DOMESTIC TORTS IN NEW JERSEY

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TABLE OF CONTENTS

Double click on underlined titles and chapters for full text

AFFIRMATIVE DOMESTIC TORTS

RESULTING FROM THE MARITAL DISSOLUTION

3.1. Dissipation of Marital Assets

3.2. Invasion of Privacy - General

3.3. Invasion of Privacy - Wiretapping

3.4. Invasion of Privacy; Stalking, Visual Prying, Eavesdropping and Phone Harassment

3.5. False Arrest and Imprisonment

3.6. Malicious Prosecution and Abuse of Process

3.7. Defamation: Libel and Slander

3.8. Interference with Custody and Visitation/Child Abduction

3.9. Breach of Fiduciary Duty; Fraudulent Conveyance and Conversion

3.10. Spoilation of Evidence

3.11. Tortious Interference with a Business Relationship

3.12. Tortious Interference with a Prospective Business Relationship

THIRD PARTY ACTIONS

4.1. Introduction.

4.2. History of the Abrogation of Parental Tort Immunity/Negligence.

Negligence Actions by Children Against Parents or Relatives.

4.3. Incest Actions By Children Against Parents or Relatives

4.4. Third Party Negligence Claims - General

4.5. Negligence Claims: Medical Malpractice.

4.6. Negligence: Attorney Malpractice.

4.7. False Arrest and Imprisonment, Malicious Prosecution, and Abuse of Process

1. Statute tolling pursuant to N.J.S.A. 2A:14-21.

2. Statute tolling due to duress caused by the defendant.

3. Statute tolling pursuant to the continuous tort doctrine

5.8. Laches

5.9. Equitable Estoppel and Waiver

5.10. Lack of Personal/Subject Matter Jurisdiction

5.11. Forum Non Conveniens

5.12. Arbitration and Award

5.13. Release

5.14. Defense of Self and Others

5.15. Defense of Property

5.16. Consent

5.17. Advice of Counsel

5.18. Right of Privacy/Privilege

5.19. Comparative Negligence

5.20. Tort Liability Statute

5.21. Domestic Relations Exception to Federal Jurisdiction

DAMAGES

6.1. Introduction

A. Nominal Damages

B. Compensatory Damages

C. Punitive Damages

INTRODUCTION

Across the country, there has been an explosion of tort actions involving the family in the past few years. Some of these have been joined in matrimonial divorce actions and have been known generically in the State of New Jersey as "Tevis" claims. Others involve actions between spouses as a result of either the formation or breaking apart of the marital relationship. Still others with one family member against another; or by one member of the family unit against third parties.

With the abrogation of spousal and parental tort immunities and the growing awareness and sensitivity of the courts to domestic violence, transmission of sexual diseases and non-physical or infliction of emotional harm; the field of domestic torts in the last few years has expanded greatly. At first matrimonial courts resisted the infusion of tort actions into matrimonial cases, and now, although these matters are still met with skepticism and suspicion, the necessity of compensating injured parties is outweighing this initial resistance.

Prosser, on the "Handbook on the Law of Torts", 3-4 (5th ed. 1984) commented:

"New and nameless torts are being recognized constantly, and the progress of the common law is marked by many cases of first impression, in which the court has struck out boldly to create a new cause of action, when none has been recognized before it... When it became clear that the plaintiff's interests are entitled to legal protection against the defendant, the mere fact that the claim is novel will not of itself operate as a bar to the remedy."

This book will only include reported New Jersey cases dealing with domestic torts, but will parenthetically make reference to other causes of action which exist in other jurisdictions but are not yet recognized by case law in New Jersey.

The structure of the book will first set forth the affirmative domestic torts, third party torts, the defenses to domestic tort actions, damages, the issues of insurance coverage and the right to a jury trial. It will then cover causes of action, damages and sources of recovery.

CHAPTER TWO

RESULTING FROM THE MARITAL RELATIONSHIP

Because of the passage of the Heart Balm Act, ***N.J.S.A.***2A:23-1, (see discussion under Defenses at Section 5.2), you can no longer sue your fiance for failing to get married, but what about the opposite, fraudulently inducing someone to marry? By setting the stage here, I will attempt to show how the creative mind can find remedies where none previously existed.

Why would one sue another party for deceiving them into marriage, and what would be the purpose of bringing the action?

Picture a short term marriage in which few assets are accumulated and the dependent spouse would be entitled to little or no alimony because of the length of the marriage. Under existing law as a result of the divorce, the dependent spouse would get no assets and little or no alimony. Since they did not contribute much to the marriage, they should not receive much from it.

But what if upon entering into this marriage, this spouse had to pay dearly. Perhaps one gave up substantial alimony payments from a previous spouse in order to marry the second; perhaps one lost widow's or widower's workmen's compensation death benefits, social security benefits or loss of income caused by relocation to the residence of the new spouse.

This tort is usually relied on, and framed in fraud or misrepresentation. The tort in order to be actionable requires:

(1) A false representation made by the defendant;

(2) Knowledge or belief on the part of the defendant that the statement is false.

(3) An intent to induce the plaintiff to rely on the misrepresentation;

(4) Justifiable reliance on the part of the plaintiff; and

(5) Damage to the plaintiff.

See ***Prosser and Keaton,Torts***, Sec. 105 at 728 (5th ed.1984)

In the usual case, one party induces the other into a sham marriage knowing that they are already married yet representing themselves as single. The defendant's liability need not be an intentional misrepresentation, but could be a negligent one, either not knowing that

the former marriage was not dissolved, assuming that it was; or having the first marriage improperly dissolved as to cause liability.

Damages done to the other party are couched in either negligent or intentional distress language, as well as loss of reputation or as can be seen from the following case, monetary damages, including compensatory and punitive damages.

Morris v. MacNab, 25 *N.J.* 271, 135 *A2d.* 657 (1957) was an action by a woman against her husband for the tort of fraudulently inducing her into marrying him, already having been married and living with his first wife, for the purpose of getting her to advance funds to him.

Already having an existing marriage in place, MacNab married Morris, went on a honeymoon, and then under the pretext of seeing his grandchildren, stayed away many nights. Morris finally discovered that MacNab's wife, who he said was dead, was alive and that Morris was spending most of the time with her rather than with herself. She immediately caused his arrest and he pleaded guilty to a charge of bigamy and received a suspended sentence.

During the course of their relationship, MacNab obtained under false and fraudulent representations, approximately $6,500.

At trial, Morris sought compensatory and punitive damages, for shame, humiliation and mental anguish which had been caused by the defendant's action to fraudulently induce her to enter into a marriage which he knew to be bigamous as well as to induce her to advance to him monies. At trial, she was awarded $1,500 in compensatory and $1,000 in punitive damages for her shame and humiliation because of his inducement to enter into a marriage which he knew to be bigamous; and $6,400 for compensatory and $600 for the punitive damages for the monies that she advanced to him. The defendant appealed and raised as a defense, the "Heart Balm Act" (*N.J.S.A.*2A:23-1, *See* discussion in Chapter 5.2).

The Supreme Court decided while still upholding the "Heart Balm Act", that these torts, were not barred by the Act and that Morris' recovery was not one of the "well known evils" which the Legislature was seeking to eliminate in the passage of the "Heart Balm Act".

Another example of an actionable tort would be where one party induces another to marry as a means of either gaining entry into the United States, or securing their "green card".

***See* Practice Form #1**

Again one might ask why would somebody want to sue for fraudulent inducement to continue a marital relationship. Picture this scenario. A party supports a spouse for four years of medical school, three years of residency and two years of internship, at which

time the doctor finds someone else. Under New York law, in the case of ***O'Brien v. O'Brien***, 66 *N.Y.2d* 576, 498 *N.Y.S.2d* 743, 489 *N.E.2d.* 712 (1986) the party is entitled to part of the doctor's medical degree and his continuing ability to earn.

In New Jersey under ***Dugan v. Dugan***, 92 *N.J.* 423, 427 *A2d.* 1 (1983) a spouse is not entitled to a part of future earnings, but only to reimbursement alimony in which only that part of the monies that they contributed to the lifestyle of the individual, minus expenses, can be reimbursed.

Instead of merely suing in a divorce complaint for alimony, and for a share in what little equitable distribution assets there are at the time, we now sue for fraudulent inducement to continue the marital relationship.

In that instance, it is alleged that the only reason that the doctors/spouses kept the marriage going, was for the other spouse to support them so that they could get through school. The damages sought are on the basis of tort for this fraud.

As of this time, there is no reported case in the State of New Jersey on this cause of action.

***See* Practice Form #2.**

You are able to set aside a property settlement agreement under **Rules of Court 4:50** if you do so within the time prescribed under the Rule and its various parts. But what if time has elapsed or the agreement has merged or has been incorporated into the judgment of divorce?

Imagine the case where a spouse convinces the mate to get divorced, for the sake of protecting assets in bankruptcy or for tax reasons, i.e. that two can file cheaper than one; when the real reason is that they want a divorce to be with somebody else.

As of this time, there is no reported case in the State of New Jersey dealing with this cause of action.

***See* Practice Form #3.**

To comprise assault and battery, there are two elements. One is the attempt to touch or strike another person with unlawful force or violence; and the second that there be an actual and intentional harmful or offensive touching.

In order to recover for an assault, the plaintiff must prove that they was placed under apprehension of imminent harmful or offensive contact. (*See Restatement (Second) of Torts*, Sections 13, 22, 23, 24 and 27 and ***New Jersey Model Jury Charges*** Section 3.10., New Jersey Institute for Continuing Legal Education, 1992, 1996.)

Battery is the actual touching itself, but such a touching which is "unpermitted by the norms of social custom, even though not harmful in nature, ..." **(*See Restatement (Second) of Torts,*** Sections 18 and 19.)

