

## **Suing the Abuser: Tort Remedies for Domestic Violence**

Written by Brian K. Zoeller, Esq., and Patrick Schmiedt, as it appeared in the Spring 2004 issue of *Victim Advocate*.

*By Brian K Zoeller, Esq., and Patrick Schmiedt*

The most dangerous place for a woman in the United States has become her own home. Domestic violence is the single biggest cause of injury to women—more than mugging and car accidents combined.<sup>1</sup> Domestic abuse can include threats, intimidation, manipulation of children, economic control, shoving, slapping, punching, confining, raping, and murder. Approximately 1.5 million women are abused by intimate partners every year.<sup>2</sup> The situation is startling and perilous:

- In 2000, at least 1,247 women died as the result of violence by an intimate partner.
- Domestic abuse accounted for twenty percent of all nonfatal violence against women in 2001.
- Of women who reported being raped and/or physically assaulted since the age of eighteen, seventy-six percent were victimized by a current or former husband, cohabitating partner, date, or boyfriend.
- Every nine seconds, a woman is battered in the United States.
- Ninety percent of victims reported that their child was present when they were abused.
- Domestic abuse causes a \$3-5 billion loss for employers every year because employees who have been victimized are absent from work.<sup>3</sup>

The legal system's response to domestic violence has improved somewhat in recent years. More abusers are arrested and more victims obtain orders of protection. Despite this progress, there is still a lot room for improvement. One legal remedy that surprisingly few victims avail themselves of is the civil tort suit. In the past, a legal doctrine known as interspousal immunity, combined with misguided perceptions of domestic violence as being a private matter, limited a woman's ability to obtain compensation for abuse committed by a spouse. Perceptions about domestic violence are gradually changing and the interspousal immunity doctrine has been abolished in all but two states, providing today's

domestic violence victims with a range of potential tort causes of action. This article will discuss several of these causes of action and describe common defenses which must be overcome.

### **Causes of Action**

Domestic violence victims have a number of options in tort law. Claims can be made for:

- Assault
- Battery
- False imprisonment
- Intentional and/or reckless infliction of emotional distress
- Negligent infliction of emotional distress
- Intentional interference with child custody, visitation, and/or parent-child relationship
- Third-party negligence
- Tortious infliction of venereal disease
- Wrongful death

Assault and battery and infliction of emotional distress claims against perpetrators constitute the majority of domestic-violence related torts.

### **Assault and Battery**

An assault is defined as an “act by one person that creates a reasonable fear of imminent peril in the mind of another person when the actor has the apparent ability to cause bodily injury to the other person.”<sup>4</sup> A battery is any intentional, offensive, non-consensual touching ranging from a brutal beating to a shove or a tap in a rude, insolent, or angry manner.<sup>5</sup>

Most attorneys approached with a tort case involving domestic violence will be addressing issues of assault or battery. Assault and battery case law includes situations ranging from relatively minor incidents to the near killing of the victim. For example, in *DeLeon v. Hernandez*, a Texas appellate court reversed a trial court’s summary judgment against a woman who sued for assault and battery after her husband punched her in the face and body.<sup>6</sup> In *Waite v. Waite*, a Florida appellate court reversed summary judgment for a husband who had severely wounded his wife with a machete.<sup>7</sup> While the level of violence in *DeLeon* is

typical of many assault and battery suits, the unthinkable brutality in cases like *Waite* is all too common.<sup>8</sup>

### **Infliction of Emotional Distress**

Although the most common domestic violence tort is assault and battery, the tort most litigated in appellate courts is infliction of emotional distress. In an assault and battery case, the court only has to decide whether the act occurred and what damages were caused by the act. Infliction of emotional distress claims involve difficult public policy and legal issues that the courts have not decided uniformly. This cause of action often arises after a bodily injury that is so traumatic that it results in emotional and psychological damages requiring treatment. The harm may have been caused by negligent or intentional conduct. In cases of negligent infliction of emotional distress, many jurisdictions require that the victim exhibit physical manifestations of emotional distress.<sup>9</sup> Most jurisdictions do not have a similar requirement for cases alleging reckless or intentional infliction of emotional distress.

