 65 (1st ed. 1816))).

115. KEETON et al., *supra* note 2, § 122, at 901.

116. Tobias, *supra* note 111, at 363-64.

117. *Id.* at 364 (quoting 1 W. BLACKSTONE, *COMMENTARIES* \*442, reprinted in W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 122, at 859 (4th ed. 1971)).

118. See *State v. Rhodes*, 61 N.C. 453, 456 (1868) (husband has right to moderate "correction" of wife, even if no provocation).

119. *Barber v. Barber*, 62 U.S. (21 How.) 582, 589 (1858).

120. Tobias, *supra* note 111, at 371-72 & n.63; see *Longendyke v. Longendyke*, 44 Barb. 366, 367-70 (N.Y. App. Div. 1863).

121. 44 Barb. 366 (N.Y. App. Div. 1863).

122. *Id.* at 367; Tobias, *supra* note 111, at 371 n.63. Because of the merger fiction, a husband managed and controlled all of his wife's separate property and was entitled to her personal property as well. *Longendyke*, 44 Barb. at 369. Married Woman's Property Acts were passed to allow women to hold and control their own property. KEETON et al., *supra* note 2, § 122, at 902. The New York Laws at issue in *Longendyke* gave married women the right to

her husband in an action for assault and battery.<sup>123</sup> The court gave five reasons for its decision: (1) the married women's acts only gave women rights to distinguish property from their husbands and did not give a right of action against them;<sup>124</sup> (2) the action was against public policy because the law was to protect "conjugal union and tranquility";<sup>125</sup> (3) a broad construction of the married women's acts would "sow the seeds of perpetual domestic discord and broil" and tempt women to encroach upon their husbands' property;<sup>126</sup> (4) even though the acts broadened the married women's right to contract, they did not contemplate women selling property to husbands (and therefore did not contemplate actions against them either);<sup>127</sup> and (5) husbands and their property were exempt from liability from contracts or bargains made by wives.<sup>128</sup> The court also implied that the husband had a right to use force to "restrain" his wife.<sup>129</sup>

Even though the Married Woman's Property Acts gave women the right to "sue and be sued as if they were not married,"<sup>130</sup> judges created the common law notion of interspousal tort immunity to prevent tort cases between spouses from approximately 1863 until 1913.<sup>131</sup> Most judges simply adopted the rule without explanation,<sup>132</sup> but a few courts cited the maxim of unity and stated that wives "(1) had no substantive civil causes of action against anyone, including their husbands; (2) were under a procedural disability, requiring that husbands file tort suits on their behalf; or (3) were not entitled to damages recovered because any such award would belong to their husbands."<sup>133</sup> Interspousal tort immunity became a "common-law rule that could be altered only by legislation."<sup>134</sup> The courts' stated policy for disallowing interspousal tort suits was to protect marital harmony and connubial peace.<sup>135</sup> Additionally the government

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bring suit for matters relating to their separate property. *Longendyke*, 44 Barb. at 368. The acts also gave married women the right to bring suit and recover damages for personal injuries. *Id.* The damages would be deemed the wife's separate property. *Id.*

123. *Longendyke*, 44 Barb. at 366.

124. *Id.* at 368.

125. *Id.*

126. *Id.* at 369.

127. *See id.*

128. *Id.* at 370.

129. The court gave few facts regarding the incident giving rise to the cause of action but did state the wife "was conducting herself in a very rude and indecent manner, and attempted to strike the defendant. That the force which the defendant used was necessary to restrain the plaintiff." *Id.* at 366. The court never stated what actions constituted "rude and indecent" or how much force was used. *See id.*

130. Tobias, *supra* note 111, at 372 (quoting S.C. CODE ANN. § 15-5-170 (Law. Co-op. 1976)).

131. *See id.* at 383-98.

132. *Id.* at 385 & nn.123-26.

133. *Id.* at 385 (footnote omitted).

134. *Id.* at 386.

135. *Id.* at 389; *see Abbott v. Abbott*, 67 Me. 304, 307 (1877) ("[I]t is better to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive." (quoting *State v. Oliver*, 70 N.C. 60, 61-62 (1874))), *overruled by MacDonald v. MacDonald*, 412 A.2d 71 (Me.

had an interest in protecting wedlock and the family.<sup>136</sup>

If the judges were concerned with promoting marital harmony, they could have permitted interspousal tort claims on the theory that intentional infliction of injury would be deterred.<sup>137</sup> Instead, the judges reasoned that harmony was promoted because the spouses would forgive and forget.<sup>138</sup> Unfortunately, this left women to do all the forgiving and forgetting without the redress of their injuries.<sup>139</sup>

It was not until the 1910s that women started to break through the interspousal tort immunity doctrine.<sup>140</sup> The courts started using the Married Woman's Property Acts to promote policies such as the need for deterrence from wife abuse or the redress of harm for women.<sup>141</sup> By 1970 interspousal tort immunity became the minority rule<sup>142</sup> and today it has been completely or partially abolished in most states.<sup>143</sup> Nevertheless, some states still recognize interspousal tort immunity in some cases,<sup>144</sup> and in states where it has been completely abolished, judges are carving out an exception to the abrogation.<sup>145</sup>

In *Burns v. Burns*<sup>146</sup> the Supreme Court of Mississippi examined the policies underlying that state's interspousal tort immunity doctrine.<sup>147</sup> In *Burns* a wife sued her husband for assault and battery after he beat her while they were separated and their divorce was pending.<sup>148</sup> The court decided to reexamine common law interspousal tort immunity because "when a rule of common law

1980). It is unclear whose marital harmony and peace these judges were trying to protect, because there is no peace and harmony in marriage for a woman who is beaten by her husband.

136. *Peters v. Peters*, 156 Cal. 32, 35, 103 P. 219, 220 (1909), *overruled by* *Self v. Self*, 58 Cal. 2d 683, 376 P.2d 65, 26 Cal. Rptr. 97 (1962); *Longendyke v. Longendyke*, 44 Barb. 366, 368 (N.Y. App. Div. 1863).

137. *Tobias*, *supra* note 111, at 391.

138. *Abbott*, 67 Me. at 307.

139. See *supra* notes 2-5 and accompanying text for a discussion of statistics indicating women bear the brunt of domestic violence.

140. *Crowell v. Crowell*, 105 S.E. 206 (N.C. 1920) (wife no longer her husband's chattel).

141. See, e.g., *Johnson v. Johnson*, 77 So. 335, 338 (Ala. 1917) (wife may sue husband for tort of assault; remedies of divorce and alimony are illusory and inadequate); *Gilman v. Gilman*, 95 A. 657, 657 (N.H. 1915) (wife may maintain action for assault against husband); *Crowell*, 105 S.E. at 210; see also *Tobias*, *supra* note 111, at 409-11 (courts relied on Married Woman's Property Acts, rejected interspousal immunity and used public policy arguments to allow interspousal torts).

142. *Tobias*, *supra* note 111, at 435; see *Burns v. Burns*, 518 So. 2d 1205, 1211-12 (Miss. 1988).

143. *Tobias*, *supra* note 111, at 435. See *supra* note 35 for a list of states abrogating interspousal tort immunity.

144. The rule was partially abrogated for vehicular torts only in Arizona, Idaho, Maryland, Massachusetts, Nevada, Rhode Island, Vermont and Virginia. *Burns*, 518 So. 2d at 1212-13.

145. See *infra* notes 391-404 and accompanying text.

146. 518 So. 2d 1205 (Miss. 1988).

147. *Id.* at 1209-10.

148. *Id.* at 1206.

ceases to be reasonable and just, it is no longer the common law.' ”<sup>149</sup>

The court cited three reasons for following the doctrine: legal unity, promotion of peace and harmony in the home and the avoidance of fraudulent claims.<sup>150</sup> The court found the legal unity fiction of a husband and wife in marriage was based on antiquated notions that women were merely their husbands' chattel.<sup>151</sup> As these views disappeared, the court reasoned, there was no difference between the rights of married and single women.<sup>152</sup> Analogizing the status of women to that of ex-slaves, the court said that the legislature could have kept them in bondage and subject to their husbands' tyranny and fury, but instead, had given them the same rights as others.<sup>153</sup>

The court found the promotion of domestic tranquility an illusion, saying that the peace of the relationship is destroyed by the act of violence, not the lawsuit following it.<sup>154</sup> Preventing women from suing, the court decided, does not prevent ill-will or anger, it just deprives women of adequate remedies.<sup>155</sup> Although divorce and criminal laws were available to battered spouses, the court held that these were inadequate.<sup>156</sup>

In response to the argument that interspousal tort suits promote fraud, the court in *Burns* stated that if the judicial process was so ineffective that it must deny relief because someone may commit fraud in the future, then it should abolish all causes of action.<sup>157</sup> The court said that juries, having common sense, were capable of discovering fraud and to believe otherwise insulted their intelligence.<sup>158</sup>

At least one case has held that interspousal tort immunity does not completely bar an action between spouses, it only suspends it for the duration of the marriage. In the Louisiana case of *Duplechin v. Toce*,<sup>159</sup> a husband beat his wife and she sued him in tort.<sup>160</sup> The case was dismissed because of Louisiana's interspousal tort immunity.<sup>161</sup> After the divorce, the wife brought the action again and this time obtained a verdict in her favor.<sup>162</sup> The court held that interspousal tort immunity only suspended the right to bring an action until the parties legally separate or divorce.<sup>163</sup> Thus, interspousal tort immunity did not

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149. *Id.* at 1208 (quoting *Planters' Oil Mill v. Yazoo & M.V.R. Co.*, 121 So. 138, 140 (Miss. 1929)).

150. *Id.* at 1209.

151. *Id.*

152. *Id.* at 1210.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at 1210-11.

158. *Id.* at 1211.

159. 497 So. 2d 763 (La. Ct. App. 1986).

160. *Id.*

161. *Id.* at 764.

162. *Id.* at 764-66.

163. *Id.* at 765.

forever bar the right to sue.

### B. Problems of Res Judicata and Joinder

If the battered woman is married to her batterer and is contemplating divorce, it must be decided whether to join the tort action to the divorce action. This may be determined by the jurisdiction in which the divorce is filed. Some states forbid joining a tort action to a divorce proceeding.<sup>164</sup> Other states allow joinder but do not make it mandatory.<sup>165</sup> However, tort claims may be barred by res judicata if brought after a conclusion of the divorce proceeding even in jurisdictions not mandating joinder.<sup>166</sup> Finally, one state, New Jersey, mandates the litigation of divorce and tort claims in the same proceeding.<sup>167</sup>

#### 1. States forbidding joinder of tort and divorce claims

Colorado,<sup>168</sup> Iowa<sup>169</sup> and Utah<sup>170</sup> have expressly forbidden the joinder of tort claims to divorce actions.<sup>171</sup> The rationale for keeping the causes of action separate include the "peculiar" nature of divorce proceedings.<sup>172</sup> It is thought that, in order to promote amicable settlements in divorce proceedings, the divorce should not be tried with claims adversarial in nature.<sup>173</sup>

The Supreme Court of Utah does not permit tort actions to be tried with divorce actions,<sup>174</sup> but in order to prevent unnecessary litigation, it has held that tort actions should be tried before the divorce.<sup>175</sup> However, a subsequent tort action will not be barred by res judicata if the judge improperly allowed the divorce action to proceed first.<sup>176</sup>

In a Utah case, *Noble v. Noble*,<sup>177</sup> the plaintiff-wife was granted a divorce on the ground of cruelty because her husband had shot her at close range and

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164. *E.g.* IOWA CODE § 598.3 (1981); *Simmons v. Simmons*, 773 P.2d 602 (Colo. Ct. App. 1988); *Noble v. Noble*, 761 P.2d 1369 (Utah 1988); *see infra* notes 168-86.

165. *See, e.g.*, *Nash v. Overholser*, 757 P.2d 1180 (Idaho 1988); *see infra* notes 188-231 and accompanying text.

166. *See, e.g.*, *Lord v. Shaw*, 665 P.2d 1288 (Utah 1983); *see infra* notes 232-41 and accompanying text.