There is no assault if the person who is being attacked did not know about the assault unless it is accompanied by a battery. Thus is somebody was asleep, they would not be aware of any attempt to touch them, unless as a result of it, they were injured in which case they could recover. (***See Restatement (Second) of Torts***, Sections 18 and 21.)

While the touching in a battery is usually direct touching of the plaintiff's person, the unpermitted touching of something close to his person is enough to constitute the cause of action. For instance, snatching a person's hat or a plate from their hands or even striking the plaintiff's automobile knowing that the plaintiff was inside.

At one time there was *dicta* in the case of ***Kennedy v. Camp***, 14 *N.J.* 390; 102 *A2d.* 595, (1954) that:

"A wife cannot sue her husband for beating her during coverture, even after divorce..."

Tevis v. Tevis, 79 *N.J.* 42, 400 *A2d.* 1189 (1979).

On May 14, 1973, Mrs. Tevis, after returning home in the early morning after having spent the evening out, entered her house and her husband began to beat her. She suffered substantial injuries which were corroborated by the testimony of her treating physician and by photographs of her face and body taken shortly after the event.

On May 22, 1975, the parties were divorced.

On July 7, 1975, some six weeks after the divorce, and over two years after the assault and battery, Mrs. Tevis brought her tort action against the defendant for personal injuries.

The Supreme Court reversed the Appellate Division judgment and stated that the action was "time-barred" and remanded the matter to the trial court for the entry of summary judgment in favor of the defendant husband. Because the action was brought more than two years after the incident, the court held that the Statute of Limitations applied. **(*N.J.S.A.***2A:14-1, et seq. *See* discussion of Defenses under Section 5.4.)

The Supreme Court stated that the action was barred by the Statute of Limitations, and thus there would be no need to analyze it.

The Court then reviewed the history of the entire interspousal immunity doctrine, with the conclusion that since it had been partially abrogated in ***Mercado v. Mercado***, 76 *N.J.* 535, 388 *A2d*. 951 (1978), there was no tolling of her cause of action, which was subject to the Statute of Limitations. The court further noted that this tort action could have been brought by the wife as a claim in her divorce action.

"Since the circumstances of the marital tort and its potential for money damages were relevant in the matrimonial proceedings, the claim should not have been held in abeyance; it should, under the `single controversy' doctrine, have been presented in conjunction with that 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."

In ***Citiacchio v. Citiacchio***, 198 *N.J.Super* 1; 486 *A2d.* 335 (App. Div. 1984), a wife brought a tort claim for assault and battery against the husband not as a separate count, but as part of her divorce grounds for extreme cruelty. She sought compensatory and punitive damages for injuries which she sustained when her husband attempted to strangle her and allegedly shot her.

The Appellate Division did not reach the merits of the claim, but remanded it to the trial court after determination on the issue of mandatory joinder (*See* Single or Entire Controversy Doctrine, Section 5.3) and because a third party defendant's insurance coverage was involved. The court directed that the matter was to be heard separately in the Law Division where a jury trial would be available. There the wife sought to recover against the husband under their homeowners' insurance policy and Allstate disclaimed coverage as well as a claim for personal injury protection benefits under an automobile insurance policy also issued by Allstate.

(*See* discussion under Jury Trial, Chapter 7.)

***See* Practice Form #4.**

The Battered Women's Syndrome was first recognized by the courts in New Jersey in *State v. Kelly*, 97 *N.J.* 178, 478 *A2d.* 364 (1984), where the court recognized expert testimony that the syndrome was admissible because it was relevant and material to establish the honesty and reasonability of the defendant's belief that she was in imminent danger of serious bodily injury or death.

The syndrome itself was referred to in *Kelly* in that battered women exhibit common personality traits: low self esteem, traditional beliefs about the home, the family and the female sex role, tremendous feelings of guilt that their marriages are failing, and the tendency to accept responsibility for the batterer's action. Further, battered women are paralyzed by the fear of their spouse's response if they attempt to leave the relationship. *Kelly* at p. 195, The court cites *Walker, The Battered Woman* (1979) at 35-36. For a complete analysis of the syndrome, please refer to the Karp book, specifically Dr. Cheryl l. Karp's chapters on the battered women's syndrome, Dr. Karp having testified numerous times on behalf of the defense in criminal cases concerning this syndrome. *Family violence, conflict and sexual abuse,* McGraw-Hill, Inc., Box 1235, Colorado Springs, Colorado 80901.

In the case of first impression, Judge Andrew Napolitano in *Cusseaux v. Pickett,* in response to defendant's motion pursuant to rule: 6-2 to dismiss the first count of the

plaintiff's complaint for failure to state a cause of action created this new cause of action.

The complaint against Pickett alleges that he mistreated Cusseaux, "jeopardized her health and well-being, and caused her physical injuries, on numerous occasions," as "part of a continuous course of conduct and constituted a pattern of violent behavior, frequently associated with being intoxicated."

Judge Napolitano used a Louisiana case of *Laughlin v. Breax*, 515 *So.2D.* 480 (La.App. 1 Cir. 1987) To support his decision to recognize the cause of action, but rejected the case's decision that the complainant had to sue on each individual incident of abuse and not as a continuing tort.

The court then stated:

"it would be contrary to the public policy of this state, not to mention cruel, to limit only those individual incidents of assault and battery, for which the applicable (2 year) statute of limitation has not yet run. The mate who was responsible for creating the condition suffered by the battered victim must be made to account for his actions--all his actions."

The court further recognized that the "Battered-Women's Syndrome" is not an affirmative cause of action by the courts of this state, and in fact is only cognizable under the law as a defense in criminal actions.

The judge allowed this new cause of action to stand despite the motion to have the action dismissed for failure to state a claim for relief stating that the new jersey supreme court has expressly held that trial courts must accord any plaintiff's complaint a "meticulous" and "indulgent" examination.

The court pointed to the prevention od domestic violence act, *N.J.S.A.2C:25-16* to the effect that the legislature found that domestic violence was a serious crime against society; and that there are thousands of persons in this state who are regularly beaten, tortured, and in some cases even killed by their spouses and cohabitants.

The statute further stated that it was the responsibility of the courts to protect victims of violence that occurs in a family or a family-like setting by providing access to both emergent and long term civil and criminal remedies and sanctions.

The court in analyzing all of the above stated:

the efforts of the legislature to this end should be applauded. However, they are but steps in the right direction. As in the case with the domestic statute where existing criminal statutes were inadequate, so too are the civil laws of assault and battery insufficient to address the harm suffered as a result of domestic violence. Domestic

violence is a plague on our social structure and a frontal assault on the institution of the family. The battered-women's syndrome is but one of the pernicious symptoms of that plague. Although the courts could be hard-pressed to prescribe a panacea for all domestic violence, they are entrusted with the power to fashion a palliative when necessary. The underpinning of our common law and public policy demand that, where the legislature has not gone far enough, the courts must fill the interstices."

The court then set down the four standards in order to prove a cause of action for battered-women's syndrome. The plaintiff must show:

"1. Involvement in a marital or a marital-like intimate relationship; and

2. Physical or psychological abuse perpetrated by the dominant partner to the relationship over an extended period of time; and

3. The aforestated abuse has caused recurring physical or psychological injury over the court of the relationship; and

4. A past or present inability to take any action or improve or alter the situation unilaterally."

In 1994, the federal government enacted a statute 40 U.S.C. Par. Which is entitled civil rights remedies for gender-motivated violence act, the purpose of which was to protect the civil rights of victims o f gender motivated violence and to provide a federal civil rights cause of action for victims of crimes of violence motivated by gender.

The federal statute defines a "crime of violence motivated by gender" as an act or series of acts that elsewhere would constitute a felony against person or property subjecting the person to serious risk of injury, and irregardless of whether or not there were criminal charges prosecutions in another forum; and irregardless of whether or not the acts were committed within the jurisdiction of the united states.

1. Actions under the statute must be proven by preponderance of the evidence that they were motivated by gender.

2. There is no necessity for prior criminal complaint prosecution or conviction in order to establish the elements of the cause of action.

3. Jurisdiction can be concurrent between the federal and state courts.

4. The federal courts decline any other involvement in the case, including the establishment of divorce, alimony and equitable distribution of marital property or child custody decrees.

The purpose of the law was to cover all rapes and intended rapes, including marital rapes and date rapes and apply to battery, violence against a person's home or property and transmission of sexual diseases.

The law is not just limited to spousal abuse, but applies to any gender-motivated violence, even if the parties are not married.

Property damage is covered by the law in such a situation where a spouse destroys items in the house, or does malicious damage to the other spouse's car.

An action can be brought in the federal court at the same time as an action for her divorce or other relief is brought in the state court; or instead of any other action. The advantage would seem that in the federal court as a civil rights act you would be entitled to a jury trial, where they most likely would not be entitled to within new jersey.

There is also the question as to whether or not one action will be stayed pending resolution of the other, and as to which one will go ahead and which one would be stayed.

This law is part of the omnibus crime bill which was recently passed by congress after extensive lobbying by president clinton. As of this time, the law doesn't specify and effective date, but will presumably go into effect on the day that the president signs the omnibus crime bill.

As of this date, it is unclear whether the law allows a suit to be brought before the violence occurred before the effective date of the statute, and a good argument would be made that if some if not all of the events occurred prior to the enactment of the federal statute, it should not fall within the act. In previous decisions on retroactivity, the U.S. Supreme court in interpreting a 1991 civil rights act said that it didn't apply to pre-act conduct unless that conduct is made abundantly clear to be included.

