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TORT REMEDIES FOR VICTIMS OF DOMESTIC ABUSE

DOUGLAS D. SCHERER*

More than three million American women suffer severe beatings from their husbands each year.¹ Verbal threats and harassment accompany physical harm or occur without physical harm. Evidence of intentionally inflicted harm is readily available in serious cases through police reports, medical records, witnesses, and admissions by perpetrators who genuinely believe that they are justified in their abusive conduct. If the victim brings a civil action for damages based upon conduct that resulted in a criminal conviction, the perpetrator may be precluded from contesting the underlying facts in the civil action.² This resolves the issues of causation and liability and leaves only damages in dispute in the civil action.

In light of this, why have trial lawyers not been more active in bringing civil actions for money damages based upon domestic violence? Why have they not furthered the public interest by combatting this morally repugnant conduct? The assumption of the author is that trial lawyers simply are unaware of the potential for significant monetary damages in these actions. They mistakenly assume that such actions are barred by the interspousal immunity doctrine, even though this doctrine does not bar the great majority of potential actions. They also do not realize that nearly all jurisdictions permit litigation of matrimonial torts independent of divorce proceedings. Actions for battery and assault are available in all American jurisdictions. The suitability of these actions in domestic abuse cases that involve physical injury or

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1. HANDBOOK OF FAMILY VIOLENCE 3 (Vincent B. Van Hasselt et al. eds., 1988).

2. See RESTATEMENT (SECOND) OF JUDGMENTS § 85(2)(a) (1982) ("A judgment in favor of the prosecuting authority is preclusive in favor of a third person in a later civil action against the defendant in the criminal prosecution."); see also *King v. Prudential Property & Casualty Ins. Co.*, 684 F. Supp. 347, 349 (D.N.H. 1988) (applying New Hampshire law); *Zeidwig v. Ward*, 548 So. 2d 209, 214-15 (Fla. 1989); *Hanover Ins. Co. v. Hayward*, 464 A.2d 156, 160 (Me. 1983); *Knoblauch v. Kenyon*, 415 N.W.2d 286, 292 (Mich. Ct. App. 1987); *Hopps v. Utica Mut. Ins. Co.*, 506 A.2d 294, 297 (N.H. 1985).

threat of physical injury is readily apparent. Nearly all American jurisdictions recognize the tort of intentional infliction of emotional distress, an action that is especially appropriate for a continuing pattern of domestic abuse.

This Article discusses the use of intentional tort actions by victims of domestic abuse who seek monetary damages. Part I discusses the phenomenon of domestic abuse, with emphasis on physical and emotional harm and factors that justify punitive and compensatory damage awards. Part II discusses the torts of battery, assault, and intentional infliction of emotional distress, and the appropriateness of these actions in domestic abuse cases. Part III discusses the interspousal immunity doctrine and demonstrates the limited extent to which the doctrine bars domestic abuse tort actions. Finally, Part IV discusses judicial acceptance of tort actions in domestic abuse cases. An Appendix, which lists reported cases, follows this Article.

I. CHARACTERISTICS OF DOMESTIC ABUSE

For purposes of this Article domestic abuse is harm intentionally inflicted by one adult upon another during the course of or after the termination of a domestic relationship. The phrase domestic relationship includes marital relationships and nonmarital relationships with varying degrees of intimacy or prior intimacy.³ Although child abuse often occurs in tandem with abuse directed at an adult, the Article's focus is upon adult-to-adult conduct.⁴ Abuse of elders also is excluded from consideration.⁵

3. An excellent 1981 article provides statistical data concerning women who sought assistance at La Casa De Las Madres, a shelter for victims of domestic abuse in San Francisco. One hundred and forty-six women were residents at the shelter between March and September of 1977. Thirty-six percent were victims of abuse by men to whom they were *not* married (the categories were: married—53%, single—20%, separated—12%, cohabiting—12%, and divorced—4%). Constance F. Fain, *Conjugal Violence: Legal and Psychosociological Remedies*, 32 SYRACUSE L. REV. 497, 565 n.349 (1981) (citing Marta S. Ashley, *Shelters: Short Term Needs*, in BATTERED WOMEN: ISSUES OF PUBLIC POLICY 371, 380-81 (1978)).

4. Approximately one-third of the male spouse batterers in the sample used for a 1975-78 study also beat their children. LENORE E. WALKER, *THE BATTERED WOMAN* 27 (1979). A 1975 study of 100 battered wives demonstrated that 54% of the wife batterers abused their children. Suzanne K. Steinmetz, *The Violent Family*, in VIOLENCE IN THE HOME: INTERDISCIPLINARY PERSPECTIVES 51, 62 (Mary Lystad ed., 1986). An illustrative case is *Caron v. Caron*, 577 A.2d 1178 (Me. 1990), in which a man subjected his wife and stepson to physical and emotional abuse. The court upheld an award for punitive damages of \$75,000 to the woman and \$35,000 to her son. *Id.* at 1181.

5. Public focus on abusive conduct among family members began with child abuse, expanded to spousal abuse, and now extends to physical and emotional abuse of elderly persons by younger family members. Dr. Marion Goldstein, a specialist in geriat-

Domestic abuse typically occurs in a home setting, even if the perpetrator no longer resides in the home. However, tortious conduct may occur in other settings such as the victim's place of employment. Most domestic abuse involves male perpetrators and female victims. "[P]sychiatric disorders that predispose[] individuals to violence or submission to violence"⁶ is a purported cause of domestic abuse. One commentator, Mary Russell, explained the phenomenon in a "family systems theory,"⁷ which treats spousal abuse as "a mutual problem rather than the fault of one partner."⁸ Experts sometimes utilize a "social learning theory,"⁹ which "conceptualizes violence as a learned behavior rather than psychopathology or character deficit."¹⁰ Feminist theory also regards hostility and aggression by males against females as a "socially learned phenomenon."¹¹

Russell discussed sociological theories that focus on "cultural

ric psychiatry, concluded that an abuser of an elderly person most often is a caregiver who "is a middle-aged woman . . . whose caregiving and self-sacrificing have brought her to exhaustion." Marion Z. Goldstein, *Elder Neglect, Abuse, and Exploitation*, in FAMILY VIOLENCE: EMERGING ISSUES OF A NATIONAL CRISIS 99, 103 (Leah J. Dickstein & Carol C. Nadelson eds., 1989). Another author, in contrast, referred to "[s]everal studies [which] found that the abuser is more likely to be a male caretaker." ROBERT T. SIGLER, DOMESTIC VIOLENCE IN CONTEXT: AN ASSESSMENT OF COMMUNITY ATTITUDES 58 (1989).

6. Mary Russell, *Wife Assault Theory, Research and Treatment: A Literature Review*, 3 J. FAM. VIOLENCE 193, 194 (1988).

7. *Id.* at 195.

8. *Id.* An example of a perverse application of this mutual problem approach is *Desmond v. Desmond*, 509 N.Y.S.2d 979 (Fam. Ct. 1986). A woman fled to Virginia with her children to escape abuse from her former husband. The abuse consisted of "repeated acts of physical terror and forced sex over a number of years, commingled with emotional abuse (much of which was seen or heard by the children)," *id.* at 983, and "repeated acts of assault and battery upon her face, back, and buttocks with her husband's fists and feet," *id.* at 983-84. The abuser petitioned for custody on the theory that his former wife acted improperly when she removed the children from New York. The judge permitted the woman to retain custody and continue to live in Virginia, but directed "that both parents undergo psychological counseling separately" and that they provide counseling "by a licensed mental health professional" for the children. *Id.* at 984.

9. Russell, *supra* note 6, at 195.

10. *Id.* Russell discussed "modeling," noting that a "high incidence of batterers . . . witnessed family violence as children." *Id.* Focusing on victims she wrote: "Learned helplessness . . . has been used to explain assaulted women's seeming passivity in the face of repeated violence." *Id.* Research findings "support the now widely held belief that wife abuse is learned behavior transmitted from generation to generation. Apparently some women learn to accept violent behavior and some men learn to be abusive from many factors including early childhood experiences with abuse." Bonnie Y. Lewis, *Psychosocial Factors Related to Wife Abuse*, 2 J. FAM. VIOLENCE 1, 9 (1987).

11. James V.P. Check, *Hostility Toward Women: Some Theoretical Considerations*, in VIOLENCE IN INTIMATE RELATIONSHIPS 29, 34 (Gordon W. Russell ed., 1988). Check separately analyzed the interconnected phenomena of hostility toward women and the use of aggression to express hostility. *Id.*

norms that permit such behavior and social organization that fosters its occurrence."¹² Under this approach the family "is viewed as reinforcing social inequalities based on gender and economics that increase the likelihood of abuse."¹³ Russell described a 1980 national survey which "revealed that 24% of males and 22% of females viewed minor violence against their spouses as normal."¹⁴

Similarly, Walker evaluated the effect of religious and social customs combined with inadequate protection provided to women by the criminal justice system.¹⁵ She concluded that religious and social customs lead a man to believe that "his rights invariably supersede" those of his wife.¹⁶ According to Walker, "America's social, legal, and religious institutions perpetuate the myth that a woman is to blame for being battered."¹⁷

Clinical studies have evaluated the causes of spousal abuse and the frequency of its occurrence.¹⁸ Domestic abuse is not confined to lower economic and social levels. Professional and white collar workers perpetrate acts of domestic abuse along with laborers, blue collar workers,

12. Russell, *supra* note 6, at 198.

13. *Id.*

14. *Id.*

15. LENORE E. WALKER, TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS 236-38 (1989).

16. *Id.* at 236.

17. *Id.* at 235. Walker wrote:

In light of all this, it is no mystery that batterers believe they have the right to "discipline" a woman. Furthermore, they believe that others, including legal authorities, have no right to interfere. And many battered women have been socialized to believe not only that their men have the right to beat them but that, if they are beaten, they must somehow deserve to be beaten. Even though many women understand that battering is the man's problem, they feel guilty nevertheless; despite what they know, they feel that somehow, some way, they could have done something "better" to help him stop himself.

Id. at 237.

18. For an excellent and comprehensive discussion of causative factors of domestic abuse, see Fain, *supra* note 3, at 510-17; see also Evan Stark & Anne Flitcraft, *Violence Among Intimates—An Epidemiological Review*, in HANDBOOK OF FAMILY VIOLENCE, 293, 294 (Vincent B. Van Hassett et al. eds., 1988). The authors wrote:

Feminists argue that male violence against women and children is different than other forms of domestic violence because it converges with broader patterns of discrimination. This combination of assault and discrimination against women leads to entrapment and is manifested in a distinct clinical profile—"the battering syndrome"—which evokes a range of psychosocial problems alongside injury. However, the majority of nonfeminist clinicians and researchers approach various forms of domestic violence—including wife-husband assault and elder abuse—as symptomatic of distinct family dynamics, psychopathology, and stress.

Id.

and unemployed persons. Walker's studies confirmed this fact.

Most battered women are from middle-class and higher-income homes Although some battered women are jobless, many more are highly competent workers and successful career women. They include doctors, lawyers, corporation executives, nurses, secretaries, full-time homemakers, and others. Battered women are found in all age groups, races, ethnic and religious groups, educational levels, and socioeconomic groups.¹⁹

Walker explained the myth that "[m]iddle-class women do not get battered as frequently or as violently as do poorer women"²⁰ as follows:

Most previously recorded statistics of battering have come from lower-class families. However, lower-class women are more likely to come in contact with community agencies and so their problems are more visible. Middle- and upper-class women do not want to make their batterings public. They fear social embarrassment and harming their husbands' careers. Many also believe the respect in which their husbands are held in the community will cast doubt upon the credibility of their battering stories.²¹

A recent comparative study of women who are "at-risk" for wife assault noted that women of higher socioeconomic status reported being verbally assaulted and subjected to "minor physical violence" as often as women of lower socioeconomic status.²² However, "lower socio-

19. WALKER, *supra* note 4, at 18-19.

20. *Id.* at 21.

21. *Id.* at 21-22. Fain discussed this myth as follows:

Contrary to the myth that battering occurs more frequently among lower income groups, spouse abuse may occur in any home. Extensive research has revealed that the practice of wife abuse permeates all racial, cultural, educational, and economic classes, and occurs in both urban and rural communities. One reason for the myth that marital abuse is a problem that exists primarily among low income groups is the failure of medical doctors, psychologists, ministers, marriage counselors, and family members to report incidents of abuse to the police. Thus, cases involving middle income persons may not come to the attention of the legal community and social agencies. Although statistics are available from police records, they are inadequate because these offenses often are unrecorded or are classified as assaults or homicides with no indication that they are marital abuse cases. Furthermore, police records are inadequate indicators of the magnitude of the problem. They contain little information about the socioeconomic level of offenders and victims. Poor persons usually resort to the police for protection, whereas middle and upper income persons procure the services of medical doctors, ministers, marriage counselors, and other professionals.

Fain, *supra* note 3, at 502-03 (footnote omitted).

22. Gerald T. Hotaling & David B. Sugarman, *A Risk Marker Analysis of Assaulted Wives*, 5 J. FAM. VIOLENCE 1, 10 (1990).

economic women were more likely to be severely assaulted.”²³ Reports are unclear about whether higher socioeconomic status women experience fewer serious assaults than lower socioeconomic women or whether they simply report it less. Nonetheless, research clearly shows that verbal abuse, minor physical abuse, and severe physical assault occur at all socioeconomic levels.

Low self-esteem is a common characteristic of battered women. Commentators have suggested that this characteristic is caused by domestic abuse and is not a pre-existing characteristic that leads to a relationship with an abusive partner.²⁴ Other research indicates that “low self-esteem and negative self-images” are characteristics that are shared by abusers and their victims, regardless of how the victims perceived themselves prior to entering into the abusive relationships.²⁵

Myths and stereotypes permeate uninformed discussion of domestic abuse. Walker debunked the “myth of the masochistic woman” who “experiences some pleasure, often akin to sexual pleasure, through being beaten by the man she loves.”²⁶ Walker’s studies refute the myths that “[b]atterers are violent in all their relationships”²⁷ and that “[b]atterers are unsuccessful and lack resources to cope with the world.”²⁸ Walker also identified as a myth the commonly held belief that batterers cannot change.²⁹ At the same time she rejected the likelihood that a “[l]ong-standing battering relationship can change for the

23. *Id.*

24. *Id.* at 9.