167. *Tevis v. Tevis*, 400 A.2d 1189 (N.J. 1979). *But see* *Brown v. Brown*, 506 A.2d 29 (N.J. Super. Ct. App. Div. 1986) (exception to compulsory joinder rule).

168. *Simmons*, 773 P.2d 602.

169. IOWA CODE § 598.3 (1981).

170. *Noble v. Noble*, 761 P.2d 1369 (Utah 1988).

171. Linda J. Kroning, *Joinder of Tort and Divorce Claims*, in SECTION OF FAMILY LAW, AM. BAR ASS'N., MARITAL & PARENTAL TORTS: A GUIDE TO CAUSES OF ACTION, ARGUMENTS, AND DAMAGES 93-94 (1990) [hereinafter MARITAL TORTS].

172. *Id.* at 93.

173. *Id.*

174. *Noble v. Noble*, 761 P.2d 1369, 1371 (Utah 1988).

175. *Id.*

176. *See id.* at 1374.

177. 761 P.2d 1369 (Utah 1988).

left her disabled.<sup>178</sup> She then brought an action in tort alleging battery, intentional infliction of emotional distress and negligence.<sup>179</sup> Her defendant-husband tried to bar the tort action under the doctrine of res judicata because the trial court had considered his wife's injuries and medical expenses when awarding alimony and property to her.<sup>180</sup> This, he claimed, amounted to an award of damages for his tort.<sup>181</sup> The court held that the tort claims were not barred by res judicata because they could not be and were not tried with the divorce action.<sup>182</sup> The only justification given by the court for not allowing joinder of tort claims to divorce actions was that tort claims "are legal in nature [and] should be kept separate from divorce actions, which are equitable in nature."<sup>183</sup>

This conflicts with the notion of merger of law and equity in the American court system.<sup>184</sup> It is not unusual for law and equity actions to be tried together.<sup>185</sup> In jury trials, the judge will reserve decision on all equitable matters, leaving the jury to its own province.<sup>186</sup>

The decision to forbid joinder of tort and divorce claims could have the effect of deterring battered women from seeking redress of their injuries in tort actions. A separate action will require the expenditure of additional resources, financial as well as emotional, which the battered woman may not have. For her, the trauma of divorcing her batterer may make it unlikely she will want to go through another trial after she gets divorced.

## 2. Joinder discouraged but not forbidden

Alaska,<sup>187</sup> Arizona,<sup>188</sup> Idaho,<sup>189</sup> Indiana,<sup>190</sup> Massachusetts,<sup>191</sup> New Hampshire<sup>192</sup> and Wisconsin<sup>193</sup> strongly discourage joinder of tort claims to divorce actions.<sup>194</sup> In all of these states, courts have discussed the fundamental differences between divorce and tort actions. Although they did not expressly

178. *Id.* at 1370-71.

179. *Id.* at 1371.

180. *Id.*

181. *Id.*

182. *Id.* at 1374.

183. *Id.* at 1371.

184. *See* FED. R. CIV. P. 2 ("There shall be one form of action to be known as 'civil action.'").

185. *See* *Ettleson v. Metropolitan Life Ins. Co.*, 317 U.S. 188 (1942) (remedies in law and equity available to parties in same court and same action).

186. *See, e.g.,* *Maharam v. Maharam*, 575 N.Y.S.2d 846, 847 (App. Div. 1991) (in tort action tried with divorce proceedings, jury first renders verdict on tort issue, then court determines equitable distribution and support).

187. *Nelson v. Jones*, 787 P.2d 1031 (Alaska 1990).

188. *Windauer v. O'Connor*, 485 P.2d 1157 (Ariz. 1971).

189. *Nash v. Overholser*, 757 P.2d 118 (Idaho 1988).

190. *McNevin v. McNevin*, 447 N.E.2d 611 (Ind. Ct. App. 1983).

191. *Heacock v. Heacock*, 520 N.E.2d 151 (Mass. 1988).

192. *Aubert v. Aubert*, 529 A.2d 909 (N.H. 1987).

193. *Stuart v. Stuart*, 421 N.W.2d 505 (Wis. 1988).

194. *See* *Kroning, supra* note 171, at 93-94.

state joinder was forbidden, the courts' strong language suggests they discourage such joinder.

In *Aubert v. Aubert*,<sup>195</sup> a New Hampshire case, the husband-plaintiff brought a personal injury action against his wife after having been granted a divorce on the grounds of extreme mental cruelty.<sup>196</sup> The court held that a cause of action in tort is "fundamentally different from a divorce proceeding, and that the respective issues involved are entirely distinct."<sup>197</sup> For example, the type of relief available in the two actions is different. In a divorce action, the relief sought is the dissolution of the legal relationship of "man and wife"<sup>198</sup> while the relief sought in a tort action is the recovery of compensation for "injuries suffered as a result of a civil wrong."<sup>199</sup> The court explained alimony could not be a bar to recovery because it "is an allowance for support and maintenance" with no other purposes.<sup>200</sup> The court held damages may not be awarded and liability cannot be determined in a divorce proceeding.<sup>201</sup>

In a Massachusetts case, *Heacock v. Heacock*,<sup>202</sup> a separated couple had an argument over the phone.<sup>203</sup> The husband went to the wife's house to continue the argument, but she would not let him in.<sup>204</sup> He then broke the glass on the door, grabbed her arm and smashed her head against the door causing severe injury.<sup>205</sup> She later filed separate divorce and tort claims.<sup>206</sup> The trial court dismissed the tort claim on grounds of "issue preclusion, claim preclusion or res judicata, . . . whichever happens to be the best one."<sup>207</sup> The appeals court reversed, holding that the tort was not based on the same underlying claim as the divorce.<sup>208</sup>

The court stated that the purpose of a tort is to redress a legal wrong.<sup>209</sup> The purpose of divorce is to sever the marital relationship and fix the corresponding rights and obligations.<sup>210</sup> The awards in a divorce action are not to compensate for injuries, but to provide economic support to the dependent spouse.<sup>211</sup> Property division is to recognize and equitably recompense the

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195. 529 A.2d 909 (N.H. 1987).

196. *Id.* at 911.

197. *Id.*

198. *Id.* at 912.

199. *Id.*

200. *Id.* (quoting *Kennard v. Kennard*, 179 A. 414, 419 (N.H. 1935)).

201. *Id.*

202. 520 N.E.2d 151 (Mass. 1988).

203. *Id.* at 152.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.* at 153.

209. *Id.*

210. *Id.*

211. *Id.*

party's respective contributions to the relationship.<sup>212</sup> The husband had argued that the policy behind claim preclusion is to prevent piecemeal litigation; however, the court found this would not be the case with a divorce and subsequent tort action.<sup>213</sup>

In a case from Alabama, *Ex parte Harrington*,<sup>214</sup> a woman was paralyzed for life after her husband shot her.<sup>215</sup> She filed for divorce in April and for personal injury recovery in June.<sup>216</sup> The husband tried to have the tort claims dismissed, claiming that the divorce and tort actions were the same because they stemmed from the same wrongful act—the shooting.<sup>217</sup> The husband argued that the same act may give rise to multiple legal theories, but essentially were the same action.<sup>218</sup> The only difference was the relief sought and because of the merger of law and equity, separate suits in divorce and tort were barred.<sup>219</sup>

The court said the two actions were not the same.<sup>220</sup> The mere fact that the wife had charged the husband with assault in the divorce proceeding did not make it identical to the assault and battery action.<sup>221</sup> Therefore, claim preclusion did not bar the tort action.

### 3. States allowing or mandating joinder

Courts in eight states, Alabama,<sup>222</sup> Arkansas,<sup>223</sup> Georgia,<sup>224</sup> Nevada,<sup>225</sup>

212. *Id.*

213. *Id.*

214. 450 So. 2d 99 (Ala. 1984).

215. *Id.*

216. *Id.*

217. *Id.* at 100.

218. *Id.* at 101.

219. *Id.*

220. *Id.*

221. The court stated that there were two tests to determine whether the causes of action were the same: *res judicata* or the same evidence test. *Id.* at 101. However, the court did not apply these tests. *Id.* at 101-02.

222. *Jackson v. Hall*, 460 So. 2d 1290 (Ala. 1984).

223. *Smith v. Smith*, 14 Fam. L. Rep. (BNA) 1609 (Ark. 1988).

224. *Mize v. Mize*, 56 S.E.2d 121 (Ga. Ct. App. 1949) (contract action properly litigated in former divorce action).

225. *Pelletier v. Pelletier*, 742 P.2d 1027 (Nev. 1987) (conversion action joined to divorce action). In *Pelletier* the tort action was improperly filed by a third party (the wife's mother-in-law) as a counterclaim to a divorce action initiated by the wife. *Id.* Although the court stated it had been improperly joined to the divorce action because the third party had no interest in the divorce action, the court implied that the joinder of a tort to a divorce action would be proper if filed by one of the parties to the divorce action. *Id.* at 1028 ("A pleading may state as a counterclaim any claim *against an opposing party* . . . . No application was made for intervention . . . and the counterclaim was completely beyond the scope of the pleadings in the divorce action." (quoting NEV. R. CIV. P. 13(b))).

New Jersey,<sup>226</sup> New York,<sup>227</sup> Tennessee<sup>228</sup> and Texas,<sup>229</sup> have allowed joinder of tort claims to divorce actions, but have not expressly ruled it compulsory.<sup>230</sup> Although joinder is not compulsory in these states, *res judicata* may still bar a subsequent suit in tort if the issue is raised during the prior divorce proceeding.<sup>231</sup>

*a. claim preclusion as a bar to subsequent tort actions*

In *Kemp v. Kemp*<sup>232</sup> a Tennessee Court of Appeals barred a battered woman's tort action brought after the final divorce decree.<sup>233</sup> The divorce court ordered the husband to pay the woman's past and future medical bills incurred from injuries suffered at his hand.<sup>234</sup> Even though the court admitted the two actions were not the same, the court stated that by recovering an award of her medical expenses she "in effect . . . prevailed on a tort claim."<sup>235</sup>

The court's reasoning is directly opposite of the rationale used by the courts in states that forbid joinder of tort and divorce claims.<sup>236</sup> As the New Hampshire Supreme Court has pointed out, the award of alimony as maintenance and support is not the same as the redress of a civil wrong.<sup>237</sup> There is no reason that spouses should not be held to the same level of conduct as the rest of society.<sup>238</sup> However, the *Kemp* court found that the wrong was redressed in the award of future medical expenses and the wife did not have a separate tort

226. *Brown v. Brown*, 506 A.2d 29, 30 (N.J. Super. Ct. App. Div. 1986) (only torts arising after divorce may be tried separately).

227. *Maharam v. Maharam*, 575 N.Y.S.2d 846, 847 (App. Div. 1991) (tort for transmission of venereal disease joined with divorce action).

228. *Kemp v. Kemp*, 723 S.W.2d 138, 140 (Tenn. 1987) (probate court hearing divorce action had jurisdiction to award tort damages in divorce proceeding). Although the court did not expressly state that all tort actions must be joined to divorce proceedings for injuries arising out of a marriage, the court implied this when it said "principles of *res judicata* apply not only to issues actually raised and finally adjudicated in prior litigation, but to 'all claims and issues which were relevant and which could reasonably have been litigated in a prior action.'" *Id.* at 150 (quoting *American Nat'l Bank & Trust v. Clark*, 586 S.W.2d 825, 826 (Tenn. 1979)).

229. *Mogford v. Mogford*, 616 S.W.2d 936, 940 (Tex. Civ. App. 1981) (personal injury action properly joined to divorce action). "A party may state as many separate claims as he or she has regardless of consistency and whether they are based on legal or equitable grounds or both." *Id.*

230. Kroning, *supra* note 171, at 93.

231. See *infra* notes 232-41 and accompanying text.

232. 723 S.W.2d 138 (Tenn. Ct. App. 1986).

233. *Id.* at 139.

234. *Id.* at 140.

235. *Id.*

236. See *supra* notes 168-86.

237. *Aubert v. Aubert*, 529 A.2d 909, 912 (N.H. 1988).