***Landgraf v. U.S.I. Film products,* 114 S.Ct 1483; *Rivers v. Roadway Express Inc.*, 114 *S.Ct.* 1510.**

The new law also doesn't include any statute of limitations and at this time we can assume that the statute of limitations would be the same as set forth in federal statute of limitations actions which for personal injury actions, is a two year period.

Citing that defense as well as the domestic violence statute, *N.J.S.A.*2C:23-18 which reported that there was a high incidence of unreported abuse because there is a stigma against battered women that is institutionalized in the attitudes of law enforcement agencies, not to mention the stereotypes and myths concerning the characteristics of battered women and their reasons for staying in a battering relationship, the Court created this new cause of action.

The Court stated that:

"Domestic violence is a plague on our social structure and a frontal assault on the institution of a family. The battered-women's syndrome is but one of the pernicious symptoms of that plague. Though the courts would be hard-pressed to prescribe a panacea for all domestic violence, they are entrusted with the power to fashion a palliative when necessary. The underpinning of our common law and public policy demand that, where the legislature has not gone far enough, the courts must fill in the interstices...Thus, this court will recognize the battered-women's syndrome as an affirmative cause of action under the laws of New Jersey."

The Court further established that in order to have a cause of action for the battered-women's syndrome, the plaintiff must allege the following elements:

1. Involvement in a marital or marital-like intimate relationship; and

2. Physical or psychological abuse perpetrated by the dominate partner to the relationship over an extended period of time; and

3. The fore stated 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 to improve or alter the situation unilaterally.

The Court based part of its decision upon the Louisiana case of *Lauglin v. Breaux*, 515 *So.2d.* 480 (La.App. 1 Cir. 1987) which created the cause of action, but rejected the holding in the case to the extent that each individual action of assault and battery must be proved.

The question then arises why the action was not barred by a motion because of the Statute of Limitations which worked so effectively to bar causes of action to those assaults not brought within the two year Statute of Limitations for assault and battery. See Section 5.7, Statute of Limitations.

Marital rape has been an anathema to the courts because of what they believe was the impossibility of proofs and the possibility of one spouse, most likely the wife, making up the cause of action in order to gain some advantage in a matrimonial case. With the passage of time and the growing sensitivity of the judiciary to the facts that there can be such a thing as non-consensual sexual intercourse, the cause has surfaced in the criminal law field and as a part of matrimonial litigation.

***N.J.S.A.*2C:14-1 changed the existing law to define rape to include more than sexual intercourse, and no longer required the necessity that it be shown that there was penetration by the male sexual organ into the sexual organ of the female.**

Sexual penetration now is extended to mean not only "vaginal intercourse, but cunnilingus, fellatio or anal intercourse between persons or the insertion of the hand, finger or object into the anus or vagina either by the actor or upon the actor's instruction. The depth of the insertion shall not be relevant as to the question of commission of the crime".

The statute which is part of "offenses involving danger to the person", covers sexual offenses which also includes other degrees of sexual contact short of penetration.

No physical force in addition to that which is entailed in the act of involuntary or unwanted sexual penetration is required for conviction for sexual assault. *State in Interest of M.T.S.*, 129 *N.J.* 422, 609 *A2d*. 1266 (1992).

In *Lickfield v. Lickfield*, 260 *N.J.Super* 21, 614 *A2d.* 1365 (Ch.Div. 1992), a wife brought a claim against her husband in Domestic Violence Court for marital rape as the basis for precluding him from the marital home under the "Prevention of Domestic Violence Act". When the tort action was presented in the divorce case, the husband moved to preclude her on the procedural grounds that she was barred by the entire controversy doctrine (see Section 5.3), from bringing this action because she had already received a judgment against him under the "Prevention of Domestic Violence Act", *N.J.S.A.*2C:25-17 *et seq*. The court stated that since the domestic violence proceeding was an emergency, cursory examination of the issues showed that her claim survived and was not to be precluded. They commented upon the "Prevention of Domestic Violence Act", noting that the Act was made to insure the maximum protection to victims of domestic violence by providing access to emergent and long-term civil and criminal remedies and sanctions. They rejected the defendant's view that since the "Prevention of Domestic Violence Act" provides for money damages, and the wife did not properly articulate a reservation of her right to damages, she waived her right to damages by failing to pursue them during the domestic violence hearing. The court found that the time restrictions imposed upon the wife by the Act, are incongruent with a strict interpretation of the entire controversy doctrine.

"A case cannot be made for damages in an action for personal injuries until the extent of the damages are known. The Act requires that a final hearing be held within l0 days of the filing of the domestic violence complaint and the complaint is usually filed the day of or within days after the violence occurs. This expedited process is available for the protection of the victim and to prevent further acts of domestic violence. The process, however, is ineffective if the victim is forced to make a case for damages at that time as well... .

The court also rejected the defense of *res judicata*, (see Section 5.12) that the issue had already been litigated, because only the issue of liability was decided, but the issue of damages could be decided at the divorce trial.

***See* Practice Form #5**

***See* Practice Form #6.**

2.8. Intentional Infliction of Emotional Injury/Distress

The history of claims for intentional infliction of emotional distress reflects only a gradual and reluctant growth in the State of New Jersey. As late as 1975, the New Jersey Courts did not recognize a separate cause of action for intentional infliction of emotional distress. *Hafner v. Hafner*, 136 *N.J.Super* 328, 343 A2d. 166(Law Div.1975).

In later non-matrimonial cases, the Law Division has recognized that extreme or outrageous conduct could give rise to such cause of action. *Hume v. Bayer*, 178 *N.J.Super* 310, 428 *A2d*. 966 (Law Div. 1981).

Both *Hafner* and *Hume* refer to the *Restatement (Second) of Torts,* Sec. 46D (1965) contained the quote "outrageous conduct as causing severe emotional distress". Section 46 provides:

"(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) When such conduct is directed at a third person, the actor is subject to liability is he intentionally or recklessly causes severe emotional distress

(a) to a member of such person's immediate family who was 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."

To establish a claim for intentional infliction of emotional distress, the plaintiff must establish intentional outrageous conduct by the defendant, proximate cause, and distress that is severe.

Initially, the plaintiff must prove that the defendant acted intentionally or recklessly. For an intentional act to result in liability, the defendant must first, intend to do the act. Liability will also attach when a defendant acts recklessly in deliberate disregard of a high degree of probability that emotional distress will follow. *Hume, supra* 178 *N.J.Super* 319.

Second, the defendant's conduct must be extreme and outrageous. *Hume, supra* 178 *N.J.Super* at 315. The conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and be regarded as

atrocious and utterly intolerable in a civilized community." *Restatement, supra,* Sec.46D.

Third, the defendant's action must have been the proximate cause of the plaintiff's emotional distress. *Caputzal v. Lindsay,* 48 *N.J.* 69, 77-78, 222 A2d. 513(1966).

Fourth, the emotional distress suffered by the plaintiff must be "so severe that no reasonable man could be expected to endure it." *Restatement, supra,* Sec. 46J. W. Prosser & P. Keaton, *Handbook on Torts,* par. 12 at p.55 (5th ed. 1984)

Whether the emotional distress is severe enough to present a cause of action, is a question for the court to determine based upon the proofs before it.

The expansion in the marital tort arena from torts which result in physical injury to those torts which are manifested by non-physical injuries, emotional injuries or emotional distress has been most difficult. Courts were reluctant to award damages that they deemed unprovable. At first, only emotional or mental injuries accompanied by some other tort, usually physical harm, were allowed.

The arguments against allowing these causes of actions are basically the same, as they were to physical torts between spouses before the abolition of interspousal immunity, i.e. that the courts would be inundated with these applications; the "flood of litigation" argument, and that the extent of the injuries would be more difficult to prove and ethereal. Prosser, Torts (4 Ed. 1971) Par. 12 at 51, states:

"It is the business of the Court to remedy wrongs that deserve it, even at the expense of 'flood of litigation' and it is a pitiful confession of incompetence on the part of any court of justice to deny relief on such grounds."

***Morris v. MacNab,* 25 *N.J.* 271, 135 *A2d.* 657 (1957). The *Morris* case previously mentioned *supra* under 2.1, involved a woman suing a man for the tort of fraudulently inducing her into marrying him when he knew he was previously married and that he would be committing bigamy.**

MacNab married Morris, went on a honeymoon, and then under the pretext of seeing his grandchildren, stayed away many nights. Morris finally discovered that MacNab's wife, who he had said was dead, was alive and that Morris was spending most of the time with her, rather than with herself.

During the course of the relationship, MacNab obtained under false and fraudulent representations, approximately $6,500 from Morris.

In the trial, Morris sought compensatory and punitive damages for shame, humiliation and mental anguish which had been caused by the defendant's action to fraudulently induce her to enter into a marriage which he knew to be bigamous, and to induce her to advance these monies.

At trial, she was awarded $1,500 in compensatory and $1,000 in punitive damages, for her shame and humiliation because of his inducement to enter into a marriage which he knew to be bigamous; and $6,400.00 for compensatory and $600.00 for punitive damages for the monies that she advanced him.

The defendant appealed stating that the Supreme Court decided while holding the "Heart Balm Act", *N.J.S.A.*2A:23-1 that these torts, were not barred by the Act and that Morris' recovery was not one of the "well known evils" which the Legislature was seeking to eliminate in the passage of the "Heart Balm Act".

***Scholz v. Scholz*, 177 *N.J.Super* 647, 427 *A2d.* 619 (Ch.Div. 1980) is a Bergen County Chancery Division case in which the plaintiff wife sought to amend her complaint for divorce on the grounds of extreme cruelty by adding causes of action for slander, alienation of children's affections, and assault and battery.**

The gist of the complaint was that the husband made false and slanderous statements to their children about her reputation and about her affections for the children, knowing that these statements were false.