25. LEWIS OKUN, *WOMAN ABUSE: FACTS REPLACING MYTHS* 66 (1986).

26. WALKER, *supra* note 4, at 20. Russell cited a 1985 survey which found that “25% of college males and 14% of college females agree that assaulted wives enjoyed being hit.” Russell, *supra* note 6, at 199. Abandonment of abusive conduct by a batterer may require rejection of “an entrenched system of shared socio-cultural sexist attitudes and role expectations.” Jerry L. Jennings, *Preventing Relapse Versus “Stopping” Domestic Violence: Do We Expect Too Much Too Soon from Battering Men?*, 5 J. FAM. VIOLENCE 43, 48 (1990) (emphasis omitted).

27. WALKER, *supra* note 4, at 24. Walker wrote: “Based on the women in my study, I estimate that only about 20 percent of battered women live with men who are violent not only to them but also to anyone else who gets in their way. . . . Most men who batter their wives are generally not violent in other aspects of their lives.” *Id.*

28. *Id.* Walker referred to findings from a study in England that “physicians, service professionals, and police had the highest incidence of wife beating.” *Id.* She also noted that “batterers in this sample would be indistinguishable from any other group of men in terms of capability.” *Id.* at 25.

29. “If the psychosocial-learning theory of violent behavior is accurate, then batterers can be taught to relearn their aggressive responses. Assertion rather than aggression, negotiation rather than coercion, is the goal.” *Id.* at 28. Change by batterers is not easy and extends beyond abandonment of abusive conduct to rejection of “an entrenched system of shared socio-cultural sexist attitudes and role expectations.” Jennings, *supra* note 26, at 48 (emphasis omitted).

better."³⁰

Walker's studies revealed that family violence follows "a definite battering cycle" consisting of "the tension building phase; the explosive or acute battering incident; and the calm, loving respite."³¹ Women commonly are trapped by economic considerations,³² responsibilities to children, an emotional need to maintain a relationship that hopefully will improve, a belief that escape is impossible, and a recognition that available remedies are controlled by others.³³ They often hold a realistic belief that an abuser will threaten or beat them if they attempt to escape.³⁴ Escape may be impossible simply because there is no place else to go.³⁵

Peterson-Lewis and her associates identified the factors that lead a woman to terminate an abusive relationship.³⁶ They concluded that a female victim of spousal abuse tends to stay in an abusive relationship if she perceives that factors outside her personal relationship with the

30. WALKER, *supra* note 4, at 28. Walker's research led her to the following conclusion:

Relationships that have been maintained by the man having power over the woman are stubbornly resistant to an equal power-sharing arrangement. Thus, even with the best help available, these relationships do not become battering free. At best, the violent assaults are reduced in frequency and severity. Unassisted, they simply escalate to homicidal and suicidal proportions. The best hope for such couples is to terminate the relationship. There is a better chance that with another partner they can reorder the power structure and as equals can live in a nonviolent relationship.

Id. at 29.

31. *Id.* at 55.

32. Straus, Gelles, and Steinmetz noted, "Women are bound by many economic and social constraints, and they often have no alternative to putting up with beatings by their husbands." MURRAY A. STRAUS ET AL., *BEHIND CLOSED DOORS: VIOLENCE IN THE AMERICAN FAMILY* 44 (1981).

33. Okun discussed why victims of abuse return to their abusers after temporary escape. OKUN, *supra* note 25, at 55-56.

34. Lenore E. Walker et al., *Beyond the Juror's Ken: Battered Women*, 7 VT. L. REV. 1, 10 (1982). Fear also prevents victims from seeking help. Okun wrote:

The fear of retribution from the batterer for seeking help or for revealing the abusive situation is another major force obstructing the woman from seeking outside intervention. These fears are justified for the most part. Many of the most severe conjugal assaults and murders are in response to battered women's attempts to seek help or to leave.

OKUN, *supra* note 25, at 72 (footnote omitted).

35. Jill Winter, Executive Director of the Huntington Coalition for the Homeless in New York, provides emergency shelter and transitional living units for homeless women and their children. Most of these women are domestic violence victims. When asked why they stayed as long as they did with abusive partners, nearly all said that they had no place else to go. Interview with Jill Winter, in New York, N.Y., May 13, 1992.

36. Sonja Peterson-Lewis et al., *Attribution Processes in Repeatedly Abused Women*, in *VIOLENCE IN INTIMATE RELATIONSHIPS* 107 (Gordon W. Russell ed., 1988).

abuser have caused the abuse.³⁷ On the other hand, a victim tends to leave if she perceives that factors within the relationship, such as the "negative attitude [of the abuser] toward her," have caused the abuse.³⁸ A victim who "blame[s] the harmdoer," rather than outside causes, "is likely to believe that she might be harmed again in the future" and is likely to feel anger and a desire to retaliate against the harmdoer.³⁹

Research revealed common patterns in battering relationships. These include exposure of male perpetrators to abuse when they were children,⁴⁰ forcible rape of abuse victims by male perpetrators,⁴¹ and social isolation of the couple.⁴² Negative characteristics of male batterers include a "tendency to minimize and deny their violent behavior."⁴³ They "often see the woman as the cause of their violence."⁴⁴ They "are usually very dependent on their partners as the sole source of love, support, intimacy, and problem solving."⁴⁵ Furthermore, they demonstrate "jealousy [and] extreme suspiciousness,"⁴⁶ have "low self-esteem,"⁴⁷ and "tend to be angry and depressed."⁴⁸ Pregnancy increases the frequency of physical violence, with the focus of attack shifting from the head and face to the abdomen.⁴⁹ Abusers appear to be more violent in nonmarital relationships than in marital relationships.⁵⁰ For those who have been married, a significant portion of violence occurs during separation or after divorce.⁵¹ Sonkin, Martin, and Walker drew

37. *Id.*

38. *Id.* at 108.

39. *Id.* at 113.

40. DANIEL J. SONKIN ET AL., *THE MALE BATTERER: A TREATMENT APPROACH* 449 (1985).

41. *Id.* at 17.

42. *Id.* at 43.

43. *Id.* at 42.

44. *Id.*

45. *Id.* at 43.

46. *Id.*

47. *Id.* at 44.

48. *Id.* at 45. The personal characteristics of male batterers, including their emotional dependence on victims, jealousy, unpredictability, and placement of blame for abuse on victims, are discussed further in OKUN, *supra* note 25, at 66-70. Research by Hamberger and Hastings revealed a high incidence of personality disorders among male batterers. L. Kevin Hamberger & James E. Hastings, *Personality Correlates of Men Who Abuse Their Partners: A Cross-Validation Study*, 1 J. FAM. VIOLENCE 323 (1986). For a profile of men subject to criminal prosecutions for domestic abuse, see Albert R. Roberts, *Psychosocial Characteristics of Batterers: A Study of 234 Men Charged with Domestic Violence Offenses*, 2 J. FAM. VIOLENCE 81 (1987).

49. OKUN, *supra* note 25, at 50.

50. *Id.* at 43.

51. Okun cited national crime statistics demonstrating that "26% of perpetrators of spouse assaults . . . were either legally separated spouses or divorced ex-spouses." *Id.*

a parallel between men who rape and men who batter. Rapists "express power and anger"⁵² in their conduct. Similarly, men who batter express dominance and anger against women and obtain sexual excitement engendered by seeing a victim suffer.⁵³

During the last fifteen years there has been a dramatic increase in public focus on domestic abuse. All fifty states and the District of Columbia have enacted remedial legislation.⁵⁴ The preference for nonintervention has given way to varying degrees of responsiveness by police officers⁵⁵ and judges.⁵⁶ At the same time the criminal justice system in general, and criminal court judges in particular, lack enthusiasm for domestic violence cases.⁵⁷ As Judge June Galvin described:

The cycle of filing and dismissing charges against a family member committing an act of domestic violence is too familiar to municipal court judges, prosecutors and police officers. In retrospect, the victim of domestic violence generally wanted only one result: to have the perpetrator leave the residence, which was more or less a legally enforced "cooling off" period.⁵⁸

at 49.

52. SONKIN, *supra* note 40, at 18.

53. *Id.*

54. Patricia L. Micklow, *Domestic Abuse—The Pariah of the Legal System*, in HANDBOOK OF FAMILY VIOLENCE 407, 411 (Vincent B. Van Hasselt et al. eds., 1988) (citations omitted). By contrast, "no domestic abuse statutes were in effect in the United States prior to 1975." *Id.* at 407.

55. Mandatory arrest requirements have modified the conduct of police officers. See Sarah M. Buel, Recent Development, *Mandatory Arrest for Domestic Violence*, 11 HARV. WOMEN'S L.J. 213, 215 (1988) (discussing the deterrent effect of arrest compared with mediation or ordering the batterer to leave the premises for eight hours); see also Lisa G. Lerman, *A Model State Act: Remedies for Domestic Abuse*, 21 HARV. J. ON LEGIS. 61 (1984) (presenting a comprehensive model act on domestic abuse that emphasizes victim protection). For a comprehensive Canadian study of the factors that influence police responses to spousal abuse complaints in Quebec City, see F. Lavoie et al., *Police Attitudes in Assigning Responsibility for Wife Abuse*, 4 J. FAM. VIOLENCE 369 (1989). The authors reported that police react differently to situations in which a husband "resorts to physical violence" than to situations "involving threats." *Id.* at 385. In the latter situation police "adopt a neutral position toward the abused wife. In fact, they maintain this neutral position even if the threats are repeated." *Id.*

56. Protective orders are readily available and are enforced through misdemeanor prosecutions or contempt proceedings. Many cases discuss the use of protective orders. See *Harper v. Harper*, 537 So. 2d 282 (La. Ct. App. 1988); *Hall v. Hall*, 408 N.W.2d 626 (Minn. Ct. App. 1987); *Kass v. Kass*, 355 N.W.2d 335 (Minn. Ct. App. 1984); *Marquette v. Marquette*, 686 P.2d 990 (Okla. Ct. App. 1984); *Melvin v. Melvin*, 580 A.2d 811 (Pa. Super. Ct. 1990); *Yankoskie v. Lenker*, 526 A.2d 429 (Pa. Super. Ct. 1987); *Eichenlaub v. Eichenlaub*, 490 A.2d 918 (Pa. Super. Ct. 1985).

57. WALKER, *supra* note 15, at 241 ("It is a fact that batterers often suffer no legal consequences whatsoever for their behavior.").

58. June R. Galvin, *Ohio's New Civil Remedies for Victims of Domestic Violence*, 8 OHIO N.U. L. REV. 248, 248 (1981); see Micklow, *supra* note 54, at 407-08.

Historically, concern for family privacy has shielded domestic abuse from external control despite "the social costs of exploitation and violence in unregulated family relations."⁵⁹

There have been improvements during recent years in the criminal law response to domestic violence,⁶⁰ and civil protective orders are in general use.⁶¹ This reflects a growing recognition of the need for intervention and effective remedies.⁶² The remedies that recently have become available are aimed, however, almost exclusively at violence prevention. They do not redress physical injury and emotional harm, even for long-suffering victims. The physical injuries suffered by female victims of domestic abuse can be shocking and permanent in their disabling impact. Emotional injury likewise is extreme and comparable to injury that supports large emotional pain and suffering awards in tort litigation. Okun noted that "[v]erbal abuse from the assailant is virtually always present in battering relationships. This includes threats of murder against 20% to 40% of victims. Threats of beatings are also common and appear to be a strictly male behavior."⁶³ Victims feel "worthlessness, humiliation, powerlessness, helplessness, self-blame, and shame."⁶⁴

Fear, paralyzing terror, and anxiety seem to be the most ubiqui-

59. Franklin E. Zimring, *Legal Perspectives on Family Violence*, 75 CAL. L. REV. 521, 533-39 (1987).

60. Lowell F. Schechter, *Introduction: Coping with Family Violence Strategies and Tactics for the 1980's*, 6 VT. L. REV. 325, 328-30 (1981).

61. See *supra* note 56.

62. Further statistics demonstrate that domestic violence has reached epidemic proportions in this society A study conducted by the National Institute of Mental Health revealed that 1.8 million women are *severely assaulted* by their husbands each year, and child abuse is considered to occur in half of these homes. Additionally, marital abuse has been a contributing factor in one fourth of all divorces in this country

Female victims often suffer severe physical injuries, sometimes resulting in death. Many non-fatal injuries require emergency medical attention. The fact that these women were beaten by their spouses, however, often is omitted from their medical files. The results of one study of hospital emergency room services indicated that of the 1,400 women treated in a given period, almost half had injuries inflicted by their spouses. Hence, the incidence of physical abuse was approximately ten times more frequent than medical files indicated.

In brief, the conjugal violence problem in this country is a national tragedy that is approaching epidemic dimensions. Family violence has been described as a systematic form of torture, a physically or emotionally destructive act, and a generic disease transmitted from one generation to the next. Statistics and studies confirm the prevalence of the problem and the extent and nature of the injuries resulting therefrom.

Fain, *supra* note 3, at 504 (footnotes omitted).

63. OKUN, *supra* note 25, at 50 (footnotes omitted).

64. *Id.* at 71.

tous emotional experiences among battered women. Victims of woman abuse are often immobilized by their fear of the batterer and his violence. This fear can literally petrify the woman so that she is unable to resist an attack or retaliate. . . . The battered woman's fear includes anticipation of further conjugal attacks and is magnified by the unpredictable nature of the assaults

. . . .
In terms of psychiatric symptomology, battered women resemble cases of agitated depression. As a result of prolonged stress, they often manifest psychosomatic symptoms such as backaches, headaches, and digestive problems. The battered woman may appear to have aged prematurely. Often there will be fatigue, restlessness, insomnia, or loss of appetite. Great amounts of anxiety, guilt, and depression or dysphoria are typical.⁶⁵

Follingstad and others evaluated the interrelationship between physical and emotional abuse through interviews with 234 abused women. They identified different types of emotional abuse and analyzed the frequency of occurrence and impact on the victim.⁶⁶ They discussed the forms of emotional abuse identified by other researchers, including "ridicule, verbal harassment, and name-calling"⁶⁷; "isolation (either social or financial)"⁶⁸; "jealousy/possessiveness"⁶⁹; "verbal threats of abuse, harm, or torture"⁷⁰; "threats to divorce or abandon . . . or to have an affair"⁷¹; and "damage to or destruction of the personal property of the woman."⁷² The Follingstad study revealed that 229 of the 234 abused women (98%) had "experienced at least one in-

65. *Id.* at 72-73 (footnotes omitted).