238. See *Lilly & George, supra* note 37, at 27 (Under large judgment against husband for abusing wife, "spouses will be held to the same level of responsibility to one another as are members of society in general.").

action.<sup>239</sup>

In an Alabama case, the signing of a divorce settlement agreement was held to bar a subsequent tort action by a wife against her husband.<sup>240</sup> Because there were words in the agreement stating that the agreement was in "full settlement of all claims between the parties," the court held that it was the wife's intent to waive her tort claims in addition to the settlement of the divorce.<sup>241</sup> Even though states may allow tort actions to be brought after divorce proceedings are over, the issues raised during the divorce proceeding, or the wording of a settlement agreement could bar future tort recovery.

*b. new jersey: compulsory joinder and its exception*

New Jersey's "entire controversy" doctrine requires joinder of both tort and divorce claims in a single action.<sup>242</sup> If the tort happened during marriage, the money damages would affect the outcome of the divorce proceedings. Therefore, the parties should litigate both claims together.<sup>243</sup>

In *Brown v. Brown*<sup>244</sup> the New Jersey court considered whether a tort arising during a divorce action must be joined to the existing divorce action.<sup>245</sup> In *Brown* the couple had already separated and were in the process of dissolution at the time the husband attacked his wife.<sup>246</sup> His attack aggravated her existing muscular dystrophy and caused her chronic cervical strain.<sup>247</sup> As a result, she required hospital care, extended treatment and therapy.<sup>248</sup> The New Jersey court held that the tort did not have to be joined to the dissolution case.<sup>249</sup>

The court found that if the tort occurred before the divorce action was instituted, it must be brought with the divorce action.<sup>250</sup> If the tort occurred after termination of the marriage, then it may be brought as a separate claim.<sup>251</sup> Because this action was brought during the pendency of divorce, the court chose to look to the facts of the case and implied that the wife would be prejudiced by adherence to the rigid rule of joinder.<sup>252</sup> The court considered due process, problems of practice and pleading and judicial administration to find that the

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239. *Kemp*, 723 S.W.2d at 140.

240. *Jackson v. Hall*, 460 So. 2d 1290, 1292 (Ala. 1984).

241. *Id.* at 1291-92.

242. *Brown v. Brown*, 506 A.2d 29, 32 (N.J. Super. App. Div. 1986) ("The entire controversy doctrine . . . is a preclusionary principle intended to prevent the fractionalization of litigation by requiring all claims between the same parties arising out of or relating to the same transactional circumstances to be joined in a single action.").

243. *See id.*

244. 506 A.2d 29 (N.J. Super. Ct. App. Div. 1986).

245. *Id.* at 30.

246. *Id.* at 31.

247. *Id.*

248. *Id.*

249. *Id.* at 34.

250. *Id.* at 33.

251. *Id.*

252. *Id.* at 35.

new tort claims would conflict with the entire controversy doctrine.<sup>253</sup> Therefore, under *Brown*, while a tort claim must be joined to a divorce claim, there will be an exception if the tort arises during pendency of the divorce proceedings and requiring joinder would prejudice the plaintiff.<sup>254</sup>

#### IV. INTERSPOUSAL TORT CAUSES OF ACTION

It was thought that the demise of interspousal tort immunity would open the floodgates of litigation and fraud as unhappy couples took their differences to court.<sup>255</sup> This has not happened<sup>256</sup> and some plaintiffs are receiving compensation for wrongs committed by their spouses during marriage.<sup>257</sup> For example, courts now recognize the tortious infliction of venereal disease<sup>258</sup> and have allowed recovery for the transmission of AIDS between spouses.<sup>259</sup>

Unfortunately, tort law still fails to provide adequate remedies for battered women abused by their spouses or domestic partners. Battered women pursue claims for intentional infliction of emotional distress and assault and battery with little success.<sup>260</sup> One case asked the court to recognize a new tort of spousal abuse.<sup>261</sup> In two successful tort actions, the plaintiffs received substantial awards after presenting testimony explaining the Battered Woman Syndrome.<sup>262</sup> This evidence demonstrated the severe psychological damage victims of domestic violence suffer.

##### A. Assault and Battery

Most interspousal tort cases are brought by battered spouses,<sup>263</sup> and three-

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253. *Id.* at 33.

254. *See id.* The court found significant the fact that the wife's divorce attorney had told her he would not pursue the tort action for her. *Id.* In fact the attorney would not even engage in research to decide in which jurisdiction the tort claim should properly be brought—the one where the tort occurred or where the divorce action was pending. *Id.*

255. *See, e.g.,* *Davis v. Bostick*, 580 P.2d 544, 546 (Or. 1978).

256. *Id.*

257. *Id.* at 545.

258. *See, e.g.,* *Kathleen K. v. Robert B.*, 150 Cal. App. 3d 992, 198 Cal. Rptr. 273 (1984); *R.A.P. v. B.J.P.*, 428 N.W.2d 103 (Minn. Ct. App. 1988); *Crowell v. Crowell*, 105 S.E. 206 (N.C. 1920).

259. *Silva v. Silva Estate*, 15 Fam. L. Rep. (BNA) 1181 (Nev. Dist. Ct. 1989) (wife awarded \$2.1 million against husband's estate because husband transmitted AIDS to wife).

260. *See infra* notes 263-419 and accompanying text.

261. *de la Croix de Lafayette v. de la Croix de Lafayette*, 15 Fam. L. Rep. (BNA) 1501 (D.C. Super. Ct. Fam. Div. Aug. 14, 1989).

262. *Gladish v. Simmons*, 11 Fam. L. Rep. (BNA) 1323 (Colo. Dist. Ct. 1985), *rev'd on other grounds sub nom.*, *Simmons v. Simmons*, 773 P.2d 602 (Colo. Ct. App. 1989); *Spotlight*, *supra* note 42, at 314 (*Curtis v. Curtis*).

263. Robert G. Spector, *Marital and Custodial Torts*, in *MARITAL TORTS*, *supra* note 171, at 4.

fourths of these cases are based on assault<sup>264</sup> and battery.<sup>265</sup> Following the abrogation of interspousal tort immunity, the courts worried about having to distinguish between two types of battery between married persons: a "purely technical battery and normal hurts of intimate living;" and one of "gross abuse of normal privilege."<sup>266</sup> There would be liability for the latter, but not the former based on the theory of consent.<sup>267</sup> "[N]ot every act that is tortious between strangers will be so regarded when . . . between spouses" based on the past conduct of the spouses and general social habits of the day.<sup>268</sup>

This "past conduct" theory gave rise to the defense of consent.<sup>269</sup> If a husband hit his wife in the past, she obviously consented to such behavior and cannot complain now. The defense of consent has never been recognized as valid in interspousal battery cases.<sup>270</sup> In fact, the main issues on appeal in interspousal battery cases have been claim preclusion<sup>271</sup> and statute of limitations.<sup>272</sup> Battered women are undercompensated for their injuries because of these two doctrines.

### 1. Damages for mental injury

In addition to damages for physical injury, juries may award damages for emotional harm in assault and battery actions.<sup>273</sup> Therefore, theoretically, a battered woman should be able to fully recover monetary damages for all mental injuries resulting from abuse under existing tort law through assault and battery actions. When awarding damages for mental or emotional harm, the focus is the woman's mind—her mental injuries. Battered women are undercompensated in assault and battery actions because judges and juries misunderstand their mental injuries.<sup>274</sup>

After the initial outburst of violence, a battered woman's pattern of behavior changes.<sup>275</sup> A battered woman may be systematically beaten over a period of

264. Assault is "apprehension of a harmful or offensive contact with [a] person." KEETON et al., *supra* note 1, § 10, at 43.

265. Battery is "[a] harmful or offensive contact with a person, resulting from an act intended to cause the plaintiff or a third person to suffer such a contact, or apprehension that such a contact is imminent." *Id.* § 9, at 39.

266. *See Lewis v. Lewis*, 351 N.E.2d 526, 532 (Mass. 1976) (conduct not tortious because of "marital concessions"; court mindful of "rights and privileges" in marriage); *Beudett v. Frana*, 173 N.W.2d 416, 420 (Minn. 1969) (spouses "assume risk").

267. KEETON et al., *supra* note 2, § 122, at 909.

268. *Lewis*, 351 N.E.2d at 532.

269. KEETON et al., *supra* note 2, § 122, at 909.

270. Spector, *supra* note 263, at 3.

271. *Id.* at 4; *see supra* notes 164-254 and accompanying text.

272. Spector, *supra* note 263, at 4; *see infra* notes 301-39 and accompanying text.

273. *See, e.g., Criss v. Criss*, 356 S.E.2d 620, 622 (W. Va. 1987) (elements of emotional distress included in damages awards for assault and battery).

274. *See, for example, Davis v. Bostick*, 580 P.2d 544 (Or. 1978), where the court found no cumulative effect from continued assaults and batteries. *Id.* at 548.

275. *See generally id.* at 42-54 (discussing learned helplessness).

several years,<sup>276</sup> with each assault a woman's fear of the batterer increases.<sup>277</sup> Each battering incident compounds a woman's mental injuries—every time the batterer beats his victim, he is beating a person who is already injured, thereby exacerbating those injuries.<sup>278</sup> It is this cumulative effect that judges and juries fail to recognize.

*a. cumulative effect of repeated beatings*

Judges and juries may empathize with the battered woman if there is evidence of the cumulative effect of systematic abuse. This was the flaw in the plaintiff's argument in *Davis v. Bostick*.<sup>279</sup> In *Davis* the plaintiff alleged the defendant "engaged in an intentional course of conduct designed to inflict emotional stress and mental anguish."<sup>280</sup> The court rejected the plaintiff's arguments and held each individual act separately actionable.<sup>281</sup> The court noted there was insufficient evidence of a cumulative effect separate from the "discrete elements of [defendant's] conduct."<sup>282</sup> She could not recover for the cumulative effect when her evidence was the harm caused by "each act in the series."<sup>283</sup> However, the court did not end its discussion there. The court went on to imply that there could never be a cumulative effect from a continuous course of assaults and batteries<sup>284</sup> and complained that the plaintiff was trying to avoid the policy of the statute of limitations.<sup>285</sup>

The court said that conduct could have a cumulative effect when threats

276. *See id.* (battered woman scolded by court for waiting three years and two months to seek legal recourse); *see also Spotlight, supra* note 42, at 314 (*Curtis v. Curtis*, No. 14514 (Idaho Dist. Ct. May 18, 1990) (unreported case) (plaintiff beaten for nine years)).

277. This fear is manifested in Walker's "tension phase." *See WALKER, supra* note 3, at 56-59; *supra* note 84. Women will alter their behavior in anticipation of another beating, hoping to prevent it from recurring. Unfortunately, this does not happen.

278. Repetitive beatings produce learned helplessness over time. *Id.* at 45.

279. 580 P.2d 544 (Or. 1978).

280. *Id.* at 545 (quoting plaintiff's allegations). The court stated there were 10 separate incidents; some were individual acts and some were "groups of substantially identical acts committed at different times." *Id.* This case is distinguishable from other battered woman cases because the abuse did not begin until after the parties separated. *Id.* The legal arguments, however, would be the same in a situation where the beatings occurred prior to separation.

281. *Id.* at 548.

282. *Id.* at 547.

283. *Id.* at 548.

284. *See id.* at 547-48 (saying closest analogy is trespass and nuisance; court could imagine cumulative effect when suicide results but not in this case).

285. *Id.* at 548. "The policy of the statute of limitations is to put at legal rest old claims." *Id.* Even though the court said the question of whether or not the actions were continuous could be left to the jury, it refused to do so in this case. *Id.* The court was disturbed by the fact that if the jury were left to decide, then it would be able to consider all relevant evidence, regardless of its remoteness in time. *Id.* However, the court recounted only 10 separate incidents alleged over a three-year and two-month period. *Id.* It seems unlikely that the evidence would be so remote in time that it could not be accurate. Even though bruises may be healed, medical records would provide reliable evidence of injuries sustained no matter how "remote."

and accusations culminate in suicide.<sup>286</sup> However, the court did not see a connection between the type of harm suffered by the abused woman and the suicide victim. Yet, some battered women *do* commit suicide as a result of the cumulative effects of the Battered Woman Syndrome.<sup>287</sup> There are similarities: both battered women and the victims of threats and accusations who commit suicide suffer from mental injury inflicted by another. With each new act the mental injury worsens and the victim suffers from the cumulative effect. In suicide cases, the mental injury is caused by the continual threat and accusations culminating in suicide. Each threat and accusation may be separately actionable, but their cumulative effect is the suicide of the victim. For battered women, the mental injury is caused by periodic beating and continual threats or feelings of threat culminating in the psychological disorder known as the Battered Woman Syndrome.<sup>288</sup> Each beating is separately actionable, but the cumulative effect is the Syndrome, or inability to change the situation.