The plaintiff claimed that the children's affections were alienated and because of this, she was deprived of their company and respect. She further claimed that her husband harassed, threatened, abused and embarrassed her by deliberately making abusive, threatening, humiliating and embarrassing statements to the children as well as to herself.

The court in rejecting the motion to add this cause of action stated:

"Slander between spouses is a common occurrence. The judicial process could never accommodate redress for every such action alleged as a wrong. Defining which are to be considered excepted is difficult but the court believes that the remarks made by spouses to and within the family unit constitute conduct that qualifies as 'a simple domestic negligence'. The same remarks to others outside of the immediate family unit could result in damage which is a risk that neither should have to bear as part of the marital relationship and should be actionable...."

The court further rejected plaintiff's claim for alienation of the children's affection because it found no authority that such cause of action existed and stated: "It is the general law of torts regarding parent/child relations that an action for interference will not lie in the absence of either seduction of the child or removal of the child from the home. *Prosser, Law of Torts* (4 Ed. 1971) 883.

***Ruprecht v. Ruprecht*, 252 *N.J.Super* 230, 599 *A2d.* 604 (Ch.Div. 1991) raised for the first time in New Jersey the question whether one spouse can sue the other spouse for intentional infliction of emotional distress in the absence of physical injury in a divorce action. While answering in the affirmative, the court rejected plaintiff's claim under the facts of this case.**

The court found that "There is no valid policy interest nor logical reason to allow one spouse to sue the other for physical injury, but not for emotional distress absent physical injury. Certainly mental and emotional distress is just as 'real' as physical pain."

"Therefore, it is this court's opinion that an independent cause of action between spouses for emotional distress without physical injury should exist in a divorce case."

The court found that in order for the matter to be actionable, the conduct must be regarded as "outrageous" as defined by Prosser, Tort *supra*, as to "exceed all bounds usually tolerated by decent society" and further accepted the Restatement's position, that to be outrageous, "the conduct must be so extreme in degree as to go beyond all possible bounds of decency and be regarded as atrocious and utterly intolerable in a civilized community."

The court next found that if the outrageous conduct is established, the plaintiff must establish that the act was intentional on the part of the defendant; that the act was the proximate cause of the distress; and that the distress is severe to establish a claim for intentional infliction of emotional distress. at page 237.

In this instance, the adulterous actions of the wife over an 11 year period of time, which was only discovered by the plaintiff husband after the fact, was not sufficient in order to comprise the outrageous conduct required to establish a cause of action.

The court noted that he could not have been injured prior to his discovery of the adulterous relationship because he did not know about the adultery, and in order to suffer emotional distress from defendant's conduct, it would be necessary for him to know about it. at page 238.

***See* Practice Form #7.**

The New Jersey Supreme Court has recognized the tort of negligent infliction of emotional distress in the non-matrimonial case of *Decker v. Princeton Packet, Inc.*, 116 *N.J.* 418, 429 (1989), 224 *N.J. Super.* 726, cert. gr. 546, 557, 111 *N.J.* 648 , aff. 561 *A2d.* 1122 which stated:

<u>"The tort involving the negligent infliction of emotional distress can be understood as negligent conduct that is the proximate cause of emotional distress in a person to whom to the actor owes a legal duty to exercise reasonable care...Thus, to establish liability for such a tort, a plaintiff must prove that the defendant's conduct was negligent and proximately caused plaintiff's injuries. The negligence of defendant, however, depends on whether defendant owes a duty of care to the plaintiff, which is analyzed in terms of foreseeability. '[L]iability should depend on the defendant's</u>

foreseeing fright or shock severe enough to cause substantial injury in a person normally constituted.' "

Most of the cases which fall under this cause of action are not between family members but between a family member and a third party. (*See* Section 4.10).

***Portee v. Jaffee*, 84 *N.J.* 88, 417 *A2d.* 521 (1980), which is the type of case mentioned above, eliminated the need for a "physical manifestation" in order to recover for emotional distress and mental anguish as long as there was a close family relationship.**

In the case of *Trisuzzi v. Tabatchnik*, 285 *N.J.Super.* 15, 666 *A2d.* 543 (App. Div. 1995) In which a wife saw a dog jump on and bite her husband, and her complaint was that even though the incident did not take long, it seemed like "an eternity" to her, and she became frozen with fear and cried hysterically during this brief episode, and after the incident she became afraid of strange unleashed dogs and could no longer walk or bicycle alone and was having nightmares, the court found that the wife's emotional distress wasn't sufficiently severe to give rise to a Portee claim.

The case was dismissed as to the plaintiff's claim for negligent infliction of emotional distress because the emotional distress was deemed to be insufficiently substantial to result in serious psychological sequelae, and the only interruption in the plaintiff's daily life was that she no longer felt comfortable walking or bicycling by herself.

Under the tort statute and now under the *Brennan* case, referred to in chapter 8 on jury trials, the appellate division affirmed the trial judge's decision that the distress was not sufficiently severe to justify submitting the matter to a jury. 285 *N.J.Super* at p. 27.

There is yet to be a reported case between spouses where there is asserted negligent infliction of emotional injury/distress.

***See* Practice Form #8.**

The incubation period for AIDS also causes problems, because the time from the transmission of the disease to its discovery could be from five to ten years. As can be seen in *J.Z.M. v. S.M.M.*, below, neither the Statute of Limitation defense nor the single/entire controversy doctrine defense is applicable, because the tort begins from when the disease is discovered or should have been discovered, not from the time of contact.

Complicating matters even more, is the fact that when one discovers that they have AIDS, the person from whom it was transmitted may no longer be alive, the estate

may have no assets or the assets may have been distributed, making the collectability of a judgment impossible.

The concept of third party liability also comes into play. One spouse may have given the other a disease, but where did the first spouse get the disease from?

And what if the spouse's partner has the disease at the time of sexual intercourse, but does not transmit it. The plaintiff spouse could suffer mental distress because of the fear of getting the disease. That scenario was presented in the Rock Hudson case involving a male homosexual lover. *Christian v. Estate of Hudson*, 15 *Fam.L.Rep.* 1280 (Cal.Super Ct. 1989).

***J.Z.M. v. S.M.M.* 226 *N.J.Super* 642, 545 *A2d* 249 (Law Div 1988). An ex-wife brought an action against her ex-husband for a diagnosis of herpes some 22 months after the dissolution of the marriage. The Court allowed this action despite the defense of a single/entire controversy doctrine (*See* Section 5.3) and stated that herpes transmission from husband to wife was a cause of action.**

***G.L. v. M.L.* 228 *N.J.Super* 566, 550 *A2d.* 525 (Ch.Div. 1988) The plaintiff wife brought a personal injury claim against her husband because he transmitted genital herpes to her during the marriage. The husband's insurance carrier defended against the negligence claim and brought a motion for summary judgment seeking to dismiss the personal injury count.**

The wife contended that the husband had sexual relations with her even after discovering that he had herpes as a result of an extramarital relationship. While the husband tried to invoke the scope of the marital or nuptial privilege in regard to sexual intercourse with his wife, the Court disagreed and stated that it was unconscionable and inconsistent that a person could escape liability for infecting a spouse with genital herpes or other sexually transmitted disease by merely claiming that the transmission occurred during privileged sexual relations of the marriage.

The Court found it inconsistent that the husband sued on an act which took place at a private moment, and then initiated marital privilege:

"Defendant misconstrues the meaning of marital privilege and furthermore destroyed any that may have existed by his own intentional involvement in an extramarital relationship. Defendant cannot simultaneously breach his marital relationship by engaging in extramarital intercourse, and claim nuptial immunity for consequences flowing from his own willful and intentional conduct." at p. 569

Deceit and fraudulent representation is established if the plaintiff shows by clear and convincing evidence each of the following elements:

(1) That defendant made a false representation of fact.

(2) That defendant knew or believed it to be false.

(3) That defendant intended to deceive plaintiff.

(4) That plaintiff believed and justifiably relied upon the statement and was induced by it to act or refrain from acting.

(5) That as a result of plaintiff's reliance upon this statement, damages were sustained.

"We conclude that the birth of a normal, healthy child as a consequence of sexual relationship between consenting adults precludes inquiry by the court's into representations that may have been made before or during the relationship by either the partners concerning birth control. We recognize the seemingly applicability of traditional tort principles to a misrepresentation such as that in this case, resulting in the birth of a child to a woman with resultant labor pain, attendant to her birth, followed by expense, inconvenience and loss of income because of the birth and existence of the child. We further recognize that we have specifically authorized recovery as some of these expenses in a medical malpractice suit by a husband and wife against the doctor, ..."

The cases the Court was referring to was third party liability. *See* Sections 4.4 and 4.5.

The Court further stated that if normal tort principles are applicable to plaintiff's claim, it would seem that normal defenses should also be available to the defendant. One defense might be whether there was reasonable reliance on defendant's status, another might be mitigation of damages.

Since it was plaintiff's contention that the child was unwanted from the beginning, the Court noted that when she became aware that she was pregnant, she had the legal right to safely abort the fetus, and thus mitigate damages.

"We question whether plaintiff in a tort action for the wrongful birth of a normal, healthy child may decide to have a child and then look to defendant for damages of the type sought by plaintiff in this case."

For public policy reasons, the Court concluded that the claim by the mother against the father was not cognizable in the State of New Jersey on public policy grounds.

***See* Practice Forms #10 and #11.**

As of yet there are no reported cases in the State of New Jersey concerning a suit either by the child itself, or through one or its parents, against another parent for physical, emotional and sexual abuse.