66. The authors, citing earlier works by Walker and Ferraro, wrote: [S]ome battered women described psychological degradation, fear, and humiliation as constituting the most painful abuse they experienced. This type of emotional abuse is seen as having long-term debilitating effects on a woman's self-esteem, which in turn diminishes her ability to cope with the abuse. The effects of psychological abuse therefore are seen as contributing to the cycle of violence in which the battered woman is trapped.

Diane R. Follingstad et al., *The Role of Emotional Abuse in Physically Abusive Relationships*, 5 J. FAM. VIOLENCE 107, 108 (1990) (citations omitted).

Nadelson and Sauzier noted that victims of abuse frequently report "somatic symptoms . . . such as headaches, asthma, gastrointestinal symptoms, and chronic pain. More than half of these women had prior psychiatric histories. Depression was the most frequent diagnosis." Carol Nadelson & Maria Sauzier, *Intervention Programs for Individual Victims and Their Families*, in VIOLENCE IN THE HOME: INTERDISCIPLINARY PERSPECTIVE 153, 156 (Mary Lystad ed., 1986).

67. Follingstad, *supra* note 66, at 108.

68. *Id.* at 109.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

cident of emotional abuse”⁷³ and that “[t]he vast majority of the women (72%) reported experiencing four or more types of emotional abuse.”⁷⁴ The following table sets forth the number of women who experienced each of the six types of emotional abuse identified by Follingstad, and the percentage of women who regarded this type as being the most damaging to them⁷⁵:

Form of Abuse	Number Who Experienced This Form of Emotional Abuse	Percentage Who Regarded This as the Most Damaging Form of Emotional Abuse
Ridicule	211	45.7
Threats of Abuse	174	14.9
Jealousy	170	12.2
Restriction	184	10.4
Threats to Change Marriage	113	5.9
Damage to Property	137	4.5

Follingstad noted that the women “who felt emotional abuse was worse than physical abuse experienced significantly more ridicule than women who thought that physical abuse was worse.”⁷⁶ Ridicule “attacks the women’s sense of self-esteem and destroys their ability to feel good about themselves.”⁷⁷

According to Sonkin, Martin, and Walker, “[p]erception of loss of control, which is inherent in battering relationships, is one of the critical factors causing psychological injury to the battered woman.”⁷⁸ This combines with feelings of betrayal,⁷⁹ fear of another beating,⁸⁰ lack of justice,⁸¹ and “fear that men will make good their threats to take away their children”⁸² and creates a condition of “learned helplessness.”⁸³ In many women psychological injury “forms a constellation of symptoms

73. *Id.* at 113.

74. *Id.*

75. *Id.* Sonkin, Martin, and Walker discussed six subcategories of psychological violence, which consisted of explicit threats of violence, implicit threats of violence, extreme controlling type of behavior, pathological jealousy, mental degradation, and isolating behavior. SONKIN, *supra* note 40, at 38-39.

76. Follingstad, *supra* note 66, at 117.

77. *Id.*

78. SONKIN, *supra* note 40, at 152.

79. *Id.* at 153.

80. *Id.* at 154.

81. *Id.*

82. *Id.* at 155.

83. *Id.* at 158.

named Battered Women's Syndrome."⁸⁴ Symptoms "include anxiety, fear, depression, shock, anger, compassion, guilt, humiliation, confused thinking, intrusive memories, uncontrolled reexperiencing of traumatic events, rigidity, lack of trust, suspiciousness, hypervigilance, and increased startle response to cues of possible violence."⁸⁵

The physical and emotional harm suffered by victims of domestic abuse is shocking. Yet, the existence of a domestic relationship, with or without marriage, causes lawyers to ignore possible tort actions that seek money damages. It is as if the lawyers assume that these victims of tortious conduct are barred in some way from obtaining a remedy that would be available if the parties had been strangers.

Lawyers who counsel victims of domestic abuse need to employ sensitive interview techniques to determine the amount of physical and emotional harm suffered and to assess the likelihood of success in possible tort actions. A lawyer usually encounters a domestic abuse victim when she seeks a divorce or civil protective order and has taken steps to gain control over her life. A tort action may be an important additional way for her to gain control.⁸⁶

II. CIVIL ACTIONS FOR BATTERY, ASSAULT, AND INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

The tort actions most useful for domestic abuse cases are those for battery, assault, and intentional infliction of emotional distress. The Restatement (Second) of Torts discusses the common-law origins of

84. *Id.* at 160-61. Some courts have recognized battered women's syndrome as a defense or sentencing factor in criminal cases in which a woman has killed or assaulted a man who physically abused her. The Louisiana First Circuit Court of Appeals upheld a jury's finding that a woman had suffered from battered woman's syndrome because of continuing abuse by a boyfriend. See *Laughlin v. Breaux*, 515 So. 2d 480 (La. Ct. App. 1987). Similarly, the Supreme Judicial Court of Maine accepted the trial court's finding that a victim of domestic abuse suffered from post-traumatic stress syndrome. *Caron v. Caron*, 577 A.2d 1178 (Me. 1990).

In addition, women have sought relief through the executive branch. On December 22, 1990, Governor Richard Celeste of Ohio granted clemency to 25 women who had been denied an opportunity to advance a battered woman syndrome defense and were convicted of murder or assault upon physically abusive men. Isabel Wilkerson, *Clemency Granted to 25 Women Convicted for Assault or Murder*, N.Y. TIMES, Dec. 22, 1990, § 1, at 1.

85. SONKIN, *supra* note 40, at 161.

86. Elba Lopez, a highly respected advocate for battered women, reported that very few of the women that she assists would have the emotional capacity to bring a civil action for damages. However, Ms. Lopez intervenes at a very early stage, when her physical presence, and that of police officers, is necessary to shield a woman from violence that may be life-threatening. Interview with Elba Lopez, in New York, N.Y. (Feb. 23, 1991).

the torts of battery and assault.⁸⁷ Sections 13 and 18 provide for liability for battery if an actor intends "to cause a harmful or offensive contact [with another] or an imminent apprehension of such a contact,"⁸⁸ and a harmful⁸⁹ or offensive⁹⁰ contact results. Section 21 provides for liability for assault if an actor "acts intending to cause a harmful or offensive contact [with another] or an imminent apprehension of such a contact, and . . . the other is thereby put in such imminent apprehension."⁹¹

A battery may be committed by indirect force, such as placing in motion a force or object that makes harmful or offensive contact with the victim, and contact may be "with anything so connected with the body as to be customarily regarded as part of the other's person and therefore as partaking of its inviolability."⁹² The plaintiff need not be aware of the contact at the time the actor inflicted it,⁹³ and contact is deemed to be harmful if there is "any physical impairment of the condition of another's body, or physical pain or illness."⁹⁴ "[C]ontact is offensive if it offends a reasonable sense of personal dignity."⁹⁵

Unlike battery, the tort of assault requires awareness.⁹⁶ The requisite apprehension occurs when the victim "believe[s] that the act may result in imminent contact unless prevented from so resulting by the [victim's] self-defensive action or by his flight or by the intervention of some outside force."⁹⁷ The victim must apprehend imminent contact, but need not be placed in fear.⁹⁸

That one who is aware that she is about to suffer a battery will have suffered an assault demonstrates the complementary nature of the two torts. Damages caused by a battery consist of physical injury and emotional pain and suffering. Damages caused by an assault consist of "mental disturbance, including fright, humiliation and the like, as well as any physical illness which may result from them."⁹⁹ Punitive damages are available for both torts under appropriate

87. RESTATEMENT (SECOND) OF TORTS §§ 13 cmt. a, 18 cmt. a (1977); see W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §§ 9-10, at 39-46 (5th ed. 1984 & Supp. 1988) [hereinafter PROSSER & KEETON].

88. RESTATEMENT (SECOND) OF TORTS § 13(a) (1977).

89. *Id.*

90. *Id.* § 18(1)(b).

91. *Id.* § 21(1)(a)-(b).

92. *Id.* § 18 cmt. c.

93. *Id.* cmt. d.

94. *Id.* § 15.

95. *Id.* § 19.

96. *Id.* § 22.

97. *Id.* § 24.

98. *Id.* cmt. b.

99. PROSSER & KEETON, *supra* note 87, § 10, at 43 (footnote omitted).

circumstances.¹⁰⁰

Domestic abuse often involves physical harm that will support a battery action and awareness of imminent physical harm that will support an assault action. In addition, it typically involves purposeful infliction of severe emotional harm and presents a prototype setting for use of the tort action of intentional infliction of emotional distress. This tort received recognition as an actionable form of conduct in section 46 of the Restatement (Second) of Torts.¹⁰¹ A comprehensive revision of this section appeared in the 1965 Restatement (Second) of Torts, which requires intentional or reckless conduct, extreme and outrageous in nature, that results in severe emotional distress.¹⁰² Normally, a plaintiff must prove that the defendant had an intent to inflict severe emotional distress; however, courts occasionally rely on a recklessness standard rather than an actual intent standard. Although courts require proof of severe emotional distress, juries may consider the character of the defendant's conduct to determine whether the plaintiff suffered emotional harm.¹⁰³ Therefore, evidence of physical or

100. *Id.* § 9, at 40-41 (citations omitted); *id.* § 10, at 43.

101. A prior version of the Restatement, RESTATEMENT (SECOND) OF TORTS § 46 (1948), provided: "One who, without a privilege to do so, intentionally causes severe emotional distress to another is liable (a) for such emotional distress, and (b) for bodily harm resulting from it." *Id.* This provision reversed the earlier approach, RESTATEMENT OF TORTS § 46 (1934), which *denied* recovery for "conduct which is intended or which though not so intended is likely to cause only a mental or emotional disturbance to another." *Id.*

102. RESTATEMENT (SECOND) OF TORTS § 46(1) (1965). The section reads in its entirety as follows:

Section 46. Outrageous Conduct Causing Severe Emotional Distress

(1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

(2) Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress (a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or (b) to any other person who is present at the time, if such distress results in bodily harm.

Id. § 46.

For a discussion of the early development of the tort action and the Restatement response, see Daniel Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 COLUM. L. REV. 42 (1982); P.R. Handford, *Intentional Infliction of Mental Distress: Analysis of the Growth of a Tort*, 8 ANGLO-AM. L. REV. 1 (1979); Willard H. Pedrick, *Intentional Infliction: Should Section 46 Be Revised?*, 13 PEPP. L. REV. 1 (1985); William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874 (1939).

103. RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (1977) ("Severe distress must be proved; but in many cases the extreme and outrageous character of the defendant's con-

objective manifestations of emotional distress is not technically required, but it has significant probative value.¹⁰⁴ Despite the arguably vague phrase "extreme and outrageous conduct," courts and juries in different jurisdictions have acted with substantial uniformity in distinguishing between actionable conduct and "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities."¹⁰⁵ Comment d to section 46 supports this position.

Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"¹⁰⁶

Applying this extreme and outrageous conduct standard, courts and juries have uniformly denied recovery for emotional distress when the claim is based on wrongful discharge of an employee,¹⁰⁷ failure by an insurance company to pay claims,¹⁰⁸ false arrest by police officers,¹⁰⁹ and financial, commercial, and real estate disputes.¹¹⁰ Recovery is

duct is in itself important evidence that the distress has existed." Comment j further states, "The distress must be reasonable and justified under the circumstances, and there is no liability where the plaintiff has suffered exaggerated and unreasonable emotional distress, unless it results from a peculiar susceptibility to such distress of which the actor has knowledge." *Id.* (citing *id.* cmt. f).

104. *See id.* cmt. k.

105. *Id.* cmt. d.

106. *Id.*

107. *E.g.*, *Webb v. HCA Health Servs. of Midwest, Inc.*, 780 S.W.2d 571 (Ark. 1989); *Sterling v. Upjohn Healthcare Servs., Inc.*, 772 S.W.2d 329 (Ark. 1989); *Harris v. Arkansas Book Co.*, 700 S.W.2d 41 (Ark. 1985); *Northrup v. Farmland Indus., Inc.*, 372 N.W.2d 193 (Iowa 1985) (en banc); *Staples v. Bangor Hydro-Elec. Co.*, 561 A.2d 499 (Me. 1989); *Madani v. Kendall Ford, Inc.*, 818 P.2d 930 (Or. 1991) (en banc); *Sheets v. Knight*, 779 P.2d 1000 (Or. 1989); *Gearhart v. Employment Div. of Dep't of Human Resources*, 783 P.2d 536 (Or. Ct. App. 1989) (en banc), *review denied*, 792 P.2d 104 (Or. 1990); *Sperber v. Galigher Ash Co.*, 747 P.2d 1025 (Utah 1987); *Dicomes v. State*, 782 P.2d 1002 (Wash. 1989) (en banc). *But see Cagle v. Burns & Roe, Inc.*, 726 P.2d 434 (Wash. 1986) (en banc) (holding that wrongful termination in violation of public policy is compensable intentional tort).

108. *See D'Ambrosio v. Pennsylvania Nat'l Mut. Casualty Ins. Co.*, 431 A.2d 966 (Pa. 1981); *Demag v. American Ins. Cos.*, 508 A.2d 697 (Vt. 1986).

109. *E.g.*, *State v. Bolt*, 689 P.2d 519 (Ariz. 1984) (en banc); *Nelson v. City of Las Vegas*, 665 P.2d 1141 (Nev. 1983) (per curiam).