In an emotional distress claim, the victim must prove that the abuser's conduct was "extreme and outrageous." Courts interpret this standard differently. *Hakkila v. Hakkila* is a good example of the high threshold for outrageous conduct that many courts require. In this New Mexico case, the husband's conduct toward his wife included assault and battery, demeaning remarks, screaming, and other actions. At the time of trial, the wife was described as being temporarily emotionally disabled. The court, however, expressing concerns about "opening the door too wide" to these types of claims, ruled that the husband's actions were not sufficiently outrageous to warrant damages for emotional distress.<sup>10</sup>

In *Henriksen v. Cameron*, on the other hand, the court found that the husband's physical and verbal abuse, which included assaulting and raping his wife and accusing her of sleeping with his brother, was sufficiently outrageous to state a claim.<sup>11</sup> In *Twyman v. Twyman*, the court upheld a lower court award of damages for emotional distress resulting from the husband's attempt to engage his wife in "deviate sexual acts."<sup>12</sup>

## **Battered Woman's Syndrome**

Whatever causes of action they invoke, domestic violence victims pursuing tort suits may want to present evidence of Battered Woman's Syndrome (BWS). BWS has been defined as a learned helplessness resulting from a pattern of abuse and reconciliation, causing a battered woman to cope with the cycle of violence by becoming passive and submissive.<sup>13</sup> While BWS has received a great deal of attention as a defense used in criminal cases against battered women who have struck back against their abusers, expert testimony about the syndrome also may be offered in civil cases. Such evidence can be used to counter a defendant's argument that — because the victim remained in the relationship — either there was no abuse or the victim consented to the behavior.<sup>14</sup> Testimony about BWS can also be offered as damages evidence of psychological trauma. In the Idaho case of *Curtis v. Firth*, the court awarded substantial punitive damages based, in part, on a psychologist's testimony that the plaintiff suffered from BWS.<sup>15</sup>

The ground-breaking New Jersey case of *Giovine v. Giovine* was the first appellate-level decision to effectively recognize a tort cause of action, predicated on BWS, for continuous domestic abuse.<sup>16</sup> The case involved a typical domestic violence situation consisting of a series of separations and reunions between a woman and her spouse. There was a pattern of physical and mental abuse over a period of many years. The victim ultimately filed a tort action, claiming that her spouse's continual and systematic abuse caused her physical and mental injury. The defense responded with a blanket statute of limitations defense as to all counts. Unexpectedly, the court held that all the acts of abuse constituted a single cause of action on which the statute of limitations did not begin to run until the occurrence of the final act and that, therefore, none of the claims were barred.<sup>17</sup> The treatment of the statute of limitations in this case will be discussed in more detail later in this article. The *Giovine* opinion has met with varied reactions and has not been accepted by other states, but the holding represents

an important step toward judicial recognition of the fact that some degree of flexibility is necessary when applying tort law to domestic violence cases.

### **Barriers to Domestic Violence Suits**

Viable domestic violence claims are all too often lost because of several legal or non-legal barriers. Counsel considering a domestic violence tort case should be fully aware of these barriers and have sound strategies for overcoming them. If a victim is not emotionally and mentally prepared to fully litigate a case, more harm than good can result from a failed attempt.

A loss at trial can demoralize an already anguished victim of domestic violence.

### ***Legal Obstacles***

There are three primary legal defenses that arise in domestic violence cases: interspousal immunity; *res judicata*, and the statute of limitations. Although the first defense, interspousal immunity, has been repealed by every state except Georgia and Louisiana, the spirit of the doctrine still echoes in domestic violence case precedent.<sup>18</sup> The other two are valid defenses to tort actions in domestic violence cases and must be carefully addressed before proceeding with a claim. Interspousal immunity arose from an early English common law doctrine pursuant to which a husband and wife constituted a single entity and a woman had no separate rights of her own. The passage of the Married Women's Property Act (MWPA) bestowed upon women property rights and the right to sue.<sup>19</sup> Despite the passage of MWPA, courts continued to recognize interspousal immunity as an affirmative defense to tort suits between spouses, invoking the need to promote harmony in the marriage.<sup>20</sup>

Despite its almost complete abolishment, echoes of this doctrine can still be heard when courts require a higher standard of proof of "outrageousness" in an infliction of emotional distress case between spouses. As the court in *Hakkila v. Hakkila* stated, "the abolition [of spousal immunity] does not mean that the existence of the marriage must be ignored in determining the scope of liability."<sup>21</sup> This case, and others with similar holdings, demonstrates a continued refusal among courts to interfere with the marital relationship, particularly in emotional

distress and mental anguish cases, even when one spouse's conduct demands that compensation be paid.