***See* Practice Form #12.**

AFFIRMATIVE DOMESTIC TORTS BETWEEN SPOUSES

RESULTING FROM THE MARITAL RELATIONSHIP 5

CHAPTER THREE

RESULTING FROM THE MARITAL DISSOLUTION

Dissipation of Marital Assets has been called many things. An attorney I knew called it a "flight plan", meaning that it was a calculated and planned course of action on behalf of one spouse to either denude the assets of the marriage or secrete them for their own favor in anticipation of a divorce. The more time the spouse had, the more unaware the other spouse was of the problems in the marriage and the less control they had over the money assets, the easier it was to put this "flight plan" into operation.

An accountant I know states that the payor spouse is suffering from RAIDS which he defines as "recently acquired income deficiency syndrome."

All of a sudden, the planning spouse's business or job is in jeopardy; they are not making as much money as they used to and all expenses have to be curtailed. The other spouse who may be non-working *must* get a job to help in the family's financial plight, and since the salary is no longer enough to meet the expenses, marital assets must be expended in order to maintain the lifestyle.

While these assets are being expended, the planning spouse is secreting other monies for future use.

The Appellate Division in the case of ***Kothari v. Kothari***, 255 *N.J.Super* 500, 605 *A2d.*750 (App.Div. 1992), set forth the following factors, which it suggested should be most commonly followed concerning resolving whether or not marital money was dissipated or not:

(1) the proximity of the expenditure to the party's separation,

(2) whether the expenditure was typical of expenditures made by the parties prior to the breakdown of the marriage,

(3) whether the expenditure benefitted the "joint" marital enterprise or was the benefit to one spouse to the exclusion of the other, and

(4) the need for, and the amount of the expenditure.

"Dissipation may be found where a spouse uses marital property for his or her benefit and for the purpose unrelated to the marriage at a time when marriage relationship was in serious jeopardy.

Whether a given cause of conduct constitutes dissipation within the meaning of the Act depends upon the facts and circumstances of the particular case.

Upon review, the trial court's determination regarding the dissipation of assets lies within the sole discretion of the trial court and will not be reversed absent abuse of discretion." (citations omitted)

Baskinger v. Baskinger, 129 *N.J.Eq.* 224, 18 *A2d*. 845 (Ch.Div. 1941). There is a very early case which predated our equitable distribution statute and dealt with property only as it applied to the husband's ability to earn an income. The wife sought to put aside as fraudulent, transactions between the husband and others including family members, in which he relinquished his interest in chattel mortgages and a retail store. The Court concluded that these transactions were all part of a plan between the three defendants, the wife having named them as parties, the transferees, to strip the husband of all apparent interest, so as to make it impossible for her to receive support from the husband. The Court determined that the transactions were made under the cloak of legality for the purpose of enabling the husband to avoid his responsibilities towards the wife.

In seeing through his subterfuge, the Court noted his history of non support to the wife, and commented that he "deserted his wife and rendered her helpless and penniless," and established a lien by the wife on the part of the husband's businesses.

Monte v. Monte, 212 *N.J.Super* 548, 515 *A2d.* 1233 (App.Div. 1986). The Appellate Division determined that the husband's loans from his family were not established as actually existing and thus the wife should not be responsible for payment of a contingent and possible non-existent debt, and the Court remanded the case to the lower court of more findings of fact as to whether or not these loans existed.

Siegel v. Siegel, 241 *N.J.Super* 12, 574 *A2d.* 54 (Ch.Div. 1990). The Court found that the husband's gambling losses equated with dissipation of marital funds where his gambling indebtedness was evidenced solely by a note from him to a closely held corporation, and the note which had never been "called", was executed only 10 days after the complaint for divorce was filed.

Goldman v. Goldman, 248 *N.J. Super* 10, 589 *A2d.* 1358 (Ch.Div. 1991). Affirmed in part and modified in part not dealing with this issue. This case involved a different twist on the dissipation of assets as well as the date for valuation of those assets.

Despite a *pendente lite* order which restrained the parties from encumbering or dissipating assets, except from conducting his business in the ordinary course, the husband loaned his company $350,000, as well as paying $50,000 of marital funds for counsel fees in connection with litigation with his partner.

The wife was never active in the business and the husband never consulted her before or after the complaint was filed about business decisions.

The business was worth $294,000 as of the date of the complaint, and as of the date of the trial, it had no value. The Court, after examining applicable law as to valuation, and specifically centering in on ***Scavone v. Scavone***, 230 *N.J.Super* 482, 583 *A2d.* 885 (Ch.Div. 1988), aff'd. 243 *N.J.Super* 134, 578 *A2d.* 1230 (App.Div. 1990) determined that this case presented special circumstances which would make it unfair to value the active asset as of the date of the complaint as ***Scavone*** would require and instead valued it as of the trial date.

The Court noting the obverse scenario that the wife would not be entitled to any increase in assets of the business under ***Scavone*** because it was an active asset, then dismissed this argument by saying that "No useful purpose can be achieved by discussing hypothetical scenarios".

The Court determined that since the $400,000 of marital funds were used in order to keep the business alive, that they were in good faith and "in the ordinary course" of business did not charge the loss to the husband.

The question, of course, ultimately to be answered by weighing all of these considerations, is whether the assets were expended by one spouse with the intent of diminishing the other spouse's share of the marital estate.

See **Practice Form #13.**

Restatement (Second) of Torts 652B (1970) sets forth the axiom that the intentional interference with another's interest in solitude or seclusion, involving either one's person or private affairs, is subject to liability if it is the kind that would be highly offensive to a reasonable person.

The three New Jersey cases all before 1948 dealt with government intrusion into a private person's affairs which were all allowed under circumstances of the case.

In ***Brecks v. Smith***, 104 *N.J. Eq.* 386, 146 *A.* 34 (1929) an investigation into the corruption of a police force was authorized by the prosecutor subpoenaing the individual's bank accounts to see if they deposited any ill-gotten money.

Bednarite v. Bednarite, 18 *N.J.Misc.* 633, 16 *A2d.* 80 (1940) was the beginning of allowing blood tests in paternity actions, a new science at that time.

Frey v. Dixon, 141 *N.J.Eq.* 41, 58 *A2d.* 86 (1948) was an attempt to stop an attorney general who was assigned to investigate corruption before a grand jury and asked for 4 police officers 1946 and 1947 tax returns.

See **Practice Form #13.**

"Wiretapping" is the intercepting, or the attempting to intercept, or hiring another person to attempt to intercept or intercept any wire or oral communication. In layman's language,

that is either a spouse tapping the phone themselves or hiring somebody else, i.e. a private detective to tap the phone for them. The prohibition against wiretapping only applies to a person who wiretaps a communication between two other parties. Thus, you can "tap" a telephone conversation if you are one of the parties.

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In 1992, a statute was enacted for the purpose of protecting victims who were repeated followed and threatened, and made "stalking" a crime. ***N.J.S.A.***2A:156(A)l. This bill was modeled on the California statute enacted in September of 1989 and provides that a person is guilty of stalking if he purposely and repeatedly follows or harasses another person and makes a credible threat with the intent to place that person in reasonable fear or death or serious bodily injury. The punishment for the crime would be imprisonment up to 18 months and a fine up to $7,500 or both.

In the event that there was an existing court order such as a restraining order out of a Domestic Relations Court, or if it was a second or subsequent offense, then the offense would be upgraded and the penalty would be 3 to 5 years and a fine of $7,500 or both.

The statute makes it clear that the threat could be either explicit or implicit. Specifically exempted from the Bill are any acts or conduct which occurs during organized group picketing, obviously in deference to the labor lobby. (*See* Appendix B)

In 1979, an harassment statute, ***N.J.S.A***.2C:33-4 (*See* Appendix C) was passed as follows:

(a) Makes, or causes to be made, a communication or communications anonymously or at extremely inconvenient hours, or in offensively coarse language, or any other manner likely to cause annoyance or alarm;

(b) Subjects another to striking, kicking, shoving, or other offensive touching, or threatens to do so; or

(c) Engages in any other course of alarming conduct or of repeatedly committed acts with purpose to alarm or seriously annoy such other person.

Subsequent amendments in 1983 added:

A communication under subsection a. may be deemed to have been made either at the place where it originated or at the place where it was received.

d. A person commits a crime of the fourth degree if in committing an offense under this section, he acted, at least in part, with ill will, hatred or bias toward, and with a purpose to intimidate, an individual or group of individuals because of race, color, religion, sexual orientation or ethnicity.

The original statute found as its target a finance corporation which was making harassing phone calls to one of its debtors while she was at work, defining this as "extremely inconvenient hours..." The Court in ***State v. Finance American Corp.***, 182 *N.J.Super* 33, 440 *A2d*. 28 (App.Div.1981) found that a harassing phone call was not entitled to protecting under the United States Constitution.

In ***State v. Halleran***, 181 *N.J.Super* 542, 438 *A2d.* 577 (App.Div. 1981) a woman was convicted under the statute for making anonymous telephone calls to her former husband for purposes of harassing him. The Court found that the calls came from her phone number, and found her guilty despite the fact that at that address also lived her 11 year old daughter.

In 1989 in the case of ***State v. Fuchs***, 230 *N.J.Super* 420, 553 *A2d.* 853 (App.Div. 1989) the Court refused to use this statute in order to make the act of surreptitiously peering into dwellings from a fence, and noted that being a Peeping Tom does not fall within the sanctions of the statute.

See Practice Form #16.

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False imprisonment also known as false arrest is the unlawful detention of an individual. "Detention" means the restraint of a person's personal liberty or freedom of movement and the word "unlawful" means without legal authority or justification. ***Restatement (Second) of Torts***, Section 42.

The unlawful detention can be of the briefest period of time but must be against the plaintiff's will.

For this tort to be actionable, the defendant in causing the false imprisonment or arrest must have done so intentionally, but they could have done so without any malice.