110. *E.g.*, *McGrath v. Fahey*, 533 N.E.2d 806 (Ill. 1988); *Steckelberg v. Randolph*, 448 N.W.2d 458 (Iowa 1989); *Tomash v. John Deere Indus. Equip. Co.*, 399 N.W.2d 387 (Iowa 1987); *Butler v. Poulin*, 500 A.2d 257 (Me. 1985); *Buckley v. Trenton Sav. Fund Soc'y*, 544 A.2d 857 (N.J. 1988); *Groseth Int'l, Inc. v. Tenneco, Inc.*, 440 N.W.2d 276 (S.D. 1989).

likely, however, in cases that involve sexual abuse of children,¹¹¹ sexual assault against adults,¹¹² sexual harassment of employees,¹¹³ threats against a person's life,¹¹⁴ serious interference with visitation or custody rights of parents,¹¹⁵ extreme forms of harassment by debt collectors,¹¹⁶ interference with funeral services,¹¹⁷ forcible and illegal eviction of tenants,¹¹⁸ transmission of genital herpes,¹¹⁹ extortion,¹²⁰ repeated obscene phone calls,¹²¹ continuous and highly insulting or threatening behavior,¹²² beatings,¹²³ and threats of future beatings.¹²⁴

Subsection 46(2) of the Restatement addresses liability for harm to one person because of conduct directed at another person.¹²⁵ This derivative liability is limited by the requirement that the plaintiff must actually suffer severe emotional distress. Most of the cases that have permitted recovery derived from harm to a third party have involved sexual abuse of a child¹²⁶ or sexual assault upon a spouse.¹²⁷ Finally, comment e to section 46 notes that "[t]he extreme and outrageous character of the conduct may arise from an abuse by the actor of a position, or relation with the other, which gives him actual or apparent

111. *Croft v. Wicker*, 737 P.2d 789 (Alaska 1987) (finding that parents of abused child stated claim for intentional infliction of emotional distress); *Reagan v. Rider*, 521 A.2d 1246 (Md. Ct. Spec. App. 1987) (affirming award for intentional infliction of emotional distress against stepfather for long-term sexual abuse of stepdaughter); *Nancy P. v. D'Amato*, 517 N.E.2d 824 (Mass. 1988) (affirming judgment for intentional infliction of emotional distress for abused child and denial of recovery on same claim by mother and brother of child).

112. *McCalla v. Ellis*, 341 N.W.2d 525 (Mich. Ct. App. 1983); *Mindt v. Shavers*, 337 N.W.2d 97 (Neb. 1983).

113. *Bowersox v. P.H. Glatfelter Co.*, 677 F. Supp. 307 (M.D. Pa. 1988); *Chamberlin v. 101 Realty, Inc.*, 626 F. Supp. 865 (D.N.H. 1985); *Shaffer v. National Can Corp.*, 565 F. Supp. 909 (E.D. Pa. 1983) (mem.); *Ford v. Revlon, Inc.*, 734 P.2d 580 (Ariz. 1987) (en banc); *O'Connell v. Chasdi*, 511 N.E.2d 349 (Mass. 1987); *Hogan v. Forsyth Country Club Co.*, 340 S.E.2d 116 (N.C. Ct. App.), *review denied*, 346 S.E.2d 140 (N.C.), and *review denied*, 346 S.E.2d 141 (N.C. 1986).

114. *E.g.*, *Teamsters Local 959 v. Wells*, 749 P.2d 349 (Alaska 1988).

115. *E.g.*, *Sheltra v. Smith*, 392 A.2d 431 (Vt. 1978).

116. *E.g.*, *Turman v. Central Billing Bureau, Inc.*, 568 P.2d 1382 (Or. 1977).

117. *E.g.*, *Cates v. Taylor*, 428 So. 2d 637 (Ala. 1983); *Meyer v. Nottger*, 241 N.W.2d 911 (Iowa 1976).

118. *E.g.*, *Brewer v. Erwin*, 600 P.2d 398 (Or. 1979); *Pentecost v. Harward*, 699 P.2d 696 (Utah 1985); *Birkenhead v. Coombs*, 465 A.2d 244 (Vt. 1983).

119. *B.N. v. K.K.*, 538 A.2d 1175 (Md. 1988).

120. *E.g.*, *Chandler v. Denton*, 741 P.2d 855 (Okla. 1987).

121. *E.g.*, *Ruple v. Brooks*, 352 N.W.2d 652 (S.D. 1984).

122. *E.g.*, *Ford v. Hutson*, 276 S.E.2d 776 (S.C. 1981).

123. *See, e.g.*, *Chandler v. Denton*, 741 P.2d 855 (Okla. 1987).

124. *E.g.*, *Dickens v. Puryear*, 276 S.E.2d 325 (N.C. 1981).

125. For the text of subsection 46(2), see *supra* note 102.

126. *See supra* note 111.

127. *See supra* note 112.

authority over the other, or power to affect his interests."¹²⁸

The approach of the 1965 revision has been remarkably infectious. As of 1964 the highest courts of eight states had recognized the tort.¹²⁹ From 1965 through 1991 the highest courts of an additional thirty-seven states and the District of Columbia recognized the tort.¹³⁰ The highest courts of two states, Michigan and Montana, have not formally recognized the tort, but have used section 46 principles in ways that suggest that the tort action will receive formal approval in the near future.¹³¹ The Texas Supreme Court has neither expressly recognized nor rejected the tort. However, lower court opinions in Texas reflect a general recognition of the tort.¹³² Mississippi has not formally recog-

128. RESTATEMENT (SECOND) OF TORTS § 46 cmt. e (1977).

129. *Dunn v. Western Union Tel. Co.*, 59 S.E. 189 (Ga. Ct. App. 1907); *State Rubbish Collectors Ass'n v. Siliznoff*, 240 P.2d 282 (Cal. 1952) (en banc); *Fraser v. Morrison*, 39 Haw. 370 (1952); *Savage v. Boies*, 272 P.2d 349 (Ariz. 1954); *Browning v. Slenderella Sys.*, 341 P.2d 859 (Wash. 1959) (en banc); *Knierim v. Izzo*, 174 N.E.2d 157 (Ill. 1961); *Samms v. Eccles*, 358 P.2d 344 (Utah 1961); *Alsteen v. Gehl*, 124 N.W.2d 312 (Wis. 1963).

130. *Medlin v. Allied Inv. Co.*, 398 S.W.2d 270 (Tenn. 1966); *Weicker v. Weicker*, 237 N.E.2d 876 (N.Y. 1968) (per curiam); *Pakos v. Clark*, 453 P.2d 682 (Or. 1969); *First Nat'l Bank v. Bragdon*, 167 N.W.2d 381 (S.D. 1969); *Rugg v. McCarty*, 476 P.2d 753 (Colo. 1970) (en banc); *George v. Jordan Marsh Co.*, 268 N.E.2d 915 (Mass. 1971); *Amsden v. Grinnell Mut. Reinsurance Co.*, 203 N.W.2d 252 (Iowa 1972); *Hiers v. Cohen*, 329 A.2d 609 (Conn. Super. Ct. 1973); *Womack v. Eldridge*, 210 S.E.2d 145 (Va. 1974); *Dawson v. Associates Fin. Servs. Co.*, 529 P.2d 104 (Kan. 1974); *Paasch v. Brown*, 227 N.W.2d 402 (Neb. 1975); *Eakman v. Robb*, 237 N.W.2d 423 (N.D. 1975); *Dean v. Chapman*, 556 P.2d 257 (Okla. 1976); *Harris v. Jones*, 380 A.2d 611 (Md. 1977); *Sheltra v. Smith*, 392 A.2d 431 (Vt. 1978); *Vicnire v. Ford Motor Credit Co.*, 401 A.2d 148 (Me. 1979); *Stanback v. Stanback*, 254 S.E.2d 611 (N.C. 1979); *Hatfield v. Max Rouse & Sons Northwest*, 606 P.2d 944 (Idaho 1980); *M.B.M. Co. v. Counce*, 596 S.W.2d 681 (Ark. 1980); *Waldon v. Covington*, 415 A.2d 1070 (D.C. 1980); *Peterson v. Sorlien*, 299 N.W.2d 123 (Minn. 1980), *cert. denied*, 450 U.S. 1031 (1981); *American Road Serv. Co. v. Inmon*, 394 So. 2d 361 (Ala. 1980); *Hume v. Bayer*, 428 A.2d 966 (N.J. Super. Ct. Law Div. 1981); *Star v. Rabello*, 625 P.2d 90 (Nev. 1981); *Ford v. Hutson*, 276 S.E.2d 776 (S.C. 1981); *Domini-quez v. Stone*, 638 P.2d 423 (N.M. Ct. App. 1981); *Harless v. First Nat'l Bank*, 289 S.E.2d 692 (W. Va. 1982); *Bass v. Nooney Co.*, 646 S.W.2d 765 (Mo. 1983); *Yeager v. Local Union 20*, 453 N.E.2d 666 (Ohio 1983); *Craft v. Rice*, 671 S.W.2d 247 (Ky. 1984); *Champlin v. Washington Trust Co.*, 478 A.2d 985 (R.I. 1984); *Metropolitan Life Ins. Co. v. McC Carson*, 467 So. 2d 277 (Fla. 1985); *Richardson v. Fairbanks N. Star Borough*, 705 P.2d 454 (Alaska 1985); *Leithead v. American Colloid Co.*, 721 P.2d 1059 (Wyo. 1986); *McKnight v. Voshell*, 513 A.2d 1319 (Del. 1986) (text in Westlaw); *Kazatsky v. King David Memorial Park*, 527 A.2d 988 (Pa. 1987); *Morancy v. Morancy*, 593 A.2d 1158 (N.H. 1991); *White v. Monsanto Co.*, 585 So. 2d 1205 (La. 1991).

131. See *Fulghum v. United Parcel Serv., Inc.*, 378 N.W.2d 472 (Mich. 1985); *Roberts v. Auto-Owners Ins. Co.*, 374 N.W.2d 905 (Mich. 1985); *Day v. Montana Power Co.*, 789 P.2d 1224 (Mont. 1990).

132. See *Holloway v. Browning*, 626 S.W.2d 485 (Tex. 1981) (per curiam); *Stevenson v. Koutzarov*, 795 S.W.2d 313, 318 (Tex. Ct. App. 1990); *Bushell v. Dean*, 781 S.W.2d 652, 657-58 (Tex. Ct. App. 1989), *rev'd on other grounds*, 803 S.W.2d 711 (Tex. 1991).

nized the tort, but references to the tort in recent cases indicate that the tort is available.¹³³ Indiana is the only state that has expressly rejected the tort.¹³⁴

Therefore, it appears that the tort is available in the District of Columbia and all states except Indiana. Among the jurisdictions in which the tort is available, all but five apply section 46 principles without modification. Delaware, Rhode Island, and Wisconsin modify one of the elements of section 46.¹³⁵ Georgia and Hawaii use approaches that are based upon early state decisions that recognize the tort.¹³⁶

The four interchangeable names used to describe the tort are intentional infliction of emotional distress, intentional infliction of mental distress, tort of outrage, and tort of outrageous conduct. The name intentional infliction of emotional distress predominates, especially in recent cases. Regardless of the name used by the state courts, however, the elements of the tort remain the same.

III. INTERSPOUSAL IMMUNITY DOCTRINE

The early common law barred tort actions between married persons in both England and the United States.¹³⁷ Originally, the immunity of one spouse from a tort action by the other was based upon "the common law doctrine of the legal identity of husband and wife."¹³⁸ A husband owned his wife's causes of action.¹³⁹ Therefore, if a husband

133. See *Benjamin v. Hooper Elec. Supply Co.*, 568 So. 2d 1182 (Miss. 1990); *Cumberland v. Cumberland*, 564 So. 2d 839, 842-43 (Miss. 1990); *City of Mound Bayou v. Johnson*, 562 So. 2d 1212, 1217-18 (Miss. 1990); *Life & Casualty Ins. Co. v. Bristow*, 529 So. 2d 620, 624 (Miss. 1988) (en banc).

134. See *Elza v. Liberty Loan Corp.*, 426 N.E.2d 1302 (Ind. 1981) (Hunter, J., dissenting).

135. See *McNight v. Voshell*, 513 A.2d 1319 (Del. 1986) (text in Westlaw) (holding that "bodily harm [must] result"); *Curtis v. Department for Children & Their Families*, 522 A.2d 203, 208 (R.I. 1987) (holding that "physical ills" must accompany the "mental anguish"); *Alsteen v. Gehl*, 124 N.W.2d 312, 318 (Wis. 1963) (requiring an "extreme disabling emotional response to the defendant's conduct").

136. In *East River Savings Bank v. Steele*, 311 S.E.2d 189 (Ga. Ct. App. 1983), *cert. denied*, 311 S.E.2d 189 (Ga. 1984), the court wrote that "'defendant's actions [must be] so terrifying or insulting as naturally to humiliate, embarrass or frighten the plaintiff.'" *Id.* at 190-91 (quoting *Georgia Power Co. v. Johnson*, 274 S.E.2d 17, 18 (Ga. Ct. App. 1980)). Hawaii requires that the acts of defendants be "intentional" and "unreasonable" and that the defendants "should have recognized their conduct as likely to result in illness." *Chedester v. Stecker*, 643 P.2d 532, 535 (Haw. 1982). However, the word "unreasonable" has been interpreted as meaning the same thing as the § 46 word "outrageous." See *id.*

137. See *RESTATEMENT (SECOND) OF TORTS* § 895F cmt. a (1977).

138. *Id.* cmt. b.

139. *Id.*

committed a tort against his wife, he would actually own the cause of action against himself. Similarly, he was liable for torts committed by his wife. Therefore, if she committed a tort against him, he would be personally liable for the tort against himself. The immunity doctrine avoided these unreasonable results.¹⁴⁰

Married women gained separate legal identity and rights to own property as a result of married women's acts, enacted in all jurisdictions beginning in the middle of the nineteenth century.¹⁴¹ As a result the courts permitted actions between spouses that related to property interests. However, interspousal immunity from suit was retained for actions involving invasion of personal rights.¹⁴² Courts justified the retention of the doctrine for negligence actions and intentional torts such as battery, assault, and intentional infliction of emotional distress on the questionable ground that "personal tort actions between husband and wife would disrupt and destroy the peace and harmony of the home."¹⁴³ Courts also were concerned about the "possibility of trivial actions for petty annoyances"¹⁴⁴ and collusion between spouses that would lead to "fictitious or fraudulent claims."¹⁴⁵

Thirty-nine states and the District of Columbia have eliminated interspousal immunity.¹⁴⁶ Among the eleven states that have retained interspousal immunity, only four¹⁴⁷ bar all forms of action. Two states¹⁴⁸ have abolished interspousal immunity for negligence actions, but have retained it for intentional torts. Three states¹⁴⁹ have abolished interspousal immunity for negligence actions arising out of automobile accidents, but have retained it for other negligence actions and intentional torts. One state¹⁵⁰ has abolished interspousal immunity for intentional torts, but has retained it for negligence actions. Finally, one state¹⁵¹ has abolished interspousal immunity for the tort of battery, but has retained it for other intentional torts and for negligence actions.