*b. preexisting conditions offsetting damages*

Under traditional tort law, the tortfeasor takes his or her victim as he finds him or her.<sup>289</sup> Like the person with the "eggshell skull,"<sup>290</sup> a woman should be able to recover fully because the batterer beat an injured woman with preexisting mental injuries.

The Georgia Court of Appeals in *Catlett v. Catlett*<sup>291</sup> found a woman's preexisting condition did allow for mitigation of damages when she sued her husband in tort.<sup>292</sup> The plaintiff in *Catlett* brought suit against her ex-husband for injuries inflicted during their marriage.<sup>293</sup> The plaintiff was awarded \$10,000 in compensatory damages and \$20,000 in punitive damages.<sup>294</sup> The defendant-ex-husband appealed and asked that the damages be stricken because he believed the jury found justification.<sup>295</sup> He based his argument on the fact that

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286. *Id.*

287. WALKER, *supra* note 3, at 72 ("The resulting psychological terror creates a stress reaction which produces all kinds of physical and psychological problems, including suicide.").

288. *See supra* note 84.

289. *Hoffman v. Schafer*, 815 P.2d 971, 972 (Colo. Ct. App. 1991) (certiorari granted by Colorado Supreme Court, Sept. 9, 1991); *see also KEETON et al.*, *supra* note 2, § 43, at 296 ("if the consequences themselves were foreseeable . . . not necessary to foresee the manner in which they were brought about").

290. *Hegyes v. Unjian Enter.*, 234 Cal. App. 3d 1103, 1144, 286 Cal. Rptr. 85, 110 (1991) (purpose of eggshell skull theory to increase incentive to reduce accidents). The eggshell skull theory has been used mainly in negligence cases where the plaintiff's injuries were unforeseeable because of some preexisting condition. *See id.* However, battered woman cases usually involve intentional torts, more egregious than negligence cases.

291. 388 S.E.2d 14 (Ga. Ct. App. 1989).

292. *Id.* at 15-16.

293. She brought assault, battery and false imprisonment claims against him for hitting her and preventing her from leaving his apartment; for preventing her from leaving his car; and for dragging her down a stairway by her hair. *Id.* at 15.

294. *Id.*

295. *Id.*

the jury did not award the plaintiff all medical expenses she sought.<sup>296</sup> In rejecting his argument, the court said the jury could have reduced the amount of damages because of the plaintiff's preexisting back problem.<sup>297</sup>

In *Catlett* the court did not discuss mental injuries, but it set a dangerous precedent. If Mr. Catlett can have the amount of damages he pays reduced because his wife had a preexisting back problem, he can also have his damages for mental injury mitigated by the fact that she suffered from Battered Woman Syndrome inflicted from his prior beatings. If Mrs. Catlett is barred from asserting a cause of action for all the beatings resulting in the Battered Woman Syndrome, she will be under-compensated. In this case, the evidence of the Syndrome would be twisted to be used against the victim.

Like the person who hits the stranger with the eggshell skull, a batterer should be held liable for all damages caused by his intentional abuse. The latter case is much more egregious because Mr. Catlett probably beat his wife with full knowledge of her preexisting back problem.<sup>298</sup> This act is more culpable than if the defendant acted with no knowledge of such conditions.<sup>299</sup> It follows that a batterer knows of the preexisting mental condition of a battered woman because it was his prior beatings that produced it.<sup>300</sup>

## 2. Statute of limitations

Statutes of limitations are a major hurdle encountered by battered women who try to recover for injuries inflicted during a brutal relationship. Courts have refused to toll the statute of limitations for torts occurring during the mar-

296. *Id.*

297. *Id.* at 15-16. The court also stated that the plaintiff had been in an auto accident after the alleged incidents but before trial. *Id.* at 15. The court did not elaborate on why this would reduce the damages of plaintiff's intentional torts. *See id.*

298. One would assume that a husband would know of his wife's back problems.

299. One who intends to harm another bears greater responsibility than one who inadvertently causes harm. KEETON et al., *supra* note 2, § 8, at 37. The rules are more liberal for the consequences, requirements of proof and damages permitted. *Id.*

300. Men batter women because they want to hit them. FORTUNE & HORMANN, *supra* note 89, at 59. Many batterers will try to minimize their culpability by blaming external factors such as stress or alcohol, *id.*, and may try to claim they did not know that their battering had cumulative effects. However, experts agree that these external factors are not the cause of the violence, only excuses. RULE OF THUMB, *supra* note 54, at 3.

There are some cultures in the world that drink much more than we do but yet aren't violent. So it is a cultural problem. We want to look at the oncoming bad economic times . . . the poor men being out of jobs and all the stress that that will create and, therefore, they will beat their wives.

Stress isn't the problem; it is something beyond that. It is culturally how we're brought up as men, that we can go home and we can beat our wives; they are our property and we can act violently, and until we examine that and avoid jumping to snap conclusions that alcohol is the problem or stress is the problem, we're not going to get anything done.

*Id.* (quoting *Hearing Before the U.S. Comm'n on Civil Rights, Harrisburg, Pennsylvania*, June 17-18, 1980, at 220 (testimony of Stover Clark)). It is clear that men beat women with the intent to cause harm.

riage.<sup>301</sup> Therefore, while a battered woman will be able to recover for injuries suffered from the battering incidents occurring before the period of limitations runs out, she will be barred from recovering for all her mental and physical injuries suffered during the relationship.

The statute of limitations should be tolled during marriage for interspousal torts. Interspousal torts are not typical because they are committed against a person not likely to sue. The statutes do not account for this. The first time a man beats his wife,<sup>302</sup> she may believe it is an isolated incident. Even after the second, third or fourth battering, a woman may still believe the batterer can change his behavior or she can change him.<sup>303</sup> By the time a battered woman realizes the futility of her situation and brings suit, the limitations period will have tolled for all but the recent beatings. If a woman cannot be compensated for the physical and emotional injuries suffered from the acts falling outside the limitations period, there is a causation problem created: which acts caused which harm and how are the damages allocated?

*a. allocation of damages problem*

If a court will not permit recovery for a battered woman's cumulative mental injuries in actions for assault and battery, there is the problem of allocating damages among the various assault and batteries. For instance, in *Catlett v. Catlett*<sup>304</sup> the court reasoned that the jury could have reduced the damages because of the plaintiff's preexisting condition.<sup>305</sup> How does the jury decide what part of a battered woman's injuries were inflicted by the successive beatings?

The first time a batterer beats his victim, she suffers mental injury. The second time he beats her, he is beating a person already injured. There are injuries inflicted from both incidents. If the plaintiff is barred from suing for the first

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301. See, e.g., *R.A.P. v. B.J.P.*, 428 N.W.2d 103 (Minn. Ct. App. 1988).

302. Statistics show that most batterers do not beat their wives before marriage. BROWNE, *supra* note 8, at 47 (73% to 85% do not experience physical abuse until after marriage). In cohabitation cases the battering does not begin until the parties have made a major commitment.

303. A battered woman may believe there is nothing she can do to help herself. Angela Browne gives the following account from her personal interviews of battered women:

Another woman told of leaving after the initial assault and staying at a friend's home where the man was unable to find her. However, her husband kept calling her family and threatening them. Her parents were frightened, and finally her sister persuaded her to go home "for the good of the whole family." Women also talked to clergy who told them the abuse was a cross they must bear and advised them to be better wives; of marriage counselors who searched for what the women had done to provoke their husbands and assured them that the violence would not have occurred without some contribution on their part; and of attorneys who told them the assaults sounded too minor to really be worth a court case, and advised them to see their ministers or a marriage counselor instead. Such responses play into the women's tendencies to minimize the seriousness of the violence and to blame themselves for their partners' behavior, and decrease the likelihood that the first assault will be the last. BROWNE, *supra* note 8, at 54.

304. 388 S.E.2d 14 (Ga. Ct. App. 1989).

305. *Id.* at 15-16.

battery by the statute of limitations, the jury must try to allocate the mental injury between the two batteries. Because the batterer created the allocation problem, he has the burden of proving how much mental harm resulted from the second battering.

Nevertheless some harms are by their nature incapable of division. Mental injury is one of these. To apportion mental injury would be "purely arbitrary."<sup>306</sup> Therefore the defendant should be liable for all mental injuries from both beatings. However, as is seen in *Catlett*, the jury was allowed to reduce the damages because of the plaintiff's preexisting condition.<sup>307</sup>

To resolve this issue, the statute of limitations should be tolled during the entire period of spousal abuse on the theory that spousal abuse is a continuing course of conduct.<sup>308</sup> Spousal abuse is not the "'usual personal injury case [where] the defendant's wrongful conduct ceases on a certain day insofar as it may be considered a cause of the injury in question.' . . . But in a continuing tort case, the cause of action is not complete and does not accrue until the tortious acts have ceased."<sup>309</sup> Unfortunately, the theory of continuing tort in spousal abuse cases has had limited success.<sup>310</sup>

#### b. continuing course of conduct

At least one court has ruled that the statute of limitations will be tolled when a husband's repeated acts over the course of a thirteen-year marriage resulted in the intentional infliction of emotional distress upon the plaintiff-wife.<sup>311</sup> In *Twyman v. Twyman*<sup>312</sup> the plaintiff recovered \$15,000 in damages under the theory of negligent infliction of emotional distress<sup>313</sup> based on the husband's behavior throughout the marriage.<sup>314</sup> The plaintiff-wife included a tort claim in her divorce action.<sup>315</sup> She alleged that she suffered mental and emotional harm from her husband's attempts to coerce her into performing acts of sexual bondage throughout their marriage.<sup>316</sup> This coercive behavior began

306. See KEETON et al., *supra* note 2, § 52, at 347.

307. *Catlett*, 388 S.E.2d at 15.

308. See, e.g., *Twyman v. Twyman*, 790 S.W.2d 819, 827 (Tex. Ct. App. 1989).

309. *Id.* (quoting *Adler v. Beverly Hills Hosp.*, 594 S.W.2d 153, 155 (Tex. Civ. App. 1980)).

310. See *infra* notes 311-419 and accompanying text.

311. *Twyman*, 790 S.W.2d at 821.

312. 790 S.W.2d 819.

313. *Id.*

In order to recover for negligent infliction of emotional distress, a complainant must show "the tortfeasor acted knowingly or with conscious indifference, causing a relatively high degree of mental pain and distress, such as mental sensation of pain resulting from such painful emotions as grief, severe disappointment, indignation, wounded pride, shame, despair, or public humiliation."

*Id.* at 822 (quoting *Underwriters Life Ins. Co. v. Cobb*, 746 S.W.2d 810, 819 (Tex. Ct. App. 1988)).

314. *Id.* at 821.

315. *Id.* at 819-20.

316. *Id.*

five years after they were married when he asked her to participate in deviant sexual acts.<sup>317</sup> She refused because she had been violently raped before marriage.<sup>318</sup> However, the husband continued to seek bondage with other women, frequently visited stores selling bondage paraphernalia and brought bondage magazines home.<sup>319</sup> The plaintiff lost thirty pounds, sought treatment from three counselors, sustained physical injury when she agreed to try to participate in the acts with her husband and experienced "despair, devastation and humiliation" in addition to fear of contracting AIDS or a venereal disease.<sup>320</sup> The court found this enough to support her claim of mental anguish.<sup>321</sup>

Her husband argued on appeal that the trial court erred when it applied the theory of continuing tort to her claims.<sup>322</sup> The court defined a continuing tort as "one inflicted over a period of time . . . [involving] wrongful conduct that is repeated until desisted, and each day creates a separate cause of action."<sup>323</sup> In applying the concept of a continuing tort to the case, the court held "the cause of action is not complete and does not accrue until the tortious acts have ceased."<sup>324</sup> The conduct causing the plaintiff's mental distress—the husband's continual insistence that his wife engage in deviant acts—was not held to be a series of intentional acts each with its own statute of limitations.<sup>325</sup>

It is unclear how far the Texas Third District Court of Appeals is willing to extend its concept of continuing tort because of limiting language in its opinion. Its definition of a continuing tort appears to be limited by the court's comment that "usually no single incident in a continuous chain of tortious activity can 'fairly or realistically be identified as the cause of significant harm.'" "<sup>326</sup> Therefore, the questions arise: first, what is significant harm and second, if each battering incident in a continuous pattern of spousal abuse produced "significant harm," would the plaintiff be denied recovery under a continuing tort theory?