Obviously, the false imprisonment and arrest tort does not take place if the plaintiff is in violation of some valid order and the defendant was simply exercising their legal rights.

Detention itself need not be forcible, but threats of force either by the conduct of the party or words coupled with the apparent ability to carry out such threats are sufficient. ***Jorgensen v. Penn R.R***, 38 *N.J.Super* 317, 118 *A2d* 854 (App.Div. 1955) reversed on other grounds, 25 *N.J.* 541, 138 *A2d* 24 (1958).

1 ***Harper & James***, The Law of Torts, (3rd ed.) at 227; ***Prosser on Torts***, (3rd ed.) at 57.

The damages arising from false imprisonment must arise as a proximate cause of plaintiff's injuries. Compensatory damages can be awarded for loss of time, any physical

injuries or mental and emotional stress resulting from the indignity to which the party was subjected.

Punitive damages can also be awarded if there is a belief that the defendant's action resulting in the plaintiff's arrest was maliciously motivated. ***Price v. Phillips***, 90 *N.J.Super* 480, *A2d* (App.Div. 1966), ***Barber v. Hohl***, 40 *N.J.Super* 526 *A2d* (App.Div. 1956).

On the other hand, if absence of malice can be found it may go to the mitigation of damages. ***Prosser on Torts***, (3rd. ed. at 61).

Picture this scenario: a vindictive spouse sets up a situation where it appears that the other spouse is violating the restraining order, such as issued as a result of a Domestic Violence action. As a result, the other spouse is imprisoned either overnight or for an extended period of time. An action can be brought against that spouse for false arrest and imprisonment either as a separate action or as part of the divorce action.

The damages arising from false imprisonment must arise as a proximate cause of plaintiff's injuries. Compensatory damages can be awarded for loss of time, any physical injuries or mental and emotional stress resulting from the indignity to which the party was subjected.

Punitive damages can also be awarded if there is a belief that the defendant's action resulting in the plaintiff's arrest was maliciously motivated. ***Price v. Phillips***, 90 *N.J.Super* 480, *A2d.* (App.Div. 1966); ***Barber v. Hohl***, 40 *N.J.Super* 526 *A2d* (App.Div. 1956).

If absence of malice can be found, it may go to the mitigation of damages. ***Prosser on Torts,*** (3rd. ed.) at 61.

See **Practice Form #17.**

There are two basic elements in order to sustain the cause of action for abuse of process.

They are:

(1) That the defendant made an improper, illegal and perverted use of the legal procedure that was neither warranted nor authorized by law.

(2) That the defendant had an ulterior motive in initiating the legal process such as to intimidate, harass and coerce the plaintiff for some kind of ulterior motive. ***Prosser on Torts***, Chapter 22, Section 121 at 856-857 (4th ed. 1971)

Tedards v. Audy, 232 *N.J.Super* 541, 557 *A2d.* 1030 (App.Div. 1989). A husband brought an action against his former wife's attorney for the improper use of a Writ of Ne Exeat. The Court stated that the purpose of the Writ of Ne Exeat is to compel a defendant's physical presence in court when required. After his arrest, the party may be released upon posting bail in the amount calculated to insure his presence.

In this case, it was shown that the husband posed no real threat to abscond and it appeared that the wife was using the Writ only as a means of coercing payment of a debt. The Appellate Court reversed the trial court's summary judgment in favor of defendant-attorney even though it felt that the husband's conduct was reprehensible in not paying the debt.

In this section we only deal with private defamation where the plaintiff, or complainant is a private person and not a public personage who is held to a different standard.

The general elements of defamation, which must be proven by a preponderance of the credible evidence comprise 5 elements:

(1) There must be made defamatory statement of fact.

A defamatory statement is a statement of fact which is injurious to the reputation of the plaintiff, or which exposes them to hatred, contempt or ridicule, or to loss of the good will and confidence felt toward them by others, or which has a tendency to injure them in their trade or business. ***Maressa v. New Jersey Monthly***, 89 *N.J.* 176 (1982); ***Dairy Stores, Inc. v. Sentenel Pub. Co.*** 104 *N.J.* 125 (1986); ***Restatement(Second) of Torts***, Section 559 (1977). A statement of opinion is not actionable. ***Restatement (Second) of Torts***, Section 563 (1977).

(2) The plaintiff must prove that the defamatory statement concerned the plaintiff.

The statement must have been read or heard or understood by a third party to mean the plaintiff. Where the defamatory statement concerns a group or class of persons of which plaintiff is a member, the plaintiff must establish some reasonable application of the words to themselves. *See* ***Mick v. American Dental Ass'n.*** 49 *N.J.Super* 262, 285-87 (App.Div. 1958); ***Restatement (Second) of Torts***, Section 564A, (1977).

(3) The plaintiff must prove that the defamatory statement is false.

It is not necessary that the statement be true or false in every detail, but if it is substantially false, and the falsity goes to the defamatory gist or sting of the statement, there is liability. The statement must be considered in its entire context and words or phrases must not be isolated or taken out of context. ***Restatement (Second) of Torts***, Section 581A (1977).

(4) The plaintiff must prove that the defamatory statement was communicated to

a person or persons other than the plaintiff.

It is not necessary that the defamatory statement be communicated to a large or even a substantial group of persons. It is enough that it is communicated to a single individual other than the plaintiff. However, if the defamatory statement is communicated only to a small group or single person, it is necessary that at least one of the recipients understood the statement in its defamatory sense. *See* comments B and C to ***Restatement (Second) of Torts***, Section 577 (1977).

(5) The plaintiff must prove that defendant actually knew the statement was false

when they communicated it, or defendant communicated the statement with reckless disregard of its truth or falsity, or defendant acted negligently in failing to ascertain the falsity of the statement before communicating it.

Plaintiff can satisfy this element in one of three ways:

(a) by proving that defendant communicated the defamatory statement which he/she actually knew to be false, or

(b) by proving that defendant communicated defamatory statement with a high degree of awareness that it was probably false or with serious doubts as to the truth of the statement, or

(c) by proving that defendant acted negligently in failing to ascertain the falsity of the statement prior to communicating it.

In determining if the defendant acted negligently in failing to ascertain the falsity of the statement, the standard to be applied is whether defendant failed to act as a reasonably prudent person would have acted under like circumstances. What is to be considered is whether the defendant had reasonable grounds for believing that this statement was true, and whether defendant acted reasonably in acting on the truth or falsity of the statement, communicating it. The factors which play a role in this consideration include defendant's investigation or lack of investigation of the accuracy of the statement, the thoroughness of that investigation, the investigation, the nature and interest of the persons to whom the statement was communicated, the extent of damage that would be produced if the communication proved to be false, the whether defendant had an honest but nevertheless mistaken belief in the truth of the statement. *Restatement (Second) of Torts*, Section 580B, comments G and H. ***Model Jury Charges, Civil*** (4th Edition) Section 3.11B, New Jersey Institute for Continuing Legal Education7 (1992).

As with any tort, once you prove the cause of action, you must now prove your damages. In defamation there can be both compensatory damages and punitive damages.

Compensatory damages (called special damages) are awarded for economic or financial losses suffered directly by the plaintiff as a proximate result of the injury to the plaintiff's

reputation caused by the defamatory words. These damages are never presumed, but must be specified by the plaintiff and proven by the evidence. The plaintiff must show what the loss was and by what sequence of connected events it was produced by the defamatory words. A plaintiff can only recover these damages if he can prove that the defendant's conduct was a substantial factor in causing them material, economical, financial losses.

There is also compensatory damages called general damages. These damages are in addition to the direct economic financial loss, which the law presumes to follow naturally and necessarily from either the publication of a libel, where the utterance of a slander, and which are recoverable by the plaintiff without proof of causation. This is so because the law recognizes that the damage to reputation caused by defamation may not always lend itself to proof by objective evidence. These type of damages include such things as loss of opportunity which may or may not be known; damage to reputation; or damage to a person's business or career. These damages may not be capable of being accurately measured, and can be more substantial and real than those which can be proved and measured accurately by a dollar standard.

In determining the amount of damages, it must be taken into consideration the manner in which the defamation was disseminated and the extent of its circulation, the injury to the character and reputation of the plaintiff, the bodily harm to the plaintiff and the mental anguish, suffering and emotional distress experienced by the plaintiff. The nature of the plaintiff's occupation must be considered and to the extent in which he/she may reasonably be expected to find that the defamation has interfered with his/her successful pursuit of the occupation. Also taken into consideration is the probable effect of whatever effort was made by the defendant to reduce the impact of the defamation upon the plaintiff's reputation including the effect of any public retraction, if same were made.

Compensatory Damages, Emotional Suffering. Since an action for defamation's foundation is injury to reputation, part of the compensation may be to redress the consequences which follow from injury to the plaintiff's reputation. The plaintiff thus has a claim for emotional distress because of the ill effects that he/she may have experienced because of damage done to his/her reputation for which they may be compensated. A fine line must be drawn between their emotional suffering caused by their reading of the libel or hearing the slander which is not compensable and the publication's impact of the words impact upon their reputation which is compensable.

Punitive Damages may also be awarded in addition to compensatory damages, not for the purpose to restore the plaintiff the amount of any loss sustained because of the libel or the slander; but to punish the defendant for willful or reckless conduct, to teach defendant not to do it again, to deter others from following defendant's example, and to vindicate the rights of the plaintiff in substitution for personal revenge.

Punitive Damages can be awarded whether or not compensatory damages are awarded. The punitive damages however should be of some reasonable relationship to the actual injury. The reasonableness of the relationship of punitive damages to actual injury must be considered in light of all the factors in the case. Some particular outrageous conduct

may generate only minimal compensatory damages so that higher punitive damages might be more appropriate than when substantial compensatory damages were awarded. The consideration for punitive damages must depend upon all the circumstances of the case.

