

Elements Of Interpersonal Domestic Violence Torts: Bringing Traditional Actions

by Fredrica L. Lehrman

The first issue of *DVR* introduced concepts about tort litigation and presented some trial tips. This article, and the next, will explore most of the possible actions for filing domestic violence torts against an abuser.

Domestic violence tort actions are changing the practice of law in civil courts as new issues in criminal, civil and family law reshape domestic tort law. As in any tort case, the four elements of a domestic violence tort suit are: (1) a duty to the person harmed, (2) a breach of this duty that (3) proximately causes (4) a substantial harm or injury. If duty, breach, proximate cause and real damage can be proven, and if a source of recovery exists, even the threat of a domestic tort suit can lead to advantageous settlements, especially in divorce cases in most states. As in most civil cases, plaintiffs usually must prove their claims by a preponderance of the evidence.

To explain to a judge or jury why a person may decide to remain with a violent partner, and to explain the nature of the emotional injury caused by battering, expert testimony of a psychologist, psychiatrist, or sociologist is now essential in most civil tort cases. If the victim is trying to extend the statute of limitations, an expert may also have to testify as to why the victim was unable to bring her case earlier or why the entire course of the many abusive incidents in the relationship should be perceived as one continuing tort.

The most common domestic tort suits arise when a plaintiff seeks redress for assault and battery, intentional or reckless infliction of emotional distress, or wrongful death.

Assault and Battery

Assault and battery is the most common civil tort claim in domestic violence cases. Proving assault requires showing an overt act intended to cause apprehension of imminent or harmful or offensive contact, which in fact does cause fear and damage. To prove battery, the plaintiff must show an intentional act resulting in harmful or offensive contact and resulting damage. Increasingly in divorce cases, such claims play a significant role

in overall settlement negotiations.

Some examples of cases where injured spouses have recovered damages for assault and battery torts from their abusive partners include: **Cater v. Cater**, 846 S.W.2d 173 (Ark. 1993) (wife recovered \$20,000 compensatory and \$350,000 punitive damages for assault and battery by husband); **Sumrall v. Sumrall**, 612 So. 2d 1010 (La. Ct. App. 1993) (wife recovered \$43,000 after husband beat her); **Murray v. Murray**, 598 So. 2d 921 (Ala. Civ. App. 1992) (wife recovered \$5000 compensatory and \$50,000 punitive damages against husband who physically abused her during marriage); **Sielski v. Sielski**, 604 A.2d 206 (N.J. Super. Ct. Ch. Div. 1992) (wife recovered \$1030 compensatory damages, \$1000 for pain and suffering, and \$5000 punitive damages); **Catlett v. Catlett**, 388 S.E.2d 14 (Ga. Ct. App. 1989) (wife recovered \$20,000 punitive damages against husband for assault, battery and false imprisonment); **Simmons v. Simmons**, 773 P.2d 602 (Colo. Ct. App. 1988) (wife recovered \$15,000 compensatory and \$100,000 punitive damages against husband for assault, battery and outrageous conduct); **Aubert v. Aubert**, 529 A.2d 909 (N.H. 1987) (husband recovered \$350,000 against wife who shot him at close range; wife had been convicted of attempted murder); **Duplechin v. Toce**, 497 So. 2d 763 (La. Ct. App. 1987) (wife recovered \$52,000 for battery, including scalp lacerations, broken nose, contusions and perforated eardrum). The 1994 decision in the Texas domestic violence assault and battery case of **O'Keiff v. Christ**, No. 9228795-A (Dist. Ct. Tex., Apr. 6, 1994) (reported in Law Reporter 226 (Aug. 1994)), ended in a jury award of \$10.9 million in compensatory damages and \$150 million in punitive damages against a physician who shot and severely injured his wife. The sizable punitive damage award was allowed despite a statutory cap because the jury found that the husband acted with malice. The husband later was convicted of attempted murder and sentenced to 20 years in prison.