The statute of limitations serves as the single largest bar to recovery in domestic violence cases. The defense arises most often in assault and battery cases, and it can completely defeat a suit involving multiple violent incidents. In most states, there is a two- or three-year assault and battery statute of limitations that begins to run at the time the injury occurred. In domestic violence cases, many courts view each occurrence of abuse as a separate act, and the statute of limitations begins to run for each act at the time it occurred.<sup>22</sup> Thus, if a victim has endured many years of abuse, she will only be able to bring a tort action for injuries that occurred in the most recent two or three years.<sup>23</sup>

As noted earlier, the New Jersey case of *Giovine v. Giovine* also affected the statute of limitations defense by holding that domestic violence can constitute a continuous tort that tolls the statute of limitation.<sup>24</sup> This is significant because it creates a cause of action where the statute of limitations does not begin to run until the tortious conduct stops in its entirety, allowing a woman to recover for all acts of abuse in a single cause of action. This holding is not the majority rule among the states. The majority view is demonstrated by *Laughlin v. Breaux*, in which the court held that the current remedies for domestic violence provide sufficient relief and that there is no need for recognition of a continuous tort.<sup>25</sup> *Res judicata* and the related defenses of collateral estoppel and joinder may arise in a divorce matter because a victim of domestic violence may simultaneously seek a divorce and personal injury damages. *Res judicata* and collateral estoppel prevent the relitigation of certain claims or issues which were already litigated in a previous matter. "The doctrine of *res judicata* certainly prejudices victims who are initially more interested in legally separating themselves from their abusers and who fail to bring a tort suit against their husbands at the time of the divorce, possibly out of 'fear, embarrassment, or ignorance of the law,' or other concerns."<sup>26</sup>

The issue with joinder is whether a victim must join tort causes of action with divorce proceedings. There are several states such as Texas and Tennessee that “encourage” joinder of all actions in the interest of judicial economy.<sup>27</sup> New Jersey is the only state that requires joinder of all these actions.<sup>28</sup> Other states, such as Arizona and Colorado, bar joinder of tort and divorce actions, because one is legal in nature and the other is equitable. This approach is problematic because women are often emotionally or financially drained after a divorce proceeding, some to the degree that they can no longer pursue a separate tort action. The most logical, but often not adopted, solution is to allow permissive joinder in these situations.

### ***Societal Obstacles***

When consulting with potential clients, attorneys should be aware that there are numerous external factors that may influence a domestic violence victim’s decision whether to proceed with a tort suit. Many abused women blame themselves for the abuse, concluding they are being battered because they have not been a “good” wife.<sup>29</sup> Also, society’s pressure on couples to have a successful marriage, and the embarrassment that can accompany divorce, persuades women to stay in an abusive relationship. Often, women who were subjected to abuse or witnessed abuse in their homes as children have become accustomed to it and do not recognize a problem with their spouse’s abusive behavior.<sup>30</sup>

Financial constraints keep many women from leaving abusive relationships. One Texas study found that seventy-five percent of victims who contacted shelters, hotlines, and emergency rooms had previously returned to their batterers at least five times. The women cited a lack of financial resources as the number one reason for returning.<sup>31</sup> Sometimes there is simply not a secure place for women to turn, a place where they will be protected from their abuser and homelessness. Additionally, many women feel hopeless and helpless in their situation because of police refusal to arrest abusers or a failure by police to give domestic violence calls high priority.<sup>32</sup> Finally, many domestic violence victims

fear that calling for help or attempting to leave will only bring harsher reactions from their abusers.

Domestic violence victims have different needs than other injured clients that attorneys may have represented. They have a wide variety of unique concerns which must be addressed before a tort action can be considered.

### **Continuing Challenges**

In recent years, there have been advances for victims of domestic violence—both in the legal realm and in terms of increased public awareness of the problem. The reported number of violent crimes against women committed by intimate partners declined by about 500,000 cases from 1993 to 2001.<sup>33</sup> The message that still must be disseminated as widely as possible is that domestic abuse affects all races, economic backgrounds, cultures, religions, and categories of intimate relationship. Efforts of groups such as the National Coalition Against Domestic Violence and the American Bar Association have helped combat the misconception that domestic abuse is a private problem. However, attorneys who pursue domestic tort suits should not expect “miracles” for their clients or for the problem of domestic violence in general. The nature of the crime makes progress difficult. Individual victims may have many different needs. The financial compensation that a tort suit can provide is an important step, but by no means the only step, in addressing those needs.

*Brian K Zoeller, Esq., is an attorney with the Indianapolis, Indiana, firm of Cohen & Malad, LLP. He is a Certified Family Law Specialist, and his practice is limited to family law. Mr. Zoeller has lectured on many family law issues including dissolution of marriage, contested custody cases, and effective trial strategies in family law matters. Patrick Schmiedt graduated from Butler University in Indianapolis in 2002. He is currently in his second year of obtaining a joint J.D. and MBA degree from the Indiana University School of Law— Indianapolis. This article is based in part on Linda Meier & Brian Zoeller, “Taking Abusers to Court: Civil Remedies for Domestic Violence Victims,” TRIAL, June 1995.*