The questions may have been answered in *Twyman* by the court itself. The plaintiff in that case did receive significant physical injuries when she attempted to engage in bondage activities with her husband.<sup>327</sup> Although this could be considered significant harm in itself, the court did find it part of a continuous course of conduct.<sup>328</sup> Additionally and significantly, the court focused on the

317. *Id.*

318. *Id.*

319. *Id.* The plaintiff was also distressed by the fact that her 10 year-old son discovered the bondage magazines. *Id.*

320. *Id.*

321. *Id.* at 822.

322. *Id.* at 821.

323. *Id.* (quoting 54 C.J.S. *Limitations of Actions* § 177, at 231 (1987)).

324. *Id.*

325. *Id.* at 822.

326. *Id.* at 821 (quoting *Page v. United States*, 729 F.2d 818, 821-22 (D.C. Cir. 1984) (quoting *Fowkes v. Pennsylvania R.R.*, 264 F.2d 397, 399 (3d Cir. 1959))) (emphasis added).

327. *Id.* at 820. The plaintiff testified that after one encounter she bled for four days and sought treatment from a gynecologist. *Id.*

328. *Id.* at 821.

"emotional coercion" aspect of the plaintiff's injuries.<sup>329</sup>

The court in *Twyman* further distinguished "usual personal injury case[s] [in which] the defendant's . . . conduct ceases on a certain day."<sup>330</sup> The court did not indicate whether the concept of continuing tort would only be applied to mental injuries because mental injuries are "different" from ordinary batteries.<sup>331</sup> Even if recovery would not be allowed under a theory of battery for all physical injuries suffered during a violent marriage, the court's ruling is clear that a battered woman would be able to recover for all *mental* injuries<sup>332</sup> resulting from the cycle of violence, under a theory of continuous course of conduct leading to the intentional infliction of emotional distress.

*c. continuous nature of mental injuries of battered women*

Once a woman is beaten by the person she lives with<sup>333</sup> she may become fearful: he is capable of doing it again. The battering incident may be kept alive by the batterer through threats, body movements or body language. Threats to harm the victim and the victim's family with guns, knives and other weapons are common.<sup>334</sup> Social isolation and humiliation are used in conjunction with the threat of violence to control women in battering relationships.<sup>335</sup> In effect the batterer keeps the battering incident alive in order to control the behavior of the victim.<sup>336</sup>

Battered women begin living under severe psychological stress<sup>337</sup> and may exhibit a variety of symptoms ranging from sleeplessness to heart palpitations.<sup>338</sup> Battered women start to feel powerless in their situation and begin to exhibit the same characteristics of victims who are repeatedly traumatized over short periods of time.<sup>339</sup> The effects do not dissipate over time, but are exacerbated with each new beating.

329. *Id.*

330. *Id.*

331. *Id.*

332. Loss of voluntary control or learned helplessness prevent women from changing their situation. See WALKER, *supra* note 3, at 42-54, for a description of her theory of learned helplessness in battered women.

333. Battering often occurs in couples who do not live together. For example, teenage battering has been of increasing concern.

334. WALKER, *supra* note 3, at 75.

335. *Id.* at 166.

336. *See id.* at 71-77, 166.

337. *Id.* at 61.

338. *Id.* Walker also lists "loss of appetite, or . . . overeating, oversleeping, and constant fatigue. . . . Many women suffer from severe tension headaches, stomach ailments, high blood pressure, allergic skin reactions, and heart palpitation." *Id.*

339. *Id.* at 49. Walker likens the battered woman's situation to people in concentration camps. *Id.* Their behavior is contrasted to victims of a single traumatic disaster, who usually overcome the effects in time. *Id.*

### B. *Intentional Infliction of Emotional Distress*

Because of the serious nature of the mental injuries suffered by battered women, a few women have sued their batterers for intentional infliction of emotional distress.<sup>340</sup> Although rarely used in domestic tort cases, it may have the greatest application in redressing battered women's mental injuries.<sup>341</sup>

One drawback to an intentional infliction of emotional distress cause of action is the short statute of limitations.<sup>342</sup> Because of this, some plaintiffs have argued for a "continuous" tort of negligent or intentional infliction of emotional distress.<sup>343</sup> Another drawback is that many of the decisions recognizing emotional distress have relied on acts of assault and battery to prove the outrageousness of the conduct and relegated the emotional distress to parasitic-type damages.<sup>344</sup> All cases discussed previously have dealt with a few specific instances of violence in the marital relationship. Two cases have tried to argue for a continuing tort occurring during the entire abusive relationship in order to recover for the full extent of both the physical and psychological injuries suffered during that relationship.<sup>345</sup> The cases that follow are the attempts by women who suffered from the Battered Woman Syndrome.

#### 1. Unsuccessful cases of intentional infliction of emotional distress

##### a. *Oregon: no intentional infliction of emotional distress in assault and battery actions*

In *Davis v. Bostick*<sup>346</sup> the plaintiff brought a cause of action for an "intentional course of conduct designed to inflict emotional stress and mental anguish."<sup>347</sup> The court, however, saw the case as a series of intentional torts, assaults, batteries, etc., each with its own statute of limitations which started running at the time of the specific act.<sup>348</sup> Even though the court found that the defendant's conduct was extreme and outrageous, the plaintiff was denied damages because the statute of limitations had expired for each and every individual battery.<sup>349</sup> It appears that the court treated intentional infliction of emotional distress as parasitic to each battery action and not as an independent cause of

340. See, e.g., *Davis v. Bostick*, 580 P.2d 544, 547 (Or. 1978).

341. Robert E. Driscoll, *Intentional Infliction of Severe Emotional Distress*, in *MARITAL TORTS*, *supra* note 171, at 57. A prima facie case is established by allegations of (1) intentional acts, (2) of extreme and outrageous conduct, (3) proximately causing, (4) severe emotional distress. *Id.* Several recent cases have shown the courts' willingness to recognize this tort in the domestic relations context. See *infra* notes 420-31 and accompanying text.

342. Spector, *supra* note 263, at 11.

343. See, e.g., *Davis*, 580 P.2d 544.

344. See, e.g., *id.*; see KEETON et al., *supra* note 2, § 12, at 57.

345. *Davis*, 580 P.2d 544; *Chiles v. Chiles*, 779 S.W.2d 127 (Tex. Ct. App. 1989).

346. 580 P.2d 544 (Or. 1978).

347. *Id.* at 545 (quoting plaintiff).

348. *Id.* at 547. See *supra* notes 301-39 and accompanying text for a discussion of the statute of limitations problem in this context.

349. *Davis*, 580 P.2d at 548.

action.<sup>350</sup>

The plaintiff alleged that each of the acts caused some harm, but she also alleged that cumulatively they caused her mental suffering.<sup>351</sup> She alleged she felt "harassed" and became "a nervous person."<sup>352</sup> The court agreed that the defendant's behavior was "all of a piece in intent and content without substantial letup for three years and with almost diabolical variety"<sup>353</sup> yet refused to allow the plaintiff to recover for the psychological effect of the injuries.<sup>354</sup> The court declared that it could "well imagine" that a course of conduct could have an identifiable effect, such as when threats and accusations cause suicide, but refused to imagine an identifiable effect in this case.<sup>355</sup>

The reasoning of this and other cases runs contrary to current tort law on intentional infliction of emotional distress. The Oregon Supreme Court in *Davis* suggested that a claim for intentional infliction of emotional distress is only parasitic to the assault and battery causes of action.<sup>356</sup> However, intentional infliction of emotional distress has been recognized as an independent tort since the 1930s.<sup>357</sup> The tort has stood alone for conduct which would seem less extreme and outrageous than a husband's continued physical and mental abuse of his wife.<sup>358</sup> Clearly the test in the early cases was not whether the mental suffering was the result of another alleged tort such as battery, but whether the conduct in itself would lead a person, upon hearing the facts, to exclaim "outrageous."<sup>359</sup> Yet, the *Davis* court proclaimed that the conduct was indeed intentionally continuous and outrageous, but did not allow the action to stand.<sup>360</sup>

*b. New Mexico: husband's privilege and privacy paramount to wife's mental injuries*

In a recent New Mexico decision, *Hakkila v. Hakkila*,<sup>361</sup> the wife counter-

350. See *id.* "Recovery for mental injury was permitted only if it could be shown that the mental damages were 'parasitic' to another already recognized tort." Driscoll, *supra* note 341, at 57.

351. *Davis*, 580 P.2d at 547.

352. *Id.*

353. *Id.*

354. *Id.* at 548.

355. *Id.* (citing *Tate v. Canonica*, 180 Cal. App. 2d 898, 5 Cal. Rptr. 28 (1960)).

356. *Id.* at 547.

357. KEETON et al., *supra* note 2, § 11, at 60.

358. For example, the tort is recognized where an employee of a railroad or hotel (considered common carriers) insults a customer. See, e.g., *Chamberlain v. Chandler*, 5 Fed. Cas. (C.C. Mass. 1823) (No. 2575). Other cases allowed the cause of action when a practical joke led to physical and mental illness of the plaintiff, *Wilkinson v. Downton*, 2 Q.B. 57 (1897), and where the nature of the conduct was similar to extortion, *Johnson v. Sampson*, 208 N.W. 814 (Minn. 1926) (girl coerced into signing immoral confession).

359. KEETON et al., *supra* note 2, § 11, at 60 n.54 (quoting RESTATEMENT OF TORTS § 46 cmt. g (Supp. 1948)).

360. *Davis*, 580 P.2d at 547.

361. 812 P.2d 1320 (N.M. Ct. App. 1991), *cert. denied*, 811 P.2d 575 (N.M. 1991).

claimed for intentional infliction of emotional distress in response to her husband's dissolution petition.<sup>362</sup> Ms. Hakkila alleged a continuous course of conduct throughout the marriage that included assault, batteries, insults, demeaning remarks, locking the wife outside their home at night during winter, refusal to have sexual relations and refusing to allow the wife to pursue school and hobbies.<sup>363</sup> The court held the husband's conduct was not sufficiently outrageous to support Ms. Hakkila's claim.<sup>364</sup> Although the tort of intentional infliction of emotional distress is recognized in New Mexico, the court created a higher burden of proof for claims by spouses.<sup>365</sup>

The court stated three reasons for limiting intentional infliction of emotional distress in intramarital claims: "(1) preventing burdensome litigation of the commonplace, (2) protecting privileged conduct and (3) avoiding groundless allegations of causation . . ."<sup>366</sup> The court premised its decision with a discussion of policies for limiting the scope of intentional infliction of emotional distress: privilege and privacy of the accused.<sup>367</sup> According to the court, Mr. Hakkila had the "privilege" of inflicting emotional distress upon his wife.<sup>368</sup> The court condoned the violent and unreasonable behavior by men toward their wives. For example, the court matter-of-factly stated: "Courts must recognize we are not yet as civilized as we might wish. *Many, if not all, of us need some freedom to vent emotions in order to maintain our health.*"<sup>369</sup> Apparently the court feels it is permissible for Mr. Hakkila to maintain his mental health at the expense of Ms. Hakkila's mental health. The court continued: "Intentionally making another person unhappy or upset may also serve *useful purposes* besides simply preserving the mental health of the perpetrator" and suggests that such behavior may have a "greater social good."<sup>370</sup> The scope of the tort may be restricted because there may be a "protected liberty interest" in the conduct, according to the court.<sup>371</sup>

After concluding that conduct causing emotional distress may have social utility (for the person causing the harm) and ignoring the victim's rights, the court proceeded to apply its policies to the application of intentional infliction of emotional distress between spouses.<sup>372</sup> First the court recognized spousal abuse is prevalent in our society and claimed it "unfortunate."<sup>373</sup> However, the court

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362. *Id.* at 1321.