Wrongful Death

Although common law denied redress in cases of wrongful death, on the theory that the dead person had no standing to sue, every state has a statutory remedy for wrongful death permitting litigation by the decedent's estate. **Herget Nat'l Bank v. Berardi**, 356 N.E.2d 529 (Ill. 1976). Most statutes allow persons (as defined by the statute) to maintain an action for any wrongful act, negligence, or failure to act that causes death. These statutes apply to intentional and negligent acts. In the case of **Parman v. Price**, No. 87-CP-08-287 (S.C. Beaufort County Ct. CP Nov. 10, 1988), the parents of a wife whose husband shot and killed her won a jury award of \$10 million, which included a punitive damage award of \$7.4 million.

In theory, wrongful death is assault and battery which results in the death of the injured person, and the elements of the cause of action are similar. In Florida, for example, a court held that even interspousal immunity does "not preclude a wrongful death action ... even though decedent's personal injury action would have been barred," **Hampdon v. Duda & Sons, Inc.**, 511 So. 2d 1104, 1107 (Fla. 1987). However, statutes of limitation exist in wrongful death actions, unlike in criminal homicides.

Intentional and/or Reckless Infliction of Emotional Distress

Numerous plaintiffs injured by domestic violence are filing tort claims for emotional distress. Proving this claim requires a showing that the defendant intentionally or recklessly engaged in outrageous conduct that caused severe emotional distress to the plaintiff and physical harm (in some states) and actual damages. *The Restatement (Second) Of Torts* § 46 (1976) describes actionable conduct as "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."

Cases involving wrongful death, assault and battery, rape, or use of excessive force

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are likely to be "regarded as atrocious and utterly intolerable in a civilized community." For example, the husband in **Waite v. Waite**, 618 So. 2d 1360 (Fla. 1993), who sliced his wife's limbs with a machete, and the man in **Henrickson v. Cameron**, 622 A.2d 1135 (Me. 1993), who raped and assaulted his wife and maliciously destroyed her house were both viewed as sufficiently outrageous, as was the spouse who shot the other spouse in the head with a .22 caliber rifle, **Noble v. Noble**, 761 P.2d 1369 (Utah 1988). Similarly, the acts of the man in **Smith v. Smith**, 530 So. 2d 1389 (Ala. 1988), whose beatings caused his wife to rupture a cervical disc, and the husband who tore his wife's ear, threw hot coffee on

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her, and destroyed her furniture, in **Simmons v. Simmons**, 773 P.2d 602 (Colo. Ct. App. 1988), were both found sufficiently outrageous by the courts.

States are divided as to whether they require there be a physical injury for this tort to occur. In 1993, Texas joined 43 states that require no physical injury as a basis for a suit for intentional infliction of emotional distress. In **Massey v. Massey**, 807 S.W.2d 391 (Tex. Ct. App. 1991), *aff'd*, 867 S.W.2d 766 (Tex. 1993), the court affirmed a \$362,000 jury award to a wife who had to live "walking on egg shells" to avoid her husband's rage. This case made new law by allowing "the tort of infliction of emotional distress, without physical injury" to apply to family law cases because to do otherwise would be to deny equal protection to married persons. Another case not requiring physical injury to fulfill the elements of this cause of action was **Murphy v. Murphy**, 486 N.Y.S.2d 457 (1985). (See generally, **Twyman v. Twyman**, 855 S.W.2d 619, 621-22 & ns. 2, 3 (Tex. 1993), listing cases from 43 states that require no physical injury before liability may be established.) These states have adopted *The*

Restatement (Second) of Torts § 46 cmt. k (1965) definition of the tort of intentional infliction of emotional distress. Claims without physical abuse include interference with custodial rights, and intolerable or atrocious conduct either intended to cause or recklessly causing severe psychological harm. Intentional tort judgments cannot be discharged in bankruptcy.