Thus, the interspousal immunity doctrine bars tort actions for battery, assault, and intentional infliction of emotional distress in domes-

140. *Id.*

141. *Id.* cmt. c.

142. *See id.*

143. *Id.* cmt. d.

144. *Id.*

145. *Id.*

146. *See infra* note 154.

147. These states are Delaware, Georgia, Hawaii, and Louisiana. *See id.*

148. These states are Alaska and Massachusetts. *See id.*

149. These states are Nevada, Rhode Island, and Vermont. *See id.*

150. Utah. *See id.*

151. Florida. *See id.*

tic abuse cases in nine states.¹⁵² However, such actions generally are permissible in these states after dissolution of a marriage, based upon tortious conduct that occurred during the marriage.¹⁵³ Therefore, in these states tort actions by married victims of domestic abuse are barred during marriage, but the interspousal immunity doctrine has no effect upon civil actions for domestic abuse between unmarried or formerly married persons.¹⁵⁴

152. Alaska, Delaware, Georgia, Hawaii, Louisiana, Massachusetts, Nevada, Rhode Island, and Vermont. *See id.* In Utah only battery actions are permitted.

153. *E.g.*, *Duplechin v. Toce*, 497 So. 2d 763 (La. Ct. App. 1986), *writ denied*, 499 So. 2d 86 (La. 1987); *Nogueira v. Nogueira*, 444 N.E.2d 940 (Mass. 1983). *Contra* *Stanfield v. Stanfield*, 371 S.E.2d 265 (Ga. Ct. App. 1988); *Counts v. Counts*, 266 S.E.2d 895 (Va. 1980).

154. The following is the current status of the interspousal immunity doctrine in the United States:

District of Columbia: Abolished. D.C. CODE ANN. § 30-201 (1988) (effective in 1976); *see* *Turner v. Taylor*, 471 A.2d 1010, 1012, n.2 (D.C. 1984). *Alabama*: Abolished. *Johnson v. Johnson*, 77 So. 335 (Ala. 1917); *see* *Coleman v. Coleman*, 566 So. 2d 482 (Ala. 1990) (per curiam). *Alaska*: Abolished with respect to negligence actions. *Cramer v. Cramer*, 379 P.2d 95 (Alaska 1963). *Arizona*: Abolished. *Fernandez v. Romo*, 646 P.2d 878, 883 (Ariz. 1982) (en banc). *Arkansas*: Abolished. *Leach v. Leach*, 300 S.W.2d 15 (Ark. 1957). *California*: Abolished with respect to negligence actions, *Klein v. Klein*, 376 P.2d 70 (Cal. 1962) (en banc), and with respect to intentional torts, *Self v. Self*, 376 P.2d 65 (Cal. 1962) (en banc).

Colorado: Abolished with respect to negligence actions, *Rains v. Rains*, 46 P.2d 740, 743 (Colo. 1935), and with respect to intentional torts, *Simmons v. Simmons*, 773 P.2d 602, 603-04 (Colo. Ct. App. 1988), *cert. denied*, 773 P.2d 602 (Colo. 1989). *Connecticut*: Abolished with respect to intentional torts, *Brown v. Brown*, 89 A. 889 (Conn. 1914), and with respect to negligence actions, *Bushnell v. Bushnell*, 131 A. 432, 433 (Conn. 1925). *Delaware*: Reaffirmed. *Alfree v. Alfree*, 410 A.2d 161 (Del. 1979) (per curiam), *appeal dismissed*, 446 U.S. 931 (1980). *Florida*: Abolished with respect to battery. FLA. STAT. ANN. ch. 741.235 (Harrison Supp. 1989). Retained for other torts. *See* *Sturiano v. Brooks*, 523 So. 2d 1126, 1128 (Fla. 1988) (citing *Snowten v. United States Fidelity & Guar. Co.*, 475 So. 2d 1211 (Fla. 1985)); *Raisen v. Raisen*, 379 So. 2d 352 (Fla. 1979), *cert. denied*, 449 U.S. 886 (1980). *Georgia*: Retained generally. *See* *Robeson v. International Indem. Co.*, 282 S.E.2d 896, 898 (Ga. 1981).

Hawaii: Retained. HAW. REV. STAT. ANN. § 572-28 (Michie 1988); *see* *Campo v. Taboada*, 720 P.2d 181 (Haw. 1986) (citing former code section); *Peters v. Peters*, 634 P.2d 586 (Haw. 1981) (upholding statute's constitutionality). *Idaho*: Abolished. *Lorang v. Hays*, 209 P.2d 733, 737 (Idaho 1949) (community property case); *see* *Rogers v. Yellowstone Park Co.*, 539 P.2d 566, 569 (Idaho 1975). *Illinois*: Abolished. ILL. ANN. STAT. ch. 40, para. 1001 (Smith-Hurd Supp. 1991) (effective 1986). *Indiana*: Abolished. *Brooks v. Robinson*, 284 N.E.2d 794, 798 (Ind. 1972). *Iowa*: Abolished. *Shook v. Crabb*, 281 N.W.2d 616 (Iowa 1979) (en banc); *see* *McIntosh v. Barr*, 397 N.W.2d 516, 517 (Iowa 1986).

Kansas: Abolished. *Flagg v. Loy*, 734 P.2d 1183 (Kan. 1987). *Kentucky*: Abolished. *Brown v. Gosser*, 262 S.W.2d 480 (Ky. 1953). *Louisiana*: Retained. LA. REV. STAT. ANN. § 9:291 (West 1991). *Maine*: Abolished. *MacDonald v. MacDonald*, 412 A.2d 71 (Me. 1980). *Maryland*: Abolished with respect to negligence actions, *Boblitz v. Boblitz*, 462 A.2d 506, 515 (Md. Ct. App. 1983), and with respect to "outrageous intentional torts," *Lusby v. Lusby*, 390 A.2d 77, 88 (Md. Ct. App. 1978). The dissenting opinion in *Walther*

IV. JUDICIAL ACCEPTANCE OF TORT ACTIONS IN DOMESTIC ABUSE CASES

Civil actions for battery, assault, and intentional infliction of emo-

v. Allstate Insurance Co., 575 A.2d 339 (Md. Ct. Spec. App. 1989), *cert. denied*, 580 A.2d 219 (Md. 1990), referred to interspousal immunity as "fully abrogated." *Id.* at 344 n.2 (Boll, J., dissenting).

Massachusetts: Abolished for motor vehicle accidents. *Lewis v. Lewis*, 351 N.E.2d 526 (Mass. 1976). This abrogation was applied retroactively in *Pevoski v. Pevoski*, 358 N.E.2d 416, 418 (Mass. 1976), and was extended to other negligence actions in *Brown v. Brown*, 409 N.E.2d 717, 719 (Mass. 1980). *Michigan*: Abolished. *Hosko v. Hosko*, 187 N.W.2d 236 (Mich. 1971) (per curiam). *Minnesota*: Abolished. *Beaudette v. Frana*, 173 N.W.2d 416 (Minn. 1969). *Mississippi*: Abolished. *Burns v. Burns*, 518 So. 2d 1205, 1211 (Miss. 1988) (en banc); see *Cain v. McKinnon*, 552 So. 2d 91, 93 (Miss. 1989) (stating that the *Burns* rule is applied prospectively). *Missouri*: Abolished with respect to intentional torts, *Townsend v. Townsend*, 708 S.W.2d 646 (Mo. 1986) (en banc), and with respect to negligence actions, *S.A.V. v. K.G.V.*, 708 S.W.2d 651 (Mo. 1986) (en banc).

Montana: Abolished. *Miller v. Fallon County*, 721 P.2d 342, 345 (Mont. 1986); see *Noone v. Fink*, 721 P.2d 1275, 1276 (Mont. 1986). *Nebraska*: Abolished. *Imig v. March*, 279 N.W.2d 382 (Neb. 1979). *Nevada*: Abolished only in motor vehicle accident tort claims. *Rupert v. Stienne*, 528 P.2d 1013, 1017 (Nev. 1974). *New Hampshire*: Abolished. *Gilman v. Gilman*, 95 A. 657 (N.H. 1915). *New Jersey*: Abolished. *Merenoff v. Merenoff*, 388 A.2d 951, 962 (N.J. 1978); see *Tevis v. Tevis*, 400 A.2d 1189 (N.J. 1979).

New Mexico: Abolished with respect to negligence actions, *Maestas v. Overton*, 531 P.2d 947 (N.M. 1975), and with respect to intentional torts, *Flores v. Flores*, 506 P.2d 345, 346 (N.M. Ct. App.), *cert. denied*, 506 P.2d 336 (N.M. 1973). *New York*: Abolished. See N.Y. GEN. OBLIG. LAW § 3-313.2 (McKinney 1989).

North Carolina: Abolished. N.C. GEN. STAT. § 52-5 (1991). *North Dakota*: Abolished. *Fitzmaurice v. Fitzmaurice*, 242 N.W. 526 (N.D. 1932). *Ohio*: Abolished. *Shearer v. Shearer*, 480 N.E.2d 388, 394 (Ohio 1985).

Oklahoma: Abolished. *Courtney v. Courtney*, 87 P.2d 660 (Okla. 1938); see *White v. White*, 618 P.2d 921, 924 (Okla. 1980); *Fiedeer v. Fiedeer*, 140 P. 1022 (Okla. 1914). *Oregon*: Abolished with respect to negligence actions, *Heino v. Harper*, 759 P.2d 253 (Or. 1988), as applied retroactively, *Antonnaci v. Davis*, 816 P.2d 1202 (Or. Ct. App. 1991), and with respect to intentional torts, *Apitz v. Dames*, 287 P.2d 585 (Or. 1955). *Pennsylvania*: Abolished. *Hack v. Hack*, 433 A.2d 859 (Pa. 1981). *But see* *Dercoli v. Pennsylvania Nat'l Mut. Ins. Co.*, 554 A.2d 906, 907 (Pa. 1989) (suggesting that *Hack* is limited to negligence actions). *Rhode Island*: Abolished only with respect to motor vehicle accident tort claims. *Digby v. Digby*, 388 A.2d 1, 4 (R.I. 1978); see *Asplin v. Amica Mut. Ins. Co.*, 394 A.2d 1353, 1355 (R.I. 1978) (holding that defense of interspousal immunity not available if one of spouses has died). *South Carolina*: Abolished with respect to negligence actions, *Pardue v. Pardue*, 166 S.E. 101 (1932), and with respect to intentional torts, *Prosser v. Prosser*, 102 S.E. 787 (S.C. 1920).

South Dakota: Abolished. *Pickering v. Pickering*, 434 N.W.2d 758, 763 (S.D. 1989) (citing *Aus v. Carper*, 151 N.W.2d 611 (S.D. 1967); *Scotvold v. Scotvold*, 298 N.W. 266 (S.D. 1941)). *Tennessee*: Abolished. *Davis v. Davis*, 657 S.W.2d 753 (Tenn. 1983). *Texas*: Abolished. *Price v. Price*, 732 S.W.2d 316, 319 (Tex. 1987). *Utah*: Abolished with respect to intentional torts. *Stoker v. Stoker*, 616 P.2d 590 (Utah 1980); see also *Noble v. Noble*, 761 P.2d 1369, 1375 n.7 (Utah 1988) (reaffirming that *Stoker* did not address negligence actions). *Vermont*: Abolished only with respect to motor vehicle accident tort claims.

tional distress are effective, victim-controlled means for obtaining remedy and discouraging future abusive conduct, especially if there is no existing marital relationship. Research for this Article revealed, however, an astonishing underutilization of these civil causes of action. Among approximately 2600 reported state cases of battery, assault, or both, from 1981 through 1990,¹⁵⁵ only fifty-three involved adult parties in domestic relationships.¹⁵⁶ Similarly, during the same time frame, only four reported federal cases involved a claim or counterclaim between adult parties in a domestic relationship.¹⁵⁷ From 1958 through 1990 slightly more than 6000 intentional infliction of emotional distress cases were reported from all state and federal courts.¹⁵⁸ Evaluation of these cases revealed a total of eighteen¹⁵⁹ in which courts have applied the tort action to a domestic abuse fact pattern. The infrequent use of tort actions reflects surprising reluctance by lawyers to use civil actions for damages in domestic abuse cases, even though the judicial response to such cases has been overwhelmingly favorable.¹⁶⁰

Richard v. Richard, 300 A.2d 637, 641 (Vt. 1973).

Virginia: Abolished. See VA. CODE ANN. § 8.01-220.1 (Michie 1984) (effective July 1, 1981). Washington: Abolished. Freehe v. Freehe, 500 P.2d 771 (Wash. 1972) (en banc), overruled on other grounds by Brown v. Brown 675 P.2d 1207 (Wash. 1984). West Virginia: Abolished. Coffindaffer v. Coffindaffer, 244 S.E.2d 338, 343-44 (W. Va. 1978). Wisconsin: Abolished. See WIS. STAT. ANN. § 766.075 (West 1981) (effective in 1947). Wyoming: Abolished. Tader v. Tader, 737 P.2d 1065 (Wyo. 1987).

155. These results were obtained from the West Publishing Company's Westlaw computer-assisted research service.

156. See *infra* Appendix.

157. These four cases are listed under "Federal Courts" in the Appendix to this Article. The scarcity of domestic abuse cases in federal courts should not be surprising. In such cases federal court jurisdiction almost certainly would be based upon diversity jurisdiction under 28 U.S.C. § 1332.

158. The terms "intentional infliction of emotional distress," "intentional infliction of mental distress," "tort of outrage," and "tort of outrageous conduct" were used for the computer-assisted search that created this result.