Whereas compensatory damages must be measured in terms of the injury to reputation suffered by the plaintiff, the amount of punitive damages should relate to the degree of wrongfulness shown by the defendant in delivering this injury.

In determining whether to award punitive damages, the Court should consider whether defendant was motivated by an actual desire to harm the plaintiff or a calculated disregard of the consequences. What is examined is whether the defendant in making the defamatory statement, and the circumstances surrounding it, indicates that they had ill feeling, personal hostility or spite, or a natural desire to hurt the plaintiff without belief or reasonable grounds to believe in the truth of the libelous or slanderous statement.

Whether punitive damages are allowable in these cases is based upon the sound discretion of the Court or the jury. In the exercise of this discretion, all of the evidence surrounding the libelous slander including the nature of the wrongdoing, the extent of harm inflicted, the intent of the defendant, the financial resources of the defendant as well as any mitigating or extenuating circumstances that were offered by the defendant to reduce the amount of the damages. ***Model Jury Charges, Civil*** 3.11C. New Jersey Institute for Continuing Legal Education (1992, 1996).

In order for the tort of defamation to arise, someone either has to say or have put in print, thus communicating this lie to a third party.

W. Prosser & P. Keaton defined defamatory communication as:

"one which tends to hold the plaintiff up to hatred, contempt or ridicule, or to cause him to be shunned or avoided, and which tends to injure a 'reputation' in the popular sense; to diminish the esteem, respect, good will or confidence in which a person is held, or to excite adverse, derogatory or unpleasant feelings or opinions against him." *Handbook on the Law of Torts*, Sec. 111 at 773 (5th ed 1984).

Scholz v. Scholz, 177 *N.J.Super* 647, 427 *A2d.* 619 (Ch.Div. 1980). Plaintiff wife tried to include separate actions for slander, alienation of children's affections, assault and battery, which subsequently the Court denied. The Court categorized these instances over 13 years ago as "common domestic negligence between spouses" which it had to refer to a 1930 **Harvard Law Review** article in support of, stressing that every touching is not a battery, although if the same touching occurred between strangers, it might be considered so.

The Court noted that slander between spouses is a common occurrence and that the judicial process could never accommodate redress for each such action alleged as a

wrong. It also denied the plaintiff's claim for alienation of the children's affections because there was no such cause of action which existed.

***See* Practice Form #19.**

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A claim of tortious interference with custody as the basis of liability was originally found in the ***Restatement of Torts (Second)*** 700, (1976) which provides for liability when a non-custodial parent deliberately takes the child away from the custodial parent or induces the child to leave home.

A tort of custodial interference requires two elements:

(1) An intentional interference with, and

(2) A parent's right to custody of the child.

Tortious interference with custodial relations and visitation has grown in recent years along with the growth of the father's rights movement. No long sitting back, now proclaiming "I'm not going to take it any more," there has been an increasing amount of actions in State and Federal courts in which the deprived spouse, usually the father, seeks to get redress for the deprivation of custody or visitation rights.

This tort is equally applicable against third parties who aid in the abduction and disappearance of the child, such as a grandparent, private detective agency etc.

Action can be taken either at the state level, or if the child is taken from the jurisdiction, in the federal courts under the **Parental Kidnapping Prevention Act of 1980** (P.K.P.A.), 28 *U.S.C.* Sec. 1331. (*See* Appendix D).

The tort itself of child abduction goes back to the early English case of ***Hall v. Hollander***, 4 *B&C* 660, 661-662, 107 *Eng.Rep* 1206, 1206-7 (1825) where early English authorities permitted a parent to recover in tort for the abduction of a child if the parent suffered sufficient "loss of services".

In those days children were viewed as a financial asset, someone who could earn money for the family and contribute to its well-being.

New Jersey adopted this view in ***Magee v. Holland***, 27 *N.J.L.* 86, 96 (1858). In that case, the Court held that:

"One who, with knowledge that the parent does not consent, abducts or otherwise compels or induces a minor child to leave a parent legally entitled to its custody or not to return to the parent after it has been left him, is subject to liability to the parent."

In ***Magierowski v. Buckley***, 39 *N.J.Super* 534, 121 *A2d*. 749 (App.Div. 1956) the Court's view changed after l00 years. In that matter, a father's action for criminal seduction, or loss of services of a daughter as a housekeeper, because of her impregnation by another, was denied because of the Heart Balm Act.

N.J.S.A.2C:13-4 makes it a felony to unlawfully take, entice, keep or detain a child under the age of 18 from their legal guardian. New Jersey has passed a statute specifically dealing with interference with custody. This statute provides that a person commits a crime if he knowingly takes or entices a child under the age of 18 from the custody of the parent, guardian or other lawful custodian of the child, when the person has no permission to do so, or when he does so in violation of a court order. (*See* Appendix E)

Not only does the bill provide for those people who have received custody rights pursuant to court order, but parental kidnappings and third party interference with visitation or custody.

The problem with this rule is the reluctance of the county prosecutors to enforce and prosecute this bill. They would rather a complainant sought civil remedies, use the family court system, and believe that they are being used as a non-essential tool to get the child back.

DiRuggiero v. Rogers, 743 *F2d.* 1009 (3rd Cir. 1984) This was a federal action by a father against a mother and other third parties including the mother's current husband and three State Court Judges under the Parental Kidnapping Prevention Act for interference with his custody rights.

The Court did not invoke the "domestic relations exception to jurisdiction". (*See* Section 5.23)

See **Practice Forms #20, #21 and #22.**

In a marriage, each party owes a duty to the other with regard to marital property. In the event that one party acts on their own behalf, and either dissipates assets as referred to in Section 3.1, or takes marital assets for their own benefit, the other party may have a claim against them. At the present time, these claims are incorporated in the marital action and there has been no reported case in New Jersey where the breach of fiduciary duty in a marital setting has been held as a separate tort.

See **Practice Form #23.**

A cause of action exists now as a separate tort for the intentional destruction of evidence which has been dubbed "spoilation of evidence". ***Black's Law Dictionary*** 1257 (5th Ed. 1979) defines "spoilation" as follows:

"The destruction of evidence...The destruction, or the significant and meaningful alteration of a document or instrument." (citation omitted)

For a review of the genesis and development of the idea, you must look to the California case of ***County of Solano v. Delancy***, 215 *Cal.App.3d.* 1232, 264 *Cal.Rptr.* 721, 724-731 (Ct.App.1989) (review denied in order not to be officially published (Feb. 1, 1990); *See also* ***Annotation, Intentional Spoilation of Evidence Interfering with Prospective Civil Action, As Actionable***, 70 *A.L.R.* 4th 984 (1989).

The elements of the tort are:

(1) Pending or probable litigation involving the plaintiff;

(2) Knowledge on the part of the defendant that litigation exists or is probable;

(3) Willful, possible, negligent destruction of evidence by the defendant designed to disrupt the plaintiff's case;

(4) Disruption of plaintiff's case; and

(5) Damages probably caused by the defendant's acts.

In a non-matrimonial case, the Court in ***Viviano v. CBS, Inc.***, 251 *N.J.Super* 113, 597 *A2d.* 552 (App.Div. 1991) certif. denied 127 *N.J.* 565, 606 *A2d.* 375 (1992), the New Jersey court adapted the principals above and also extended the spoilation doctrine from destruction of evidence to "concealment of evidence".

This Court then set forth the elements for fraudulent concealment which require:

(1) The defendants had a legal obligation to disclose the evidence to plaintiff;

(2) That the evidence was material to plaintiff's case;

(3) That plaintiff could not have readily learned that the concealed information without defendant disclosing it;

(4) That defendant intentionally failed to disclose the evidence to the plaintiff; and

(5) That plaintiff was harmed by the relying on the non-disclosure. At p.123.

This trial court then concluded that as of yet there was no tort for *negligent* spoilation of evidence as an independent court citing ***Nerney v.Garden State Hosp.*** 229 *N.J.Super* 37, 550 *A2d*. 1003 (App.Div.1988) in which the Court said:

"[t]he negligent loss of evidence is comparable to a party's failure to comply with discovery obligations, which may result in an order barring introduction of evidence at trial."

The Court also rejected the defense of the entire controversy doctrine, citing the matrimonial case of ***Brown v. Brown***, 208 *N.J.Super* 372, 506 *A2d.* 29 (App.Div. 1986) (*See* Section 5.3).

The Court awarded the plaintiff compensatory damages of $65,600 to recompense her for interest which she lost because of the delay, and another $7,351.71 of additional expenses which she incurred because of the conduct of the defendant.

In the later non-matrimonial case of ***Hirsh v. General Motors Corp.***, 266 *N.J.Super* 222, 628 *A2d*. 1108 (Law.Div. 1993) a more extensive analysis of the intentional tort of negligence spoilation of evidence was made, recognizing the tort but rejecting the tort of negligent spoilation of evidence.

See **Practice Form #24.**

An attorney's knowledge of spoilation of evidence usually occurs after the case has begun, when the adverse party begins to erect a stone wall around the discovery process. Because of this, an amended complaint should be filed asking to include this new count.

Rules of Court 4:9-1 allows amended or supplemental pleadings either by written consent of your adversary "or by leave of Court which shall be freely granted in the interest of justice." The motion must have a copy of the amended pleading.

Rules of Court 4:9-4 speaks in terms of supplemental pleadings which refers to "transactions or occurrences which took place after the date of the pleading sought to be supplemented."

See **Practice Form #25.**

Tortious interference with a business relationship is also known as unlawful interference with contractual relations. In order to be actionable, a defendant must have unjustifiably interfered with plaintiff's conduct of his business affairs and caused them damages.