Battered Person Syndrome as a Form of Emotional Distress

Some women, long battered, have defended themselves by severely injuring or killing the batterer, sometimes at a time when he was asleep or otherwise not actually assaulting his partner. In 1979, psychologist Lenore E. A. Walker published *The Battered Woman*, a book which explained that many women long battered by a spouse were themselves severely injured by a form of post-traumatic stress disorder which Dr. Walker defined as "battered woman syndrome," something which can affect the abused partner of either sex (so it is now sometimes called the "battered person syndrome" in some states). Useful discussions of how battered women can be severely affected by domestic violence can be found in **Ibn-Tamas v. United States**, 407 A.2d 626 (D.C. Ct. App. 1979). See also, Mary Ann Dutton, "Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman's Syndrome," 21 Hofstra L. Rev. 1193 (1993). The abuse can break a person's spirit and prevent him or her from leaving a violent spouse or domestic partner. Courts in the majority of the states have allowed prosecutors or criminal defense lawyers to use expert testimony about the "battered woman's syndrome" in order to establish the honesty and reasonableness of a battered defendant's belief that she was in imminent danger of serious bodily injury or death when she maimed, killed or attempted to kill her batterer in self-defense.

Curtis v. Firth, 850 P.2d 749 (Idaho 1993), was the first civil domestic violence tort case of battery and intentional or reckless infliction of emotional distress that used expert testimony on "the battered woman's syndrome," argued that defendant's numerous wrongful acts were a continuing tort, won substantial punitive damages and was affirmed by the state's highest court. In this case, psychol-

Attorney's Fee Advantages of Suing in Tort

Attorneys usually charge contingent fees to litigate tort claims before juries. These fees, based upon a percentage of the ultimate damage awards, may make it more realistic for battered women, who are far less likely to have access to much money, to bring a tort action.

In contrast, attorneys charge hourly fees for divorce proceedings heard by a judge. Thus, when an attorney is handling both a tort case and a divorce case for the same client against her husband, the fees for tort and divorce suits must be negotiated and calculated separately. Since both actions may arise from a common nucleus of fact, due care in precise billing is important. ■

ogist Lenore E. A. Walker described the cycle of violence and its impact on the battered woman. The expert effectively answered the key question for the jury, "Why didn't the woman just leave?" The jury found that the defendant inflicted severe post-traumatic stress disorder on the plaintiff, whom he sexually assaulted and anally raped in a cycle of abuse and domination lasting ten years. The jury awarded the injured woman \$225,000 for the emotional distress claim, \$50,000 for battery and \$725,000 in punitive damages.

The plaintiff's attorney in **Curtis v. Firth** had a post-trial interview with the jurors, who told him that they decided the defendant's conduct was not intentional but was indeed reckless. Thus, jury instructions should define carefully the criteria for "reckless" infliction of emotional distress. Robert C. Huntley, Jr., "Civil Use of the Battered Woman's Syndrome (A Subset of Post-Traumatic Stress Disorder) in a Suit for Intentional or Reckless Infliction of Emotional Distress," II ATLA National College Of Advocacy Domestic Violence Seminar 1909 (1994).

There may be a growing perception that "battered person syndrome" is

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grounds for a cause of action in tort. In a recent New Jersey trial case, **Cusseaux v. Pickett**, 279 N.J. Super. 335, 652 A.2d 789 (Law Div. 1994), the court ruled that a boyfriend can be sued in tort for causing "battered woman syndrome," because "the battered woman's syndrome" is now a cognizable cause of action under the laws of New Jersey." The subsequent ruling of **Giovine v. Giovine**, 1995 N.J. Super. LEXIS 281, followed **Cusseaux's** recognition of battered woman's syndrome as a tort and also agreed that it was a continuing tort as it resulted from a continuing pattern of abuse.

Negligent Infliction of Emotional Distress

Without physical injury, a majority of states allow no cause of action for negligent infliction of emotional distress. **Ledger v. Tippitt**, 210 Cal. Rptr. 814 (1995). This tort generally requires that the defendant's conduct be negligent by creating an unreasonable risk of bodily harm and emotional disturbance. W. Prosser & P. Keeton, *Handbook on the Law of Torts* § 54 (5th Ed. 1984).

In cases where one parent sees the other abusing their child or committing illegal acts likely to cause severe mental distress to a reasonable person, an attorney might consider a claim for negligent infliction of emotional distress.