159. See Lewis v. Lennox, 567 So. 2d 264 (Ala. 1990); Simmons v. Simmons, 773 P.2d 602 (Colo. Ct. App. 1988), cert. denied, 773 P.2d 602 (Colo. 1989); Kukla v. Kukla, 540 N.E.2d 510 (Ill. App. Ct. 1989); Whittington v. Whittington, 766 S.W.2d 73 (Ky. Ct. App. 1989); Caron v. Caron, 577 A.2d 1178 (Me. 1990); McCoy v. Cooke, 419 N.W.2d 44 (Mich. Ct. App. 1988); Hudson v. DeLonjay, 732 S.W.2d 922 (Mo. Ct. App. 1987); Hassing v. Wortman, 333 N.W.2d 765 (Neb. 1983); Murphy v. Murphy, 486 N.Y.S.2d 457 (App. Div. 1985); Baron v. Jeffer, 469 N.Y.S.2d 815 (App. Div. 1983) (mem.); Halio v. Lurie, 222 N.Y.S.2d 759 (App. Div. 1961); Floyd v. Dodson, 692 P.2d 77 (Okla. Ct. App. 1984); Twyman v. Twyman, 790 S.W.2d 819 (Tex. Ct. App. 1990); Chiles v. Chiles, 779 S.W.2d 127 (Tex. Ct. App. 1989); Noble v. Noble, 761 P.2d 1369 (Utah 1988); Criss v. Criss, 356 S.E.2d 620 (W. Va. 1987); Slawek v. Stroh, 215 N.W.2d 9 (Wis. 1974); Stuart v. Stuart, 410 N.W.2d 632 (Wis. Ct. App. 1987), affirmed, 421 N.W.2d 505 (Wis. 1988). These cases are discussed in more detail in the Appendix to this Article.

160. California case law from 1981 through 1990 demonstrates the underutilization of tort actions in domestic abuse cases. During this ten-year period California courts

A complication arises if a tort action relates to domestic abuse among married persons, especially if there is a pending matrimonial action. New York apparently limits availability of the tort of intentional infliction of emotional distress, but not other torts, in domestic abuse cases involving married persons. In the 1968 case of *Weicker v. Weicker*¹⁶¹ the New York Court of Appeals rejected an intentional infliction of emotional distress claim by a woman who sought a declaratory judgment that the Mexican divorce obtained by her husband, Senator Lowell Weicker, was invalid and sought an injunction prohibiting him and his new wife from holding themselves out in public as husband and wife. The court stated:

Assuming that New York law now permits "recovery for the intentional infliction of mental distress without proof of the breach of any duty other than the duty to refrain from inflicting it" strong policy considerations militate against judicially applying these recent developments in this area of the law to the factual context of a dispute arising out of matrimonial differences.¹⁶²

The Appellate Division of the New York Supreme Court applied the *Weicker* holding in an assault and intentional infliction of emotional distress case that involved live-in lovers.¹⁶³ The court dismissed the assault claim because the one-year statute of limitations had expired. The court also dismissed the intentional infliction of emotional distress claim because "it would be contrary to public policy to recognize the existence of this type of tort in the context of disputes, as here, arising out of the differences which occur between persons who, although not married, have been living together as husband and wife."¹⁶⁴

heard one battery and assault case involving domestic abuse between adults. See *Alderson v. Alderson*, 225 Cal. Rptr. 610 (Ct. App.), *review denied*, 225 Cal. Rptr. 610 (1986). During the same period the courts heard six sexual assault cases that related to child sexual abuse by a father, stepfather, foster father, or step-grandfather. *In re Venus B.*, 272 Cal. Rptr. 115 (Ct. App. 1990) (stepfather); *Evans v. Eckelman*, 265 Cal. Rptr. 605 (Ct. App. 1990) (foster father); *Mary D. v. John D.*, 264 Cal. Rptr. 633 (Ct. App. 1989) (father), *review granted*, 788 P.2d 1155 (Cal.), and *review dismissed*, 800 P.2d 858 (Cal. 1990); *Colleen L. v. Howard M.*, 257 Cal. Rptr. 263 (Ct. App. 1989) (stepfather); *Pease v. Pease*, 246 Cal. Rptr. 762 (Ct. App. 1988) (grandfather); *DeRose v. Carswell*, 242 Cal. Rptr. 368 (Ct. App. 1987) (step-grandfather), *review denied*, 242 Cal. Rptr. 368 (Cal. 1988). Because spousal abuse or abuse among adults in a domestic relationship occurs more frequently than sexual abuse of children by family members, the scarcity of spousal abuse cases compared with child sexual abuse cases illustrates the underutilization of torts actions in spousal abuse cases.

161. 237 N.E.2d 876 (N.Y. 1968) (per curiam).

162. *Id.* at 876-77 (citations omitted).

163. *Baron v. Jeffer*, 469 N.Y.S.2d 815 (App. Div. 1983).

164. *Id.* at 817. In *Eller v. Eller*, 524 N.Y.S.2d 93 (App. Div. 1988) (mem.), the Ap-

New Jersey permits tort actions based upon domestic abuse among married persons, but requires joinder of tort claims in pending divorce actions. In *Tevis v. Tevis*¹⁶⁵ the New Jersey Supreme Court concluded in dicta that a woman who allegedly had suffered a serious beating by her former husband should have raised any tort claim she had in her divorce proceedings. Because the tort action and its potential for monetary damages were relevant to the divorce proceeding, the claim "should, under the 'single controversy' doctrine, have been presented in conjunction with [the divorce action] as part of the overall dispute between the parties in order to lay at rest all their legal differences in one proceeding and avoid the prolongation and fractionalization of litigation."¹⁶⁶

By contrast, a more recent decision by a New Jersey lower court in *Brown v. Brown*¹⁶⁷ concluded that the entire controversy doctrine did not bar a wife's tort action against her husband for a battery that occurred during the pendency of their divorce action. The court stated that although joinder would have been required if the tort had oc-

pellate Division of the New York Supreme Court relied upon Weicker in dismissing the former wife's counterclaim for intentional infliction of emotional distress in an action by the former husband against her for absconding with the children, of whom the husband had custody. The court stated, "Strong policy considerations have been held to militate against allowing recovery for the intentional infliction of emotional distress in matters arising out of the interpersonal relationships in a matrimonial context." *Id.* at 94. By contrast, the court in *Murphy v. Murphy*, 486 N.Y.S.2d 457 (App. Div. 1985), awarded damages in the amount of \$45,000 to a woman for intentional infliction of emotional distress by a man with whom she had lived. The court referred to the defendant's "threats, use of force, assaults upon and general abusive conduct toward plaintiff," *id.* at 458-59, and his "deliberate and malicious campaign of harassment," *id.* at 459. The court allowed the claim because the acts of the defendant that caused the plaintiff's emotional distress occurred after the termination of the live-in relationship. The approach in *Murphy* is consistent with the two earliest lower court cases that recognized the tort of intentional infliction of emotional distress in New York. In *Mitran v. Williamson*, 197 N.Y.S.2d 689 (Sup. Ct. 1960), the defendant solicited illicit sex with the plaintiff and sent photos of his private parts to her. The trial court held that "[a] jury under all of the circumstances in this case could find defendant's conduct so shocking that plaintiff, as alleged, suffered severe emotional disturbance and resulting physical injuries for which defendant would be liable." *Id.* at 690. In *Halio v. Lurie*, 222 N.Y.S.2d 759 (App. Div. 1961), the plaintiff and the defendant had dated for two years, with plans of marriage. He married another woman, concealed the marriage from the plaintiff while continuing to see her, wrote a sarcastic letter to the plaintiff ridiculing her, and caused her emotional harm. The appellate division concluded that a cause of action exists in New York for "the intentional infliction of serious mental distress without physical impact." *Id.* at 762. In this case it was "for the trier of the facts to determine whether such injuries were actually suffered, and whether the conduct of the defendant was such that it may be said that it went beyond all reasonable bounds of decency." *Id.* at 764 (citations omitted).

165. 400 A.2d 1189 (N.J. 1979).

166. *Id.* at 1196 (citations omitted).

167. 506 A.2d 29 (N.J. Super. Ct. App. Div. 1986).

curred prior to commencement of the divorce action, the entire controversy doctrine did not require joinder because "this tort claim is sufficiently distinct and independent from the cause of action for divorce and equitable distribution to permit separate adjudication."¹⁶⁸

Other jurisdictions have rejected the approach of New Jersey and have approved the use of tort actions for domestic abuse independent of divorce proceedings. In *McCoy v. Cooke*¹⁶⁹ a woman sued her former husband for acts of physical assault and intentional infliction of emotional distress that occurred while they were married. The trial court in the divorce proceeding found that the defendant had repeatedly battered the plaintiff.¹⁷⁰ The Michigan Court of Appeals held that res judicata did not bar the plaintiff from pursuing her tort action separately from the divorce.¹⁷¹ However, collateral estoppel prevented the defendant from denying that the batteries occurred, although he could "raise as an affirmative defense the issue whether and to what extent the divorce judgment compensated plaintiff for any injuries she suffered as a result of the batteries."¹⁷²

Similarly, in *Stuart v. Stuart*¹⁷³ the Wisconsin Supreme Court concluded that a woman could sue her former husband three months after the parties received a divorce for assault, battery, and intentional infliction of emotional distress that allegedly occurred during the marriage. The court agreed with the lower court that "although joinder of an interspousal tort action and a divorce action is permissible, it is contrary to public policy to require such a joinder."¹⁷⁴

168. *Id.* at 35. Interestingly, the court added the following statement: "Indeed, there is apparently some uncertainty as to how a marital tort claim joined with a traditional divorce action should be tried." *Id.* (citation omitted).

169. 419 N.W.2d 44 (Mich. Ct. App. 1988).

170. *Id.* at 46.

171. *Id.*

172. *Id.*

173. 421 N.W.2d 505 (Wis. 1988).

174. *Id.* at 508. The Wisconsin Supreme Court quoted with approval the following excerpt from the court of appeals opinion:

"If an abused spouse cannot commence a tort action subsequent to a divorce, the spouse will be forced to elect between three equally unacceptable alternatives: (1) Commence a tort action during the marriage and possibly endure additional abuse; (2) join a tort claim in a divorce action and waive the right to a jury trial on the tort claim; or (3) commence an action to terminate the marriage, forego the tort claim, and surrender the right to recover damages arising from spousal abuse. To enforce such an election would require an abused spouse to surrender both the constitutional right to a jury trial and valuable property rights to preserve his or her well-being. This the law will not do.

Although joinder is permissible, the administration of justice is better served by keeping tort and divorce actions separate. . . . Divorce actions will

The Colorado Court of Appeals in *Simmons v. Simmons*¹⁷⁵ considered the assault, battery, and intentional infliction of emotional distress claims of a woman who alleged that her former husband threw coffee on her and "kicked, slapped, and hit her, and tore her ear."¹⁷⁶ The court held that public policy precludes joinder of interspousal tort claims with dissolution of marriage proceedings.¹⁷⁷ Similarly, in *Chiles v. Chiles*¹⁷⁸ the Texas Court of Appeals reversed a \$500,000 judgment for intentional infliction of emotional distress. There was a jury finding that the plaintiff's former husband subjected her to "physical and verbal abuse, harassment, threats and generally provocative conduct" that caused severe emotional distress.¹⁷⁹ The plaintiff obtained the tort claim judgment as part of a divorce action, and the Texas Court of Appeals concluded that the tort claim "should not be recognized in a divorce action."¹⁸⁰ The court reasoned that "in the unique and special setting of a lawsuit for divorce, [an action for intentional infliction of emotional distress without proof of physical injury] would tend to obfuscate the issues of custody, support and division of community property."¹⁸¹

In *Coleman v. Coleman*¹⁸² the Alabama Supreme Court found that

become unduly complicated if tort claims must be litigated in the same action. . . . [R]equiring joinder of tort claims in a divorce action could unduly lengthen the period of time before a spouse could obtain a divorce and result in such adverse consequences as delayed child custody and support determinations."

Id. (quoting *Stuart v. Stuart*, 410 N.W.2d 632, 637-38 (Wis. Ct. App. 1987), *affirmed*, 421 N.W.2d 505 (Wis. 1988)).

175. 773 P.2d 602 (Colo. Ct. App. 1988), *cert. denied*, 773 P.2d 602 (Colo. 1989).

176. *Id.* at 603.

177. *Id.* at 605.

[T]he efficient administration of dissolution cases requires their insulation from the peculiarities of matters at law. The joinder of marriage dissolution actions with claims sounding in tort or, for instance, contract would require our trial courts to address many extraneous issues, including trial by jury, and the difference between the "amicable settlement of disputes that have arisen between parties to a marriage," and the adversarial nature of other types of civil cases. Moreover, such would create tension between the acceptance of contingent fees in tort claims and our strong and longstanding public policy against contingent fees in domestic cases. We conclude that sound policy considerations preclude either permissive or compulsory joinder of interspousal tort claims, or non-related contract claims, with dissolution of marriage proceedings.

Id. at 604-05 (citations omitted).

178. 779 S.W.2d 127 (Tex. Ct. App. 1989).

179. *Id.* at 131.

180. *Id.*

181. *Id.* at 132.

182. 566 So. 2d 482 (Ala. 1990) (*per curiam*).

the settlement agreement executed by the parties in the divorce action barred the wife from bringing a subsequent tort action against the husband for transmission of a venereal disease during the marriage because the wife knew of her infection prior to her release of all claims in the settlement agreement. The court described the ways in which a spouse could preserve a tort claim.