1. *First Comprehensive National Health Study of American Women*, The Commonwealth Fund (1993).
3. Statistics combined from information from the following sources: Supra note 1; Callie Rennison, *Crime Data Brief, Intimate Partner Violence 1993-2001* BUREAU OF JUSTICE STATISTICS (Feb. 2003); *Prevalence, Incidence, and Consequences of Violence Against Women: Findings from the National Violence Against Women Survey*, U.S. DEPT OF JUSTICE (Nov. 1998).
4. Indiana Pattern Jury Instruction No. 3101 (1989). Many other states use similar language.
5. *McGlone v. Hauger*, 104 N.E. 116 (Ind. App. Ct. 1914).
6. 814 S.W.2d 531 (Tex. Ct. App. 1991).
7. 593 So.2d 222 (Fla. Dist. Ct. App. 1991); *aff'd*, 618 So. 2d 1360 (Fla. 1993).
8. *See also, Simmons v. Simmons*, 773 P.2d 602 (Colo. Ct. App. 1988); *White v. White*, 601 So.2d 864 (Miss. 1992); *Catlett v. Cattlett* 388 S.E.2d 14 (Ga. Ct. App. 1989); *Henry v. Henry*, 534 N.W.2d 844 (S.D. 1995).
9. *See, e.g. Twig v. Hosp. Dist.*, 731 F.Supp. 469 (M.D. Fla. 1990).
10. 812 P.2d 1320, 1323 (N.M. Ct. App. 1991). For similar holding *see, e.g., Feltmeier v. Feltmeier*, 207 Ill.2d 263 (Ill. 2003).
11. 622 A.2d 1135 (Me. 1993).
12. 855 S.W.2d 619 (Tex. 1993). *See also, Toles v. Toles*, 45 S.W.3d 252 (Tex. App. 2001); *McCulloh v. Drake*, 2001 WY. 56 (Wyo. 2001);
13. Melissa Peña, *The Role of Appellate Courts in Domestic Violence Cases and the Prospect of a New Partner Abuse Cause of Action*, 20 REV LITIG. 503, 519-520 (2001).
14. *See, e.g., Commonwealth v. Goetzendanner*, 679 N.E.2d 240 (Mass. App. Ct. 1997), *cert. denied*, 682 N.E.2d 1362 (1997) (holding that general testimony by an expert witness about battered women's syndrome is admissible so long as the expert does not provide substantive evidence of the defendant's guilt); *State v. Ciskie*, 751 P.2d 1165, 1166 (Wash. 1988) ("Neither logic nor law requires us to deny victims an opportunity to explain to a jury through a qualified expert, the

reasons for conduct that would otherwise be beyond the average juror's understanding."); *State v. Borrelli*, 629 A.2d 1105 (Conn. 1993) (holding that the Frye test was inapplicable to BWS testimony and BWS was beyond the experience of the average juror).

15. 850 P.2d 749 (Idaho 1993).

16. 663 A.2d 109 (N.J. Super. Ct. App. Div 1995). (The majority did not explicitly recognize BWS as a continuous tort cause of action, but rather that the conduct leading to BWS could be considered as a continuous tort. The dissent pointed out that the distinction the majority made was merely one of semantics.) For more about BWS *see, supra* note 13.

17. *Id.* at 118.

18. Although Georgia and Louisiana still recognize interspousal immunity; they do so with exception in the domestic violence cases.

19. Pena, *supra* note 13, at 509.

20. *Id.* at 508.

21. 812 P.2d 1320, 1326 (N.M. Ct. App. 1991).

22. Poplar, *infra* note 29, at 171.

23. Whether it is two or three years depends on each state's applicable statute of limitations.

24. Pena, *supra* note 13, at 518.

25. 515 So.2d 480, 483 (La. Ct. App. 1987). (The court held that each incident of battery could be its own claim, thus there was no need to recognize domestic violence as a continuous tort.)

26. Pena, *supra* note 13, at 516.

27. *Twyman v. Twyman*, 855 S.W.2d 619, 625 (Tex. 1993).

28. *Id.* See also, Jill Lebowitz, *Giovine v. Giovine: Pursuit of Tort Claims for Domestic Violence in New Jersey and the Creation of a New Tort Cause of Action for "Battered Women Syndrome,"* 17 WOMEN'S RTS. L. REP. 259, 267 (1996) (explaining that most states, unlike New Jersey, use permissive joinder or discourage joinder altogether).

29. David Poplar, *Tolling the Statute of Limitations for Battered Women after Giovine*, 101 DICK. L. R. 161, 169-170 (1996).

30. *Id.* at 169-170

31. Pena, *supra* note 13, at 506.

32. Poplar, *supra* note 29, at 169-170

33. *Supra* note 3.