In states that permit a claim of negligent infliction of severe emotional distress, an attorney might plead negligent infliction in the alternative to an intentional tort because most insurance policies do not cover intentional torts. No punitive damages are available for negligence claims, and such claims are dischargeable in bankruptcy.

False Imprisonment

The law protects an individual's right to freedom of movement without inappropriate physical restraint. Restraint that imprisons a person may be physical or mental; physical barriers or threats of force can intimidate someone into compliance with orders. Prosser & Keeton, *supra* § 11 at p. 49. The **Catlett v. Catlett**, 388 S.E.2d 14 (Ga. Ct. App. 1989), court upheld a jury award of \$10,000 compensatory and \$20,000 punitive damages against a husband who struck his wife and physically kept his wife from leaving his apartment on one occasion and his car at another time.

A few earlier cases found that force by a husband and a physician to confine a wife in a mental hospital was a form of false imprisonment and assault and battery. Two such examples are **Stowers v. Argmore Acres Hospital**, 19 Mich. App. 115, 172 N.W.2d 497 (1969), *aff'd* 386 Mich. 119, 191 N.W.2d 355 (1971), and **Lorang v. Hayes**, 69 Idaho 440, 209 P.2d 733 (1949).

The causes of action described above are tort actions which can be brought in

any situation, but which, importantly, can be used to gain redress in cases of domestic violence. In the next issue of *DVR*, I will discuss certain tort actions which offer some creative alternatives to the more traditional torts discussed in this part of the article. ■

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BATTERED WOMEN'S SYNDROME AS A CAUSE OF ACTION

by Ruth Jones

Two recent New Jersey courts have ruled that battered woman's syndrome could serve as the basis of a civil action by a battered woman against her batterer.

In **Cusseaux v. Pickett**, 652 A.2d 789 (N.J. 1994), the plaintiff, Jean Marie Cusseaux, filed a civil suit against her ex-lover, Wilson Pickett, Jr. claiming the defendant severely abused her as part of a continuous course of conduct that constituted a pattern of violent behavior throughout their ten-year live-in relationship. She also alleged that this behavior caused her to suffer from battered woman's syndrome, resulting in physical and emotional injuries requiring medical and other attention.

The defendant moved to dismiss the plaintiff's complaint for failure to state a civil cause of action. The trial court denied his motion and held that battered woman's syndrome constituted a valid cause of action. The **Cusseaux** court reasoned that New Jersey first legally recognized battered woman's syndrome in **State v. Kelly**, 478 A.2d 364 (N.J. 1984), as "a series of common characteristics that appear in women who are abused physically and psychologically over an extended period of time by the dominant male figure in their lives."

Court Relied on State Statute

In recognizing the battered woman's syndrome, the **Kelly** decision relied heavily on the state's Prevention of Domestic Violence Act, **N.J. Stat. Ann.** §§ 2C:25-1 to 2C:25-16, which the court found to be legislative recognition that the existing judicial and law enforcement systems were inadequate to address the problem of domestic violence. The **Cusseaux** court reasoned that while the **Kelly** decision and the Prevention of Domestic Violence Act focused primarily on the criminal justice system, battered women also had been ill served by the civil justice system. In the absence of adequate civil laws, "common law and public policy, demand that, where the legislature has not gone far enough the courts must fill the interstices."

Elements of the Cause of Action

To recognize the battered woman's syndrome as a cause of action, the plaintiff must allege: (1) involvement in a marital or marital-like intimate relationship, (2) physical or psychological abuse perpetrated by the dominant partner to the relationship over an extended period of time, (3) the aforesaid abuse has caused recurring physical or psychological injury over the course of the relationship, and (4) a past or present inability to take any action unilaterally to improve or alter the situation. Although the **Cusseaux** decision did not turn on whether the court considered each incident of abuse a separate cause of action, the court rejected the reasoning of the Louisiana case, **Laughlin v. Breaux**, 515 So. 2d 480 (La. App. 1987), where the court had refused to find that battered woman's syndrome constituted a

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