First, if the spouse does not intend a release of all known claims, he or she could expressly reserve a tort claim from the settlement and then subsequently sue in tort. Second, the divorce defendant could counterclaim with a demand for damages based upon any tort claims or the spouse plaintiff could also include a tort claim in the divorce case. Because trial by jury is not provided for in divorce actions in Alabama, the trial court could sever the claim for damages and set the severed case for a jury trial.¹⁸³

Coleman was similar to an earlier Alabama case, *Smith v. Smith*.¹⁸⁴ The wife brought an independent action for assault and battery against her husband. She alleged that one of the beatings ruptured a disc, requiring surgical fusion. The court barred the independent tort action because "the parties entered into extensive settlement negotiations and . . . central to those negotiations was the fact that Mrs. Smith had injuries resulting from the marriage and had need to be compensated in some way for those injuries."¹⁸⁵

Courts have permitted, or required, independent tort and matrimonial actions, but have barred recovery in tort actions if recovery for tortious conduct was obtained in matrimonial actions. In *Kemp v. Kemp*¹⁸⁶ the court barred an independent tort action by a woman whose husband shattered her nose when he struck her with his fist. She previously had raised the tort claim in her divorce proceeding and received damages for her injuries. Thus, res judicata barred the action because she was attempting to litigate the same cause of action a second time.¹⁸⁷ In *Nash v. Overholser*¹⁸⁸ the plaintiff could have litigated her assault and battery claims as part of her divorce proceedings, but the court did not require her to do so. The court recognized that "[d]ivorce proceedings should be handled expeditiously and with a

183. *Id.* at 485-86 (footnote omitted).

184. 530 So. 2d 1389 (Ala. 1988).

185. *Id.* at 1391; cf. *Abbott v. Williams*, 888 F.2d 1550 (11th Cir. 1989) (concluding that Alabama law does not require joinder of marital tort and divorce proceedings if the issues involved are distinct).

186. 723 S.W.2d 138 (Tenn. Ct. App. 1986), *appeal denied*, 723 S.W.2d 138 (Tenn. 1987).

187. *Id.* at 140.

188. 757 P.2d 1180 (Idaho 1988), *rejected on other grounds by State v. Guzman*, No. 17716, 1990 WL 178602 (Idaho Nov. 19, 1990) (unpublished opinion).

view toward minimizing emotional trauma; such proceedings certainly should not serve as a catalyst for additional spousal abuse."¹⁸⁹ The court noted that the wife did not plead the tort allegations in her divorce complaint, and the divorce court did not address them.¹⁹⁰

The Supreme Judicial Court of Massachusetts, in *Heacock v. Heacock*,¹⁹¹ concluded that a divorce decree did not bar a subsequent tort action for a battery that occurred during the marriage, even though the plaintiff presented evidence concerning the battery as part of the divorce proceedings.¹⁹² In *Heacock* the defendant allegedly went to the residence of the plaintiff, broke a glass panel in the door when she refused to open the door, grabbed her by the arm, and "violently pulled her, causing her repeatedly to strike her head against the door frame."¹⁹³ The plaintiff sought money damages for physical injuries, including spells of dizziness, blackouts, and traumatic epilepsy.¹⁹⁴ The court expressed its reasoning as follows:

A tort action is not based on the same underlying claim as an action for divorce. The purpose of a tort action is to redress a legal wrong in damages; that of a divorce action is to sever the marital relationship between the parties, and, where appropriate, to fix the parties' respective rights and obligations with regard to alimony and support, and to divide the marital estate. Although a judge in awarding alimony and dividing marital property must consider, among other things, the conduct of the parties during the marriage, the purposes for which these awards are made do not include compensating a party in damages for injuries suffered. . . . The plaintiff could not have recovered damages for the tort in the divorce action, as the Probate Court does not have jurisdiction to hear tort actions and award damages.¹⁹⁵

The Indiana Court of Appeals recognized the independence of tort and matrimonial actions in *McNevin v. McNevin*.¹⁹⁶ The plaintiff sued her husband in a battery action because he allegedly struck and injured her during their separation. The court permitted the plaintiff's subsequent tort action because even though the plaintiff entered into a settlement agreement that divided marital assets without mentioning her plan to bring a postdivorce tort action, "an inchoate, unliquidated tort claim could not be considered by the trial court in the dissolution

189. *Id.* at 1181.

190. *Id.* at 1182.

191. 520 N.E.2d 151 (Mass. 1988).

192. *Id.* at 153.

193. *Id.* at 152.

194. *Id.*

195. *Id.* at 153 (citations omitted).

196. 447 N.E.2d 611 (Ind. Ct. App. 1983).

proceedings (division of property).¹⁹⁷ The tort claim had “no present ascertainable value,”¹⁹⁸ and the trial court could not have considered it in approving the settlement had it known of the claim. Therefore, the plaintiff’s “failure to disclose the claim [did] not preclude an independent action.”¹⁹⁹

Similarly, in *Aubert v. Aubert*²⁰⁰ the Supreme Court of New Hampshire permitted a man to bring an intentional tort action against his former wife who shot him in the face with a .38 calibre revolver. He suffered permanent injury and disfigurement, and the court upheld an award for \$343,000 in compensatory damages. The court held that the prior divorce decree did not bar the tort action because “a civil action in tort is fundamentally different from a divorce proceeding, and . . . the respective issues involved are entirely distinct.”²⁰¹ Additionally, “the divorce court [was] without jurisdiction to award damages for personal injuries.”²⁰²

In *Walther v. Walther*²⁰³ the Supreme Court of Utah held that a court may not try a tort claim as part of a divorce action.²⁰⁴ The court quoted from an earlier Utah case in which the court expressed concern that “‘divorce actions will become unduly complicated in their trial and disposition if torts can be or must be litigated in the same action.’”²⁰⁵ Three years later the court in *Noble v. Noble*²⁰⁶ reaffirmed that a divorce decree does not bar an interspousal tort claim, even if the divorce court considered the facts relating to the tort action.²⁰⁷

197. *Id.* at 618.

198. *Id.*

199. *Id.*

200. 529 A.2d 909 (N.H. 1987).

201. *Id.* at 911.

202. *Id.* at 912. The court also held that the criminal conviction of the wife for attempted murder collaterally estopped her from litigating the issues of causation and liability in the subsequent tort action. *Id.* at 912-13; see *supra* note 2 and accompanying text.

203. 709 P.2d 387 (Utah 1985).

204. *Id.* at 388.

205. *Id.* (quoting *Lord v. Shaw*, 665 P.2d 1288, 1291 (Utah 1983)). In *Shaw* the plaintiff alleged that the defendant at different times during their marriage “choked her into semi-consciousness, then pushed her out the door and off the porch[,]” “struck her and pushed her into a wall[,]” “struck and beat her[,]” . . . struck their minor child who attempted to intervene,” and “beat her, tore her clothes from her body, and forced her to submit to sexual intercourse against her will.” *Id.* at 1289. The court wrote: “A divorce action is highly equitable in nature, whereas the trial of a tort claim is at law and may well involve, as in this case, a request for trial by jury. The administration of justice will be better served by keeping the two proceedings separate.” *Id.* at 1291. The court in *Shaw* dismissed the separate tort action because the statute of limitations had run.

206. 761 P.2d 1369 (Utah 1988).

207. *Id.* at 1374.

Glen Noble, age sixty-one, shot his wife Elaine in the head at close range with a .22 calibre rifle while she lay in bed. Ms. Noble was thirty-seven at the time and became totally and permanently disabled as a result.²⁰⁸ The divorce court considered Ms. Noble's needs, disabilities, and expenses that resulted from her injuries in resolving alimony and property division issues.²⁰⁹ However, the state supreme court permitted Ms. Noble to proceed with her subsequent tort action, subject to a bar against "duplicate compensation."²¹⁰ The court noted that, as a general rule, interspousal tort claims likely to affect a divorce action should be resolved prior to divorce proceedings.²¹¹

This survey of cases demonstrates that state courts generally are receptive to battery, assault, and intentional infliction of emotional distress claims based upon domestic abuse. If the domestic abuse occurs between married persons, joinder of tort actions in pending matrimonial actions generally is not required and may be prohibited.

V. CONCLUSION

Public policy favors a vigorous response by the legal system to the widespread problem of domestic abuse. Interspousal tort immunity does not bar the great majority of potential actions. Moreover, most jurisdictions prefer independent litigation of tort and divorce actions. Tort actions for battery and assault, based upon physical injury and threats of imminent physical injury, are as appropriate in domestic abuse cases as they would be in a nondomestic setting. The tort of intentional infliction of emotional distress permits recovery for nonimminent threats and verbal abuse intended to cause severe emotional distress.

Criminal-law and civil-law approaches have had success, but more is needed. Successful actions for battery, assault, and intentional infliction of emotional distress can serve as vehicles for remedy for victims and as a reflection of societal disapproval of this particularly repugnant form of tortious conduct.

Lawyers can make an important contribution to the national effort to combat domestic abuse by bringing civil actions that seek money damages for victims of domestic abuse. Divorce lawyers play a particularly useful role in determining the appropriateness of tort actions on behalf of marital dissolution clients who also are victims of domestic abuse. These attorneys must properly coordinate tort actions and dis-

208. *Id.* at 1372.

209. *Id.* at 1370.

210. *Id.* at 1373.

211. *Id.* at 1371 & n.4.

solution proceedings and must pay particular attention to applicable tort statutes of limitations.²¹²

212. The tort actions will be subject to the normal statutes of limitations for battery, assault, and intentional infliction of emotional distress actions.

APPENDIX

This Appendix discusses the domestic abuse cases that involve assault and battery claims reported from 1981 through 1990, four miscellaneous assault and battery cases prior to 1981, and domestic abuse cases that involve intentional infliction of emotional distress claims reported from 1958 through 1990.

District of Columbia: *Granville v. Hunt*, 566 A.2d 65 (D.C. 1989) (dismissing an assault action by a woman against her former boyfriend after a seven-year delay because of her failure to prosecute).

Alabama: *Lewis v. Lennox*, 567 So. 2d 264 (Ala. 1990) (awarding a woman compensatory and punitive damages in action against her former husband for assault, battery, and intentional infliction of emotional distress); *Smith v. Smith*, 530 So. 2d 1389 (Ala. 1988) (awarding damages for injuries in the divorce settlement agreement to a woman who raised battery claims against her former husband during divorce proceedings); *Jackson v. Hall*, 460 So. 2d 1290 (Ala. 1984) (barring a woman's independent battery action against her former husband because the tort claim was covered by her divorce settlement); *Harrington v. Harrington*, 450 So. 2d 99 (Ala. 1984) (permitting a woman who was paralyzed from the waist down because of a shooting by her husband to proceed in a battery action that was independent of her divorce action); *Underwood v. Hall*, 572 So. 2d 490 (Ala. Civ. App. 1990) (upholding an award of \$10,000 compensatory and punitive damages for a woman's injuries to face and body, including a broken wrist, caused by abuse from the man with whom she had lived); *Taylor v. Taylor*, 560 So. 2d 768 (Ala. Civ. App. 1990) (awarding a woman monetary damages on part of divorce proceedings for assault and battery claims).

Arkansas: *Takeya v. Didion*, 745 S.W.2d 614 (Ark. 1988) (ordering a new trial because punitive damages were awarded without compensatory damages in a case that involved a single woman who dated a married man who beat her, threatened to kill her, and tried to suffocate her when she attempted to end the affair); *Bruns v. Bruns*, 719 S.W.2d 691 (Ark. 1986) (ordering a new trial because of erroneous jury instructions in a case that involved a battery claim by a woman who was struck from behind and pushed down her front steps by her former husband).

California: *Alderson v. Alderson*, 225 Cal. Rptr. 610 (Ct. App.) (awarding a woman in a complicated child support and property division dispute between an unmarried couple who lived together for twelve years \$15,000 in compensatory and \$4,000 in punitive damages for her assault and battery claim based upon an incident in which the defendant broke her arm), *review denied*, 225 Cal. Rptr. 610 (1986).

Colorado: *Simmons v. Simmons*, 773 P.2d 602 (Colo. Ct. App. 1988) (awarding a woman \$15,000 in compensatory and \$100,000 in punitive damages for assault, battery, and intentional infliction of emotional distress claims against her former husband who kicked, slapped, and hit her, and tore her ear), *cert. denied*, 773 P.2d 602 (Colo. 1989).

Connecticut: *Braun v. Edelstein*, 554 A.2d 1102 (Conn. App. Ct.) (awarding a woman \$25,000 for physical and emotional injuries when the man with whom she shared a nonmarital domestic relationship became angry and assaulted her with his fists), *cert. denied*, 559 A.2d 1138 (Conn. 1989).

Delaware: *Hudson v. Hudson*, 532 A.2d 620 (Del. Super. Ct.) (holding that the interspousal immunity doctrine does not bar a battery action by a woman whose husband drove his car into a railroad sign to injure or kill her), *appeal refused*, 527 A.2d 281 (Del. 1987), and *appeal refused*, 540 A.2d 113 (Del. 1988).

Georgia: *Catlett v. Catlett*, 388 S.E.2d 14 (Ga. Ct. App.) (awarding a woman \$10,000 in compensatory and \$20,000 in punitive damages in an assault, battery, and false imprisonment action against her former husband who struck her, prevented her from leaving his apartment, confined her in his car, and dragged her down a stairway by her feet), *cert. denied*, 388 S.E.2d 14 (Ga. 1989).

Idaho: *Nash v. Overholser*, 757 P.2d 1180 (Idaho 1988) (holding that a divorce judgment does not bar an assault and battery action by a woman who alleged that her former husband physically attacked her on five occasions, including one in which the husband threw her against the corner of a shower, causing permanent injury to her arm).

Illinois: *Kukla v. Kukla*, 540 N.E.2d 510 (Ill. App. Ct. 1989) (requiring a woman to raise her husband's violation of a restraining order as a part of her divorce proceedings, and not as an independent tort action for intentional infliction of emotional distress, because conduct underlying the tort action had been regulated by a previous order of the domestic relations court); *Palmer v. Palmer*, 523 N.E.2d 1316 (Ill. App. Ct. 1988) (awarding a woman \$150,000 compensatory and \$5,000 punitive damages in her battery action after her husband drove his car into a bridge abutment to injure her and then beat her, which caused severe injuries including a broken neck).

Indiana: *McNevin v. McNevin*, 447 N.E.2d 611 (Ind. Ct. App. 1983) (holding that a woman was not required to join her tort claim based upon having been struck and injured by her husband in her divorce action).

Kansas: *Ebert v. Ebert*, 656 P.2d 766 (Kan. 1983) (holding that the interspousal tort immunity does not bar a woman's tort action against her husband based upon multiple incidents of alleged physical abuse, which caused a broken toe, broken ribs, facial lacerations, and other injuries).