363. *Id.*

364. *Id.* at 1327.

365. *Id.* at 1326.

366. *Id.* at 1325.

367. *Id.* at 1323-24.

368. *Id.* at 1324-25.

369. *Id.* at 1324 (emphasis added).

370. *Id.* (emphasis added) (citing Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 COLUM. L. REV. 42, 57 (1982)).

371. *Id.*

372. *Id.* at 1324-26.

373. *Id.* at 1324.

chose to construe the tort of outrage "loosely" because it feared taxing judicial resources.<sup>374</sup> Finally, the court stated that outrageous conduct between spouses is "likely to be privileged."<sup>375</sup> "Partners who are pledged to live together for a lifetime have a right to criticize the other's behavior."<sup>376</sup> However, the court does not distinguish Mr. Hakkila's conduct which included slamming a camper shell on Ms. Hakkila's head and the trunk lid on her hands while she was putting groceries into the camper.<sup>377</sup>

The court equates Mr. Hakkila's behavior to a benign statement such as "you look awful" or "you look 'like a hippopotamus.'"<sup>378</sup> Mr. Hakkila's privacy interests were of paramount concern and Ms. Hakkila's mental injuries were ignored.<sup>379</sup> Ms. Hakkila's mental injuries were not even in question—she was too "emotionally disabled" to even attend the hearing.<sup>380</sup> Yet the court thought nothing of her rights. Instead, the court distinguished intentional infliction of emotional distress claims against a spouse from other interspousal torts, such as automobile accidents, finding the accused in an action for intentional infliction of emotional distress needs more protection from public exposure:

Although the spouse who raises a claim of outrage has no right to complain of the exposure of matters relevant to the claim, courts must be sensitive to the *privacy interests of the defending spouse*. Any litigation of a claim is certain to require exposure of the intimacies of married life. This feature of the tort distinguishes it from intramarital torts already recognized in New Mexico.<sup>381</sup>

The court said that Mr. Hakkila's refusal to have sexual relations with his wife was too intimate a matter for inquiry and that the trial court judge based his opinion on this fact for finding outrage.<sup>382</sup> However, the court ignores the other facts: assaults, batteries and other continuous conduct which cause actual mental injury to Ms. Hakkila which was apparently serious enough to prevent her from attending the hearing.<sup>383</sup> The court made no attempt to hide its sympathy for Mr. Hakkila when it lamented: "[Mr. Hakkila] was subjected to a six-day trial, to say nothing of discovery and other preparation, surveying the rights and wrongs of a ten-year marriage."<sup>384</sup> The court worried only about protecting Mr. Hakkila from public scrutiny and not at all about his abuse of his wife. In fact, the court focused entirely on Mr. Hakkila, his needs, his privileges, his

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374. *Id.* at 1324-25.

375. *Id.* at 1325.

376. *Id.*

377. *Id.* at 1322.

378. *Id.* at 1325 (quoting RESTATEMENT (SECOND) OF TORTS § 46 illus. 13 (1965)).

379. *See id.* at 1321, 1325.

380. *Id.* at 1321.

381. *Id.* at 1325.

382. *Id.*

383. *See id.* at 1322, 1325.

384. *Id.* at 1327.

privacy and his acts and not at all on the effects of Mr. Hakkila's behavior on Ms. Hakkila. She was a nonentity in the eyes of this court.

The New Mexico Court of Appeals did not completely shut the door on interspousal claims for intentional infliction of emotional distress.<sup>385</sup> It did, however, make the standard of proof impossibly high for abused women to meet.<sup>386</sup> The court also gave a stern warning to intimidate possible plaintiffs in the future: "Motions for summary judgment should be viewed sympathetically in similar cases. If the potential harms from this kind of litigation are too frequently realized, it may be necessary to reconsider husband's suggestion that the tort of outrage be denied in the interspousal context."<sup>387</sup>

## 2. Disagreement over intentional infliction of emotional distress in divorce actions in Texas

Battered women have been more successful in Texas than in most other states when suing for intentional infliction of emotional distress.<sup>388</sup> In *Massey v. Massey*<sup>389</sup> and *Twyman v. Twyman*,<sup>390</sup> courts of appeal let stand jury verdicts in favor of the abused plaintiffs. However, the appellate court reversed a \$500,000 award to a woman in a decision which effectively created an exception to the abrogation of interspousal tort immunity in Texas.<sup>391</sup> Apparently the court thought it was against public policy to allow spouses to seek damages for intentional infliction of emotional distress.<sup>392</sup>

In *Chiles v. Chiles*<sup>393</sup> a jury awarded the plaintiff-wife \$500,000 in damages for intentional infliction of mental distress.<sup>394</sup> The claim had been brought as a second cause of action in a divorce proceeding tried to a jury.<sup>395</sup> The defendant had frequently used drugs and alcohol, physically and verbally abused the plaintiff and had relationships with women he met at topless bars.<sup>396</sup> The appellate court reversed the jury award, holding that policy considerations "militate against the introduction of the tort of intentional infliction of emotional distress"

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385. "There is no need at this time to adopt husband's recommendation that all such claims be barred." *Id.* at 1327.

386. *Id.* at 1326.

387. *Id.* at 1327.

388. See, e.g., *Massey v. Massey*, 807 S.W.2d 391 (Tex. Ct. App. 1991) (\$362,000 jury award); *Twyman v. Twyman*, 790 S.W.2d 819 (Tex. Ct. App. 1987) (writ granted Dec. 19, 1990) (\$15,000 jury award; negligent infliction of emotional distress). But see *Chiles v. Chiles*, 779 S.W.2d 127 (Tex. Ct. App. 1989) (\$500,000 judgment overturned on appeal).

389. 807 S.W.2d 391 (Tex. Ct. App. 1991).

390. 790 S.W.2d 819 (Tex. Ct. App. 1987) (writ granted Dec. 19, 1990).

391. *Chiles*, 779 S.W.2d 127.

392. See *infra* notes 391-404 and accompanying text.

393. 779 S.W.2d 127 (Tex. Ct. App. 1989).

394. *Id.* at 127-28.

395. *Id.* at 128. Texas allows some aspects of divorce proceedings to be tried to the jury. *Id.*

396. *In re Chiles*, 14 Fam. L. Rep. (BNA) 1190 (Tex. Dist. Ct. 1988), *rev'd*, *Chiles v. Chiles*, 779 S.W.2d 127 (Tex. Ct. App. 1989).

in marital disputes.<sup>397</sup>

The court believed that to allow separate damages for intentional infliction of emotional distress in a divorce proceeding would result in the "evils" avoided by the abrogation of fault divorce.<sup>398</sup> However, the court did not elaborate on these evils. It did state the tort action would "obfuscate" the other issues in the divorce proceeding—custody, support and division of community property.<sup>399</sup>

The rationale used by the court was that the tort of intentional infliction of emotional distress must be accompanied by physical injury.<sup>400</sup> Based on this premise and the fact Ms. Chiles did not allege any specific physical injuries, the court concluded that "negligent infliction of emotional distress without physical symptoms, leads us to the conclusion that the tort should not be recognized in a divorce action."<sup>401</sup>

Based on its thin rationale, the court was actually creating an exception to the abrogation of interspousal tort immunity in Texas.<sup>402</sup> The decision was severely criticized by the Third District Court of Appeals of Texas in *Twyman v. Twyman*.<sup>403</sup> The *Twyman* court held that the issue of interspousal tort immunity for all causes of action had previously been decided by the Texas Supreme Court in the case of *Price v. Price*.<sup>404</sup> The court went on to say that *Chiles* was wrongly decided under *Price* when it carved out an exception to the abrogation of interspousal tort immunity.<sup>405</sup> There was no reason to make any exceptions from the abolition of interspousal tort immunity because the policy arguments of "marital harmony and the potential for collusive lawsuits provide no support for resurrecting interspousal immunity."<sup>406</sup>

The First District Court of Appeals of Texas, in *Massey v. Massey*,<sup>407</sup> also disagreed with the *Chiles* decision.<sup>408</sup> In *Massey* the jury awarded the plaintiff-wife \$362,000 for emotional distress damages.<sup>409</sup> The parties were divorced after a twenty-two year marriage. Ms. Massey filed a tort claim with the divorce

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397. *Chiles*, 779 S.W.2d at 131-32.

398. *Id.* at 131.

399. *Id.* at 132.

400. *Id.* at 131.

401. *Id.* The court referred to negligent infliction of emotional distress even though the plaintiff alleged intentional infliction of emotional distress. *Id.*

402. This was clearly contrary to *Price v. Price*, the case in which the Texas Supreme Court had abrogated the doctrine of interspousal tort immunity. 732 S.W.2d 316 (Tex. 1987); see *Massey*, 807 S.W.2d at 397 (Texas law does not require physical injury for tort of infliction of emotional distress; to require physical injury only in family law cases is denial of equal protection); *Twyman v. Twyman*, 790 S.W.2d 819, 823 (Tex. Ct. App. 1987) (issue of interspousal tort immunity firmly settled in Texas; *Chiles* court erroneously applied law on interspousal tort immunity) (writ granted Dec. 19, 1990).

403. 790 S.W.2d 819 (Tex. Ct. App. 1987) (writ granted Dec. 19, 1990).

404. *Id.* at 821 (citing *Price v. Price*, 732 S.W.2d 316 (Tex. 1987)).

405. *Id.* at 823.

406. *Id.*

407. 807 S.W.2d 391 (Tex. Ct. App. 1991).

408. *Id.* at 396.

409. *Id.* at 395.

action and at trial alleged her husband was "abusive, explosive, and rageful."<sup>410</sup> Even though he was a bank president and had personal assets worth over \$3,000,000, he would not let Ms. Massey control any finances.<sup>411</sup> He would give her only \$20 at a time for groceries and he would buy her clothes for her.<sup>412</sup> He threatened to leave her penniless if she divorced him and never allowed her to even write a check.<sup>413</sup> He even admitted he used threats to "get his way" in his marriage.<sup>414</sup>

Ms. Massey's psychologist testified at trial that Ms. Massey was "emotionally battered."<sup>415</sup> Although the court never indicated the psychiatrist diagnosed Ms. Massey as suffering from Battered Woman Syndrome, many of the characteristics used to describe Ms. Massey are those of a battered woman.<sup>416</sup> The psychologist described Ms. Massey as

paralyzed, passive, and intimidated. . . . [Ms. Massey] was extremely fearful and had learned to deal with Henry through avoidance, "walking on egg shells" so as not to trigger Henry's rage. The psychologist characterized much of Henry's behavior as stemming from a malicious intent to harm [Ms. Massey]. She predicted that [Ms. Massey] would need extensive psychotherapy in the future.<sup>417</sup>

The court found the evidence of Henry's conduct sufficiently "outrageous" to support the emotional distress claim.<sup>418</sup>

The courts' reasoning in *Massey* and *Twyman* furthers the public policy of providing plaintiffs "redress for wrongs committed against them."<sup>419</sup> It should make no difference that the parties were married at the time the tortious acts occurred; the public policy of promoting domestic tranquility cannot be

410. *Id.* at 399.

He constantly engaged in verbal abuse such as criticism and blaming, and he belittled her in front of their children. He had temper tantrums and physical outbursts which sometimes involved the destruction of property. Although he stopped short of physically assaulting her, [Ms. Massey] testified that Henry's physical outbursts caused her to experience intense anxiety and fear.

*Id.*

411. *Id.* at 403.

412. *Id.* He became enraged once when she bought two \$75 dresses on her own. *Id.*

413. *Id.* She wrote a check, once, in an emergency. He "exploded" and forbade her from entering the bank where he worked. *Id.*

414. *Id.*

415. *Id.* at 400.

416. *See id.*

417. *Id.* All of the characteristics used by Ms. Massey's psychologist similar to those used by Dr. Lenore Walker to describe women suffering from Battered Woman Syndrome. *See generally* WALKER, *supra* note 3.

418. *Massey*, 807 S.W.2d at 400. "Outrageous conduct is that conduct which exceeds all reasonable bounds of decency." *Id.* (citing RESTATEMENT OF THE LAW, TORTS, § 46 cmt. g (Supp. 1948)). "[It] is a fact for a jury to decide." *Id.*

419. *Id.* at 396 (quoting *St. Elizabeth Hosp. v. Garrard*, 730 S.W.2d 649, 653-54 (Tex. 1987)).

achieved when one of the parties is terrorizing the other.<sup>420</sup> To follow the *Chiles* decision and allow interspousal tort immunity to continue to be applied to divorcing couples would be "denying equal protection to a person because of their status as partners in a marriage relationship."<sup>421</sup>

### 3. Intentional infliction of emotional distress allowed where expert testimony used

One of the first tort cases to introduce expert testimony on the Battered Woman Syndrome was *Gladish v. Simmons*.<sup>422</sup> The plaintiff-wife sued her husband for "psychological battery" suffered over their six and one-half year marriage.<sup>423</sup> The wife alleged that the defendant "tossed cups of coffee at her, destroyed furniture and household items during fits of rage, struck her, and threw her to the floor because she tried to intervene when he was spanking his son, and insulted her in front of her friends."<sup>424</sup> She also testified to suffering several physical ailments caused by his behavior, including "depression, severe headaches, acute stomach pains, and substantial weight loss."<sup>425</sup> No cause of action for specific acts of battery was alleged and no issue regarding the statute of limitations arose during trial.<sup>426</sup> Apparently, the court considered this tort a single, ongoing cause of action for intentional infliction of emotional distress rather than a "battery" as alleged in the complaint.<sup>427</sup> The jury, in a message to the defendant and the community that such "outrageous conduct will not be tolerated," awarded the wife \$100,000 in punitive damages.<sup>428</sup>

The most recent case allowing damages for intentional infliction of emotional distress, *Curtis v. Curtis*,<sup>429</sup> used expert testimony on the Battered Woman Syndrome to show the intentional infliction of emotional distress was suffered as a result of the abusive behavior over the course of the entire relationship.<sup>430</sup> The court considered the intentional infliction of emotional distress and the battery as separate causes of action.<sup>431</sup> Thus, even though only three batteries were alleged in the complaint, the court allowed testimony of incidents over the entire relationship to prove the intentional infliction of emotional distress.<sup>432</sup>

420. *See id.* at 396-97 (promotion of marital harmony illusory); *Twyman v. Twyman*, 790 S.W.2d 819, 823 (Tex. Ct. App. 1990) (marital harmony already destroyed).

421. *Massey*, 807 S.W.2d at 397 (quoting *Price v. Price*, 732 S.W.2d 316, 320 (Tex. 1987)); *see also Twyman*, 790 S.W.2d at 823 (also citing *Price*).

422. 11 Fam. L. Rep. (BNA) 1323 (Colo. Dist. Ct. 1985), *rev'd on other grounds sub nom. Simmons v. Simmons*, 773 P.2d 602 (Colo. Ct. App. 1989).

423. *Id.*

424. *Id.*

425. *Id.*

426. *See id.*

427. *Id.* (case proceeded on theory of psychological battery).

428. *Id.* (\$15,000 damages also awarded for remedial therapy).

429. *Spotlight*, *supra* note 42, at 314.

430. *Id.*

431. *See id.*

432. The statute of limitations issue apparently was never raised by the defense. *See id.*

These two cases appear to be a victory for battered women in the fight to have their injuries from prolonged abusive relationships redressed. It should be noted, however, that both cases used expert testimony on the Battered Woman Syndrome. The attorneys for Sandra Curtis Firth believe this was a major factor in the award of damages.<sup>433</sup>

#### V. A NEW TORT OF SPOUSAL ABUSE

In one District of Columbia case, the battered spouse asked the court to recognize a new tort of spousal abuse. The court refused to recognize it. In *de la Croix de Lafayette v. de la Croix de Lafayette*<sup>434</sup> the parties filed for divorce in 1986, and the divorce was finalized in 1987.<sup>435</sup> The following year the wife filed a tort action against her ex-husband alleging intentional infliction of emotional distress, assault, battery and spousal abuse.<sup>436</sup> She alleged he had committed various acts of assault and battery during the marriage, including sexual assault on their daughter, which caused her emotional distress.<sup>437</sup>

The plaintiff explicitly asked the court to do what the plaintiff in *Davis v. Bostick*<sup>438</sup> only implied: recognize a new tort of spousal abuse.<sup>439</sup> The new tort would treat "individual acts of violence as part of an ongoing pattern."<sup>440</sup> It would include assaults, batteries and psychological abuse occurring during the marriage.<sup>441</sup> The basic difference between the new tort and separate actions for each and every act of abuse would be the tolling of the statute of limitations as long as the spousal abuse continued.<sup>442</sup> The statute of limitations would begin to run after the last incident and would expire after three years.<sup>443</sup>

The court rejected the new tort on the ground that there was no showing that the new tort was needed to adequately address the claims.<sup>444</sup> However, no expert testimony on the Battered Woman Syndrome was given. Expert testimony may have demonstrated to the court the cumulative psychological effects on the woman, and the court could have very well concluded that a new tort was needed to give the plaintiff a chance to fully recover for all of her injuries suffered from the beginning of the cycle of violence.

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433. *Id.* Due to extenuating circumstances, Dr. Walker was available to testify only on the first day of trial. The judge allowed her to testify as the plaintiff's first witness on the condition the plaintiff lay the foundation later. The attorneys believe this helped the jury to understand Sandra's testimony under cross-examination when she was asked why she did not leave Carl. *Id.*

434. 15 Fam. L. Rep. (BNA) 1501 (D.C. Super. Ct. Aug. 14, 1989).

435. *Id.*

436. *Id.* at 1501-02.

437. *Id.* at 1502-03.

438. 580 P.2d 544 (Or. 1978).

439. *de la Croix de Lafayette*, 15 Fam. L. Rep. (BNA) at 1502.

440. *Id.*

441. *Id.*

442. *Id.*

443. *Id.*

444. *Id.*

The court also noted that the policy of finality in a divorce warranted the exclusion of the new tort between spouses.<sup>445</sup> The court reasoned that "the decision whether to divorce or not should be made in an environment as free of extraneous financial and fault considerations as possible."<sup>446</sup> This makes little sense. The fact that a woman is being beaten by her husband should be a major factor in her decision whether to divorce him. As far as financial considerations are concerned, money is recognized as a major factor in a battered woman's decision to stay married to a batterer.<sup>447</sup> She may not be able to afford to leave him. Where she will go, who will pay for food and shelter, who will look after the children if she must work—these are all considerations in her decision to leave or stay.<sup>448</sup> The court's argument also overlooks another major factor in a woman's decision not to leave—fear.<sup>449</sup> Battered women may "accurately perceive the risks of remaining, accurately perceive the risks of leaving, and choose to stay . . . because the risks of leaving outweigh the risks of staying."<sup>450</sup>

By leaving fault and economic considerations out of the divorce decision, many women would be condemned to the terror of living with an abusive man and the Battered Woman Syndrome. However, if a woman can recover for her physical and emotional injuries suffered during her marriage, she will be more likely to break out of the cycle of violence.<sup>451</sup> Likewise, the tortfeasor-husband will be less likely to abuse his spouse because he knows it will cost him more than the price of alimony if she decides to leave him and sue for personal injuries.<sup>452</sup>

The courts' aversion to creating a new tort for spousal abuse is perplexing at best. One reason given is that the wrongs can be adequately addressed under existing tort laws.<sup>453</sup> This reasoning fails for two reasons. First, because of the short statute of limitations for intentional torts of assault and battery, a battered woman cannot get redress for the full effects of the Battered Woman Syndrome.<sup>454</sup> Second, courts are reluctant to recognize intentional infliction of

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445. *Id.*

446. *Id.*

447. See WALKER, *supra* note 2, at 36.

448. *Id.* at 130.

449. "Batterers reportedly would frighten their women with terrorizing descriptions of how they would torture them. They often backed up these descriptions through the use of guns, knives, and other weapons in their abusiveness." *Id.* at 75; see also Littleton, *supra* note 10, at 29 (battered women give four reasons for staying in battering relationships: fear, love, desire for connection and absence of options).

450. Littleton, *supra* note 10, at 45-46. Littleton takes the argument one step further by adding that battered women "are trying to rescue something beyond themselves." *Id.* at 46. Littleton argues that these women still love their batterers and stay in order to try to help them. See *id.* at 46-47.

451. See *supra* note 84 discussing the cycle of violence.

452. See Littleton, *supra* note 10, at 52-53 (calling for increase of perceived costs of battering behavior).

453. See, e.g., *de la Croix de Lafayette v. de la Croix de Lafayette*, 15 Fam. L. Rep. (BNA) 1501, 1502 (D.C. Super. Ct. Aug. 14, 1989).

454. See *supra* notes 301-39 and accompanying text.

emotional distress as a tort separate from assault and battery in the domestic context.<sup>455</sup>

It can be argued, however, that cases such as *Gladish v. Simmons*<sup>456</sup> and *Curtis v. Curtis*,<sup>457</sup> where the courts allowed recovery of intentional infliction of emotional distress, show an emerging trend toward the recognition of the problems faced by battered women and a willingness to let juries rectify the situation with punitive damages in intentional infliction of emotional distress cases.<sup>458</sup> However, *Gladish* and *Curtis* are only two isolated cases, and because neither case was appealed there is no appellate authority for the trial courts to follow. Moreover, the defendants in both cases apparently did not raise the statute of limitations issue. It is unclear what would have happened had the issue been pursued. Appellate cases show a reluctance to let the intentional infliction of emotional distress cause of action stand on its own without valid assault and battery actions filed within the short statute of limitations period.<sup>459</sup>

Another reason given for disallowing recognition of the new tort is that it would open up the floodgates of litigation.<sup>460</sup> However, this was an argument for maintaining the common law doctrine of interspousal immunity when it was first attacked.<sup>461</sup> Some courts have acknowledged that this has not happened.<sup>462</sup>

Some courts, when asked to recognize a new law that they do not like, may "pass the buck" to the legislature for its creation.<sup>463</sup> This is very hypocritical considering that the common law doctrine of interspousal tort immunity was created by judges to counteract the legislature's desire to give women their own identity, through control of their property, when the Married Women's Acts were first passed.<sup>464</sup> It is also hypocritical in that judges have created a whole plethora of laws, including intentional infliction of emotional distress, negligent infliction of emotional distress and the tortious infliction of venereal disease, an interspousal tort recognized in many states.<sup>465</sup>

## VI. PROPOSED RESOLUTION

### A. *What the Courts Can Do*

In order for battered women to be fully compensated for their physical and

455. See, e.g., *Criss v. Criss*, 356 S.E.2d 620, 622 (W. Va. 1987).

456. 11 Fam. L. Rep. (BNA) 1323 (Colo. Dist. Ct. 1985), *rev'd on other grounds sub nom. Simmons v. Simmons*, 773 P.2d 602 (Colo. Ct. App. 1988).

457. *Spotlight*, *supra* note 42, at 314.

458. *Gladish*, 11 Fam. L. Rep. (BNA) at 1323; *Spotlight*, *supra* note 42, at 314.

459. See *supra* notes 301-39.

460. See, e.g., *de la Croix de Lafayette v. de la Croix de Lafayette*, 15 Fam. L. Rep. (BNA) 1501, 1502 (D.C. Super. Ct. Aug. 14, 1989).