Kentucky: *Whittington v. Whittington*, 766 S.W.2d 73 (Ky. Ct. App. 1989) (holding that allegations that a husband committed adultery and endorsed checks with his wife's name on them did not allege conduct that would constitute intentional infliction of emotional distress).

Louisiana: *Laughlin v. Breaux*, 515 So. 2d 480 (La. Ct. App. 1987) (awarding a woman \$57,297 in damages following proof that she suffered from battered woman's syndrome caused by a pattern of domestic abuse by her former boyfriend that included verbal harassment, beatings, and rapes); *Duplechin v. Toce*, 497 So. 2d 763 (La. Ct. App. 1986) (awarding a woman \$52,000 in special and general damages based upon an incident in which her husband threatened and tortured her), *writ denied*, 499 So. 2d 86 (La. 1987). **Maine:** *Caron v. Caron*, 577 A.2d 1178 (Me. 1990) (awarding a woman \$119,000 in compensatory and \$75,000 in punitive damages and awarding her young son, the stepson of the defendant, \$20,000 in compensatory and \$35,000 in punitive damages in an assault, battery, and intentional infliction of emotional distress action against the husband/stepfather).

Maryland: *Lusby v. Lusby*, 390 A.2d 77 (Md. 1978) (permitting a woman to bring an intentional tort action against her husband who allegedly forced her car off the road, battered and raped her, and assisted two other men in their attempt to rape her).

Massachusetts: *Heacock v. Heacock*, 520 N.E.2d 151 (Mass. 1988) (holding that a woman was not required to join her tort claims in her divorce action based upon her allegation that her former husband broke a glass panel in a door, grabbed her by the arm, and violently pulled her, causing her repeatedly to strike her head against the door frame); *Terrio v. McDonough*, 450 N.E.2d 190 (Mass. App. Ct.) (awarding a woman \$15,000 in damages following proof that she was raped and pushed down a flight of stairs by her former boyfriend), *review denied*, 450 N.E.2d 190 (Mass.), and *review denied*, 453 N.E. 1231 (Mass. 1983).

Michigan: *McCoy v. Cooke*, 419 N.W.2d 44 (Mich. Ct. App. 1988) (allowing recovery to a woman for battery and intentional infliction of emotional distress subject to reduction based upon a recovery that she already had received in her divorce action for her husband's assaultive conduct); *Goldman v. Wexler*, 333 N.W.2d 121 (Mich. Ct. App. 1983) (holding that a woman's tort claim against her former husband was not barred by her divorce decree but that the husband could raise the issue of double recovery as an affirmative defense).

Minnesota: *Plath v. Plath*, 428 N.W.2d 392 (Minn. 1988) (holding that a two-year statute of limitations barred a battery action by a wife based upon an allegation that her hus-

band pushed her back, causing her to fall and break her hip); *Montgomery v. Day*, No. C1-87-1911, 1988 WL 24844 (Minn. Ct. App. Mar. 22, 1988) (unpublished opinion) (allowing a woman to recover damages from a former boyfriend who fractured her arm), *review denied*, 1988 WL 24844 (Minn. Apr. 28, 1988).

Mississippi: *Cain v. McKinnon*, 552 So. 2d 91 (Miss. 1989) (holding that the interspousal immunity doctrine does not bar an intentional tort action by a woman against her former husband based upon allegations that he savagely and brutally assaulted and beat her); *Burns v. Burns*, 518 So. 2d 1205 (Miss. 1988) (abolishing the interspousal immunity judicially and permitting a woman to proceed with a tort action based upon her allegation that her husband assaulted and battered her).

Missouri: *Townsend v. Townsend*, 708 S.W.2d 646 (Mo. 1986) (en banc) (holding that the interspousal immunity does not bar a battery action by a woman against her husband who shot her in the back); *Hudson v. DeLonjay*, 732 S.W.2d 922 (Mo. Ct. App. 1987) (allowing a female cohabitant to raise assault and intentional infliction of emotional distress counterclaims in property dispute).

Nebraska: *Hassing v. Wortman*, 333 N.W.2d 765 (Neb. 1983) (disallowing a woman's action against her former husband for intentional infliction of emotional distress because his conduct of revealing her premarital pregnancy to relatives already aware of it, revealing information to her employer that did not jeopardize her job, and engaging in other inappropriate conduct did not cause emotional distress so severe that no reasonable person could have been expected to endure it).

New Hampshire: *Brown v. Brown*, 577 A.2d 1227 (N.H. 1990) (excluding evidence of an annulled criminal conviction for assault in a civil battery action by a wife).

New Jersey: *Tevis v. Tevis*, 400 A.2d 1189 (N.J. 1979) (holding that the "entire controversy" rule required a woman to bring her tort action, based upon a beating by her husband, as a part of her divorce action); *Brown v. Brown*, 506 A.2d 29 (N.J. Super. Ct. App. Div. 1986) (holding that a woman was not required by the "entire controversy" rule to join her tort action with her divorce action because the divorce action already was pending when the husband allegedly battered and assaulted her).

New York: *Murphy v. Murphy*, 486 N.Y.S.2d 457 (App. Div. 1985) (reducing a woman's award from \$90,000 to \$45,000 for intentional infliction of emotional distress by a man with whom she lived for four years who killed her pet goose and subjected her to threats, assaults, and general abusive conduct); *Baron v. Jeffer*, 469 N.Y.S.2d 815 (App. Div. 1983) (dismissing an assault claim in a woman's action against the man with whom she had lived because of statute of limitations); *Gross v. Gross*, 462 N.Y.S.2d 1015 (App. Div. 1983) (awarding a woman \$25,000 in damages, reduced to \$15,000 on appeal, for an assault upon her by her former husband); *Halio v. Lurie*, 222 N.Y.S.2d 759 (App. Div. 1961) (recognizing the tort of intentional infliction of emotional distress in a case that involved a man who humiliated his former girlfriend by dating her after marrying another woman and by writing a sarcastic letter to her).

North Carolina: *Gay v. Gay*, 302 S.E.2d 495 (N.C. Ct. App. 1983) (awarding a woman \$13,620 in compensatory and \$10,000 in punitive damages following proof that her husband committed numerous assaults and batteries upon her that caused a fracture of the left leg and ankle and other injuries).

Ohio: *Casalinova v. Solaro*, No. 14052, 1989 WL 111942 (Ohio Ct. App. Sept. 27, 1989) (unpublished opinion) (affirming a default judgment and \$100,000 damage award for a woman who suffered physical and mental abuse, with attendant injuries, on four separate occasions in nonmarital relationship), *dismissed*, 549 N.E.2d 1190 (Ohio), *cert. denied*, 110 S. Ct. 3215 (1990); *Grooms v. Grooms*, No. 84AP-773, 1985 WL 9879 (Ohio Ct. App. Feb. 26, 1985) (unpublished opinion) (barring a wife by the applicable statute of limitations in her assault and battery action against her husband based upon his striking her in the face, breaking her nose, and injuring her mouth and teeth); *Gabriel v. DePrisco*, No. L-84-063, 1984 WL 14343 (Ohio Ct. App. July 27, 1984) (unpublished opinion) (barring a woman's assault and battery action against her former husband by applicable stat-

ute of limitations); *Woyczynski v. Wolf*, 464 N.E.2d 612 (Ohio Ct. App. 1983) (husband sued his wife and his wife's attorney for malicious prosecution relating to domestic violence charges and she filed a counterclaim for assault which she subsequently agreed to dismiss), *overruled on other grounds by* *Trussell v. General Motors Corp.*, 559 N.E.2d 732 (Ohio 1990); *Gravill v. Gravill*, No. 45542, 1983 WL 4631 (Ohio Ct. App. Aug. 25, 1983) (unpublished opinion) (civil action by a woman alleging that she suffered an assault and battery by her husband); *Lanter v. Lanter*, No. C-820860, 1983 WL 5124 (Ohio Ct. App. July 13, 1983) (per curiam) (unpublished opinion) (holding that a woman's action for assault by her husband barred by the interspousal immunity); *Owens v. Owens*, No. C-810878, 1982 WL 8622 (Ohio Ct. App. July 14, 1982) (per curiam) (unpublished opinion) (holding that the applicable statute of limitations barred a woman's assault and battery action against her husband who allegedly drove his car away when she was partially out of the car, dragging her several feet and causing a rear tire to pass over her right arm); *Green v. Green*, 446 N.E.2d 837 (Ohio Ct. App. 1982) (holding that a woman's assault and battery action against her husband was barred by the applicable one-year statute of limitations); *Lee v. Lee*, No. 339, 1981 WL 5121 (Ohio Ct. App. May 20, 1981) (unpublished opinion) (holding that an assault and battery action by woman against former husband that was filed after the marriage ended was not barred by interspousal immunity).

Oklahoma: *Floyd v. Dotson*, 692 P.2d 77 (Okla. Ct. App. 1984) (holding that the trial court erred when the jury awarded \$10,000 in damages for intentional infliction of emotional distress for conduct of the defendant that involved a threat to use nude photos of plaintiff and a cassette recording of their love-making because jury instruction required the conduct to be unreasonable rather than extreme and outrageous).

Oregon: *Apitz v. Damages*, 287 P.2d 585 (Ore. 1955) (allowing the executor of a woman's estate to sue the estate of the woman's husband who had murdered her and committed suicide).

Tennessee: *Whatley v. Whatley*, No. 15, 1988 WL 42971 (Tenn. Ct. App. May 4, 1988) (allowing a woman to receive a jury award of \$22,473 compensatory and \$45,000 punitive damages, reduced by the trial judge to \$14,700 compensatory and \$20,000 punitive damages, in an action against her former husband that was based upon an incident in which he beat her); *Kemp v. Kemp*, 723 S.W.2d 138 (Tenn. Ct. App. 1986) (barring a woman from proceeding with her battery action because the tort cause of action had been considered during the divorce proceedings and the woman already had been awarded damages for her injuries).

Texas: *Twyman v. Twyman*, 790 S.W.2d 819 (Tex. Ct. App. 1990) (awarding \$15,000 for a "negligent" infliction of emotional distress action brought against a husband who pressured his wife to engage in bondage and other sexual conduct offensive to her); *Chiles v. Chiles*, 779 S.W.2d 127 (Tex. Ct. App. 1989) (holding that the trial court had erred in awarding the plaintiff \$500,000 for intentional infliction of emotional distress as a separate cause of action in her divorce action, despite a jury finding that there was physical and verbal abuse, harassment, threats and generally provocative conduct); *Armstrong v. Armstrong*, 750 S.W.2d 45 (Tex. Ct. App. 1988) (holding that a woman is not permitted to bring an independent tort action because she sought, as part of her prior divorce proceedings, a disproportionate share of the marital property because of her husband's assault upon her); *Misleh v. Misleh*, No. 01-86-0366-CV, 1987 WL 13524 (Tex. Ct. App. July 9, 1987) (unpublished opinion) (upholding a jury award of \$7,000 in actual and \$45,000 in punitive damages for assault and false imprisonment claims by a woman who was beaten by her husband); *Ulrich v. Ulrich*, 652 S.W.2d 503 (Tex. Ct. App. 1983) (awarding a woman \$15,000 in damages as part of divorce proceedings for physical abuse by her husband that included a twisting of her ankle until it broke and a twisting of her wrist until it broke).

Utah: *Noble v. Noble*, 761 P.2d 1369 (Utah 1988) (permitting a woman to proceed with an independent tort action based on having been shot in the head by her husband while

she lay in bed with consequent total and permanent disability even though the shooting incident was considered in her divorce proceeding, but with the provision that double recovery was not to be received); *Walther v. Walther*, 709 P.2d 387 (Utah 1985) (requiring a woman to litigate a battery claim that was based upon physical abuse by her husband in a tort action separate from her divorce action); *Lord v. Shaw*, 665 P.2d 1288 (Utah 1983) (holding that actionable torts between married persons should not be litigated in a divorce proceeding and dismissing a woman's assault and battery action because of the applicable statute of limitations).

Vermont: *Ward v. Ward*, 583 A.2d 577 (Vt. 1990) (holding that a woman was barred from joining her assault and battery claims against her husband in her divorce action). *West Virginia*: *Criss v. Criss*, 356 S.E.2d 620 (W. Va. 1987) (holding that a claim of intentional infliction of emotional distress was duplicative of assault and battery claims based upon an incident in which estranged husband of plaintiff allegedly threatened her with a hunting knife, forced her to undress, and sexually assaulted her); *Coffindaffer v. Coffindaffer*, 244 S.E.2d 338 (W. Va. 1978) (holding that interspousal immunity does not bar an action by a woman against her husband in which she alleged that he negligently struck her with an automobile and then intentionally assaulted her causing her further injuries).

Wisconsin: *Stuart v. Stuart*, 421 N.W.2d 505 (Wis. 1988) (permitting a woman to proceed with her assault, battery, and intentional infliction of emotional distress action against her former husband despite a prior divorce decree because it is contrary to public policy to require joinder even though joinder of the divorce action and interspousal tort action would be permissible); *Slawek v. Stroh*, 215 N.W.2d 9 (Wis. 1974) (father of an illegitimate child sought judicial determination of paternity and the mother counterclaimed with claims of assault, battery, intentional infliction of emotional distress, and seduction).

Federal Courts: *Abbott v. Williams*, 888 F.2d 1550 (11th Cir. 1989) (applying Alabama law in a battery and intentional infliction of emotional distress action by a woman against her former husband and concluding that prior divorce decree did not bar subsequent tort action unless the settlement agreement settled all claims, including the tort claims); *Moran v. Beyer*, 734 F.2d 1245 (7th Cir. 1984) (holding that the Illinois interspousal tort immunity statute was unconstitutional in an action by a woman whose husband beat her on numerous occasions and claimed that he was justified on grounds of provocation and self-defense); *Reitmeier v. Kalinoski*, 631 F. Supp. 565 (D.N.J. 1986) (during the course of a real property dispute between prior cohabitants a man sought partition and the woman counterclaimed based upon fifteen alleged instances of assault and battery); *Abady v. Macaluso*, 90 F.R.D. 690 (E.D. Pa. 1981) (man brought a complicated tort and contract action against former girlfriend and her mother; former girlfriend counterclaimed for assault, battery, intentional infliction of emotional distress, false imprisonment, and other torts).