461. See, e.g., *Davis v. Bostick*, 580 P.2d 544, 546 (Or. 1978).

462. See, e.g., *Simmons*, 773 P.2d at 604 (citing cases from New Jersey, Utah and Arizona).

463. *Id.*

464. See *supra* notes 120-36 and accompanying text.

465. See, e.g., *Kathleen K. v. Robert B.*, 150 Cal. App. 3d 992, 198 Cal. Rptr. 273 (1984); *Crowell v. Crowell*, 105 S.E. 206 (N.C. 1920).

mental injuries, courts should recognize the continuing tort of spousal abuse. The elements would be similar to those impliedly asked for by the plaintiff in *de la Croix de Lafayette v. de la Croix de Lafayette*:<sup>466</sup> (1) intentional acts; (2) of extreme and outrageous conduct; (3) of a continuous nature; (4) proximately causing; (5) physical injury or emotional distress.<sup>467</sup> The statute of limitations would begin at the last incident of violence. The term spouse should not be limited to married couples, but should be defined to include any partner in an intimate, on-going domestic relationship, including a "spouse, former spouse, cohabitant, former cohabitant or any adult person related as closely as a cousin or any other person with whom the batterer has had a dating or engagement relationship or against the parent of a minor child by the other parent."<sup>468</sup>

Interspousal tort immunity should be completely abolished in all actions. It is a common law doctrine created for the purpose of preventing women from being treated equally under the law.<sup>469</sup> In jurisdictions where the immunity has been abolished, courts should not try to create exceptions for intentional infliction of emotional distress actions.<sup>470</sup> The immunity was completely abolished in Texas and New Mexico, yet courts in both states created exceptions to prevent battered women from recovering for their mental injuries inflicted by abusive husbands.<sup>471</sup>

The courts should not bar interspousal tort claims on the ground of res judicata because the parties had previously been involved in a divorce proceeding. Women should not be barred from recovery for personal injuries suffered because they received an equitable divorce settlement, to which they would have been entitled regardless of the injuries received. Tort actions are to redress a wrong and every member of society should be held to the same standards whether or not the parties are married. The Second Division Court of Appeals in Arizona put it most succinctly when it said: "Whether a man has laid open his wife's head with a bludgeon, put out her eye, broken her arm, or poisoned her body, he is no longer exempt from liability to her . . . . We have progressed that far in civilization and justice."<sup>472</sup>

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466. 15 Fam. L. Rep. (BNA) 1501, 1501-02 (D.C. Super. Ct. Aug. 14, 1989).

467. *Id.* at 1502.

468. CAL. CIV. PROC. CODE § 540 (West 1987) (from definition of domestic violence). The definition should be broad enough to protect all people in intimate relationships from abuse, as does the California domestic violence law. *Id.*

469. *See Price v. Price*, 320 S.W.2d 316, 320 (Tex. 1987) ("To leave in place a bar to . . . suits involving non-vehicular torts would amount to a repudiation of the constitutional guarantee of equal protection under the laws.").

470. *See, e.g., Hakkila v. Hakkila*, 812 P.2d 1320 (N.M. Ct. App. 1991), *cert. denied*, 811 P.2d 575 (N.M. 1991); *Chiles v. Chiles*, 779 S.W.2d 127 (Tex. Ct. App. 1989).

471. *Hakkila*, 812 P.2d 1320; *Chiles*, 779 S.W.2d 127.

472. *Windauer v. O'Connor*, 477 P.2d 561, 564 (Ariz. 1970) (quoting *Bogen v. Bogen*, 12 S.E.2d 649, 651 (N.C. 1941)), *vacated*, 485 P.2d 1157 (Ariz. 1971).

### 1. Legal reasoning

The courts acknowledge the Battered Woman Syndrome as validly recognized by science and permit expert testimony about it to be used to either reduce or justify the charge of murder.<sup>473</sup> Battered Woman Syndrome is characterized by a continuous cycle of violence that needs to be broken. With this in mind, there should be little question of the Battered Woman Syndrome's validity in proving why the tort of spousal abuse is a continuous act intended to inflict injury upon the victim. It should be welcomed by the courts as a way of addressing the victim's needs and making her financially independent so she may break out of the cycle of violence.<sup>474</sup>

Further, the courts should not focus entirely on the perpetrator's rights in domestic abuse cases.<sup>475</sup> The court in *Hakkila* concerned itself more with protecting the abuser's rights than addressing his victim's injuries.<sup>476</sup> Nor should the courts make the standard of outrageous conduct so high that no battered woman could ever meet it.<sup>477</sup> Men who batter women should be held to the same levels of reasonable conduct as the rest of society.

The recognition of the new tort would solve the growing controversy over the statute of limitations in these cases. Presently, it is up to judicial whim to decide whether the acts were continuous or not.<sup>478</sup> Additionally, there is the uneven application of laws involving the use of intentional infliction of emotional distress in tort cases between spouses. For example, in the state of Texas, the districts disagree as to whether interspousal tort immunity still exists in actions for intentional infliction of emotional distress between spouses.<sup>479</sup>

### 2. Policy

There are many reasons why the courts should want to advance the new tort. The first is to deter violence. Domestic violence statistics are staggering and are grossly underreported.<sup>480</sup> If battery is the single largest cause of injury to women, as the Surgeon General has stated, by deterring domestic violence we can not only protect women, but save enormous economic costs.<sup>481</sup>

By allowing women to be compensated for their injuries, they will better be able to obtain economic independence. Economic necessity is a frequently cited

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473. See *supra* notes 223-44 and accompanying text.

474. See *Mogford v. Mogford*, 616 S.W.2d 936, 940 (Tex. Civ. App. 1981).

475. See *Hakkila*, 812 P.2d 1320.

476. See *id.* at 1325. The *Hakkila* court did say that Mr. Hakkila would not be as protected if he committed a "battery," yet Mr. Hakkila *did* commit several batteries on his wife. The court ignored this. See *id.*

477. See *id.*

478. Compare *Twyman v. Twyman*, 790 S.W.2d 823 (Tex. Ct. App. 1990) (continuing tort of negligent infliction of emotional distress) with *Davis v. Bostick*, 580 P.2d 544 (Or. 1978) (continuing tort disallowed).

479. See *supra* notes 386-419 and accompanying text.

480. GOOLKASIAN, *supra* note 5, at 2.

481. See *supra* note 3.

factor in the reasons why battered women do not leave their batterers.<sup>482</sup> Statistics show Battered Woman Syndrome is not found in just impoverished families.<sup>483</sup> There are a great many wealthy men who beat women, like Mr. Curtis or Mr. Massey,<sup>484</sup> who can afford to compensate the victims of their abuse.

Poor women have an even greater incentive for seeking redress in the civil rather than the criminal courts. If the man is the primary breadwinner, which is often the case in abusive relationships, it will not help an economically dependent woman to have him put in jail.<sup>485</sup> She and her children need him to be a working and a fully functioning member of society. The goal should be to keep such men out of jail unless absolutely necessary. There are a growing number of domestic violence diversion programs and treatment available for men who batter women.<sup>486</sup> If the consequences to men who batter women involve economic as well as criminal sanctions, there will be even more incentive for men who batter to seek treatment and stop altogether.

Courts should stop accepting domestic violence as inevitable. As long as men know they will not be held accountable by the laws and the judiciary, they will continue their violent behavior. Women deserve to be respected enough to have the protection of law. The *Hakkila* court suggested that domestic violence is inevitable because "we are not yet as civilized as we might wish" and went so far as to state that inflicting mental distress is mentally healthy for the perpetrator and "may also serve [other] useful purposes."<sup>487</sup> This view should not be tolerated. The *Hakkila* court trivialized Mr. Hakkila's actions, comparing them to "family romping."<sup>488</sup> Mr. Hakkila's romps included throwing his wife across the room and her face into a pot of dirt; slamming a camper shell on his wife's head and the trunk on her hands; refusing to allow his wife to pursue school and hobbies; going into rages and screaming at his wife, among others.<sup>489</sup>

It is time for courts to stop protecting men who batter. It is time to address the intolerable conditions under which many women live.<sup>490</sup> The courts need to stop treating spousal abuse victims as the problem and start placing the blame with those who perpetrate random and uncontrolled violence toward women.<sup>491</sup>

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482. GOOLKASIAN, *supra* note 5, at 7.

483. WALKER, *supra* note 3, at 34.

484. *See supra* notes 420-31 and accompanying text.

485. Littleton, *supra* note 10, at 54.

486. CALIFORNIA ATTORNEY GENERAL, *supra* note 21, at 128.

487. *Hakkila v. Hakkila*, 812 P.2d 1320, 1324 (N.M. Ct. App. 1991), *cert. denied*, 811 P.2d 575 (N.M. 1991).

488. *Id.* at 1323.

489. *Id.* at 1322. The court did not believe that Mr. Hakkila would go into rages and scream at his wife when they were home alone because he did it only one time in front of witnesses. *Id.* at 1322. Why does the court not believe Ms. Hakkila?

490. Littleton, *supra* note 10, at 42.

491. *Id.*

### B. Legislatures

Legislatures can amend their domestic violence laws to include the recovery of civil damages for abuse suffered during a marriage, cohabitation or other dating relationship. Most states have already made domestic violence a crime, however, this does not compensate the *victim* of the crime with monetary judgments for injuries suffered which may be extensive and long lasting. Women should have the ability to seek compensation for wrongs committed against them by domestic partners and hold those partners to the same standards under the civil law as the rest of society.

Legislatures should not sit back and wait for courts to change the laws to accommodate the needs of women. Action is needed to make the law more equitable. First, legislatures should explicitly repeal any vestiges of interspousal tort immunity. Second, legislatures should give women the option of joining tort claims with divorce actions. They should not make joinder mandatory as many women do not know their rights or may be too frightened of their batterers to bring a tort action until after their marriage has been dissolved. Third, legislatures should not let divorce settlements preclude tort actions. Many women may not be savvy enough to understand that settlement agreements could prevent further recovery or may not be able to afford an attorney during dissolution proceedings. Fourth, legislatures should codify a new tort of spousal abuse.

### C. What Attorneys Can Do

Attorneys who handle divorce or tort litigation between spouses should familiarize themselves with the warning signs of domestic abuse.<sup>492</sup> Many women are either afraid or embarrassed to admit they have been victimized by a loved one's abuse as is highlighted in both the *Curtis* and *Chiles* cases.<sup>493</sup> In both of those cases, it was the attorneys who realized that these women had suffered from more than a dysfunctional marriage.<sup>494</sup>

Furthermore, attorneys can develop new strategies in the pursuit of tort cases in which women have been battered. The attorneys in *Curtis* partially attribute their success to the fact that the first witness on the stand was their expert witness, Dr. Lenore Walker.<sup>495</sup> Even though this was not planned, they believe it helped the jury understand the plaintiff's cross-examination and why the plaintiff did not simply walk out of the relationship, even before the plaintiff took the stand. This way, it did not seem to the jury that excuses were being made after cross-examination.

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492. Many sources are available. For example, see KUEHL et al., *supra* note 7, ch.2 and LEFCOURT, *supra* note 3.

493. *Chiles v. Chiles*, 779 S.W.2d 127 (Tex. Ct. App. 1989); *Spotlight*, *supra* note 42, at 314 (*Curtis v. Curtis*).

494. *Lilly & George*, *supra* note 37, at 26-27 (*Chiles v. Chiles*); *Spotlight*, *supra* note 42, at 314 (*Curtis v. Curtis*).

495. *Spotlight*, *supra* note 42, at 314.

## VII. CONCLUSION

Women have achieved tremendous gains in having their wrongs redressed by the legal system in the last century. Women were finally recognized as legal entities in the eyes of the court, although in limited situations in the late 1800s with the passage of the Married Women's Acts. In the 1970s women were finally able to sue their spouses for certain injuries suffered during the marriage. By 1990 most states had recognized the pervasiveness of domestic abuse in our society, most of which is directed at women. Even though the law has come a long way in the last one hundred years, women still are not able to fully litigate the wrongs committed against them in the civil courts and be compensated for all injuries resulting from those wrongs. The recognition of spousal abuse as a tort would help to achieve equality in holding every member of society to the same standards of care and making available compensation for the violation of those standards.

*I cannot say that I think you very generous to the Ladies, for whilst you are proclaiming peace and good will to Men, Emancipating all Nations, you insist upon retaining an absolute power over Wives. But you must remember that Arbitrary power is like most other things which are very hard, very liable to be broken—and notwithstanding all your wise Laws and Maxims we have it in our power not only to free ourselves but to subdue our Masters, and without violence throw both your natural and legal authority at our feet . . . .*<sup>496</sup>

*Rhonda L. Kohler*

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496. Letter from Abigail Adams to John Adams (May 7, 1776), reprinted in LEVIN, *supra* note 1, at 84.