In ***Sokolay v. Edlin***, 65 *N.J.Super* 112, 128, 167 *A2d* 211 (App.Div. 1961) a non-matrimonial case, the standard was set and the Court determined that in order to sustain the allegations that defendant maliciously interfered with plaintiff's employment, there must be proof of (1) actual interference by the defendant, and (2) the malicious nature of such interference.

There has not yet been a reported case in New Jersey, either under this Section or the following Section which establishes a separate tort for tortious interference with either a business relation or with a prospective business relationship.

The scenario is not too difficult to imagine. An obstreperous spouse decides to cause all kinds of problems with their mate's ongoing business or with future business arrangement, as a result of which a business falters and fails; and diminishes in value, or an opportunity is lost.

If damages are provable, certainly a claim can be made against the interfering spouse and deduct that loss from their interest in the marital assets subject to equitable distribution.

***See* Practice Form #26.**

As in spoilation, this cause of action may not exist pre divorce complaint and a motion for a supplemental complain may be necessary.

***See* Practice Form #25.**

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Every person has a right to sue their business and be protected against unjustifiable and wrongful interference by another person. The law protects a person's interest in reasonable expectations of economic advantage.

In order to prove this case of action and recover damages, one must prove that:

(1) there was a reasonable expectation of economic advantage or benefit belonging or accruing to the plaintiff;

(2) the defendant had knowledge of such expectancy of economic advantage;

(3) the defendant wrongfully and without justification interfered with plaintiff's expectancy of economic advantage or benefit;

(4) in the absence of the wrongful act of the defendant, it is probable that the plaintiff would have realized an economic advantage or benefit;

(5) the plaintiff sustained damages as a result of it.

Restatement of Torts, 766, (1939) **Model Jury Charges,** Civil, Second Edition, 1992, Section 3.15.

***See* Practice Form #26.**

As in spoilation, this cause of action may not exist pre-divorce complaint and a motion for a supplemental complaint may be necessary.

***See* Practice Form #25.**

NOTES

NOTES

AFFIRMATIVE DOMESTIC TORTS

RESULTING FROM THE MARITAL DISSOLUTION 25

CHAPTER FOUR

Third party actions involve one or more members of the family unit against each other; or by the family unit against a third party. These include actions by children against their parents for negligence, which is not the focal point of this text; actions by a child against a parent or a relative for such things as incest or transmission of sexual diseases; by one spouse against a third party lover, or an aider or abettor of another spouse in deprivation of custody and visitation; and lastly, by the family unit against lawyers, judges, doctors, institutions or others for improper acts.

The extension of liability to third parties is also known as the "search for deep pockets," in which third parties for practical, strategic, evidentiary and monetary reasons are brought into a case.

At one time, no suits were allowed by children against their parents, or somebody who stood in the place of their parents, such as a grandparent. This followed the same rationale for not allowing suits between husband and wife-- such suits would undermine the family relationship and it is more important as a public policy to preserve the family unit than it is to allow these suits. Just as there was a slow eradication of the immunity of the husband and wife arena, because of the availability of insurance and the momentum to recompense the injured, so it is in this area.

Negligence Actions by Children Against Parents or Relatives.

In ***Reingold v. Reingold***, 115 *N.J.L.* 532 (E.& A. 1935) the doctrine of parent-child immunity was first recognized. In that case, a 19-year old unemancipated child was precluded from recovering damages for injuries suffered as a passenger in an automobile owned by her stepmother and negligently driven by her father. The Court therein gave as its main reason the preservation of family tranquility.

The early case of ***Hastings v. Hastings,*** 33 *N.J.* 247, 163 *A2d.* 139 (1960) prohibited an emancipated infant living at home from suing his or her natural parents for injuries arising out of negligence because of the principles of public policy. These were the same issues of public policy that prevented the abrogation of spousal tort immunity. The Courts did not want to undermine the familial relationship, viewing the family as a single legal entity by pitting one member of the family against another. The Courts were also reluctant to do so because of the twin fears of collusive insurance fraud and opening the floodgates of litigation. (*See* Section 1.2).

Also review the cases of ***Heyman v. Gordon***, 40 *N.J.* 52 (1963) and ***Franco v. Davis***, 51 *N.J.* 237 (1968). The doctrine of parental immunity was upheld by a slim 4 to 3 majority, as it was in *Hastings* with the dissenting opinions in all cases offered by Justice Jacobs who noted the erosion of parental immunity in other states, and urged that this state follow the trend.

Courts were not inclined to allow these suits as is evidenced in ***Cwik v. Zylstra***, 58 *N.J.Super* 29, 155 *A2d.* 277 (App.Div. 1959) which was an action brought on behalf of a boy who fell into a pail of scalding water while under the care of his grandparents. The lower court granted dismissal to the defendants upon motion made at the close of the plaintiff's case. This case dealt with pure negligence theories and did not go to any immunity questions.

As in the spousal tort case of ***Long v. Landy***, 35 *N.J.* 44, 171 *A2d.* 1 (1961) where a suit was allowed because it was a widow against her deceased husband's estate for injuries caused by him. (Section 1.2); so the case of ***Palcsey v. Tepper,*** 71 *N.J.Super*, 294, 176 *A2d*. 818 (Law Div. 1962), led to the abrogation of parental immunity and began with an action by a Guardian Ad Litem on behalf of emancipated minors in the suit against their deceased father's estate for automotive injuries. Again the rationale was that since it was an action against the father's estate, rather than the father himself, any interfamily immunity was non-existent.

In ***Wilkins v. Kane***, 74 *N.J.Super* 414, 181 *A2d.* 417 (Law Div. 1962), the trial court permitted a suit by a child against her grandparents for injuries she sustained as a result of an automobile accident, despite the fact that the child was living with the grandmother at the time the accident occurred.

The Court rationalized that in this case, the infant's home has already been broken up, and there was no family unit to preserve. That although the grandparents presently stood in *loco parentis* to the infant, by furnishing him with a home and the necessities of life, such may be discontinued by the grandparents at any time, and thus the Court did not extend the doctrine in ***Hastings*** to this particular case.

For the first time in ***France v. A.P.A. Transp. Corp.***, 56 *N.J.* 500 (1970), the doctrine of parental immunity was partially repudiated. There, the Court held that an unemancipated child could sue his or her parent for injuries that resulted in the parent's negligent operation of a motor vehicle. The Court recognized that the reasons typically given for retaining immunity for parental negligence, the preservation of domestic harmony, the deterrence of fraud and collusion, and the protection of the family exchequer had little remaining validity.

The specific holding in ***France*** was limited to the abolition of parental immunity in claims arising out of parent's negligent operation of a motor vehicle, but the Court nevertheless stated the general view that the immunity "should be abrogated in this state". at p. 506

In that case, *in dictum*, the Court further recognized that "there may be areas involved in the exercise of parental authority in care over a child which should not be justiciable in a court of law." at p. 507.

The Supreme Court in ***Foldi v. Jeffries***, 93 *N.J.* 533, 461 *A2d.* 1145 (1983) abrogated the parental immunity bar to a suit against a parent who has willfully or wantonly failed to

watch over their child, thereby causing the child to be injured, but did not abrogate parental immunity if the parent's supervision was merely negligent.

In this case, a 2-1/2 year old child was being watched by her mother in the front yard of the family residence when the child wandered out of the yard into the neighbor's residence two doors away, and was bitten on the face by a dog. The mother was unaware that her daughter had wandered off, but as soon as she disappeared, she began to search for her and found her 5 or l0 minutes later.

The child began a suit through a guardian ad litem against the owners of the dog, who in turn filed an answer and a third party complaint against the child's mother and father, alleging contributory negligence and seeking indemnification from them for resulting costs and damages. Thereafter, the guardian ad litem on behalf of the child filed an amended complaint adding her mother and father as defendants in her suit.

The Court in considering whether such parental negligence should remain immunized, noted the incongruity for disallowing this cause of action, while permitting a child to sue his parents in property or contract, ***In re Flasch***, 51 *N.J.Super* 1 (App.Div.) certif. den. 28 *N.J.* 35 (1958), and to bring tort actions in cases where the parent had subsequently died, citing ***Palcsey***, *supra*; or where the child had become emancipated, ***Weinberg v. Underwood***, 101 *N.J.Super* 448 (Law Div.1968) or where parents had acted in *loco parentis*. *See* ***Wilkins***, *infra*.

"(1) What acts or omissions by the parent could reasonably be found to be the proximate cause of the child's injuries;

(2) Whether the parent's conduct involves the exercise of parental authority or the provision of customary child care;

(3) Whether a parent;s conduct amounts to a lack of parental supervision; and

(4) Whether a fact-finder reasonably could find that the parent's conduct was willful or wanton.

In making the determination of non liability, the Court distinguished this case from the "garden variety negligence", and decided that the mother exercised her parental discretion concerning how best to care for the child, and that the decision of whether or how to have a child treated for emotional problems is a question of parental philosophy, which must be free from judicial intrusion.

The Court noted that the decision to continue driving upon hindsight might have been incorrect, but the Court emphasized that it should not substitute its own parenting philosophy for the parent's philosophy.

The trial judge found further that the mother's failure to insure that the child wore a seat belt, contrary to The Passenger Automobile Seat Belt Usage Act, *N.J.S.A.* 39:3-76(2)(e) *et seq*. did not apply to find the parent negligent.

The only New Jersey case involving an action for incest by a child against her parent is the case of ***Jones v. Jones***, 242 *N.J.Super* 195, 576 *A2d.* 316 (App.Div. 1990). This case was brought by a woman on behalf of herself and her minor child against her parents for sexual abuse over a protracted period of time. She alleged that her father's incestuous relationship with her produced a daughter who was then 14 years of age.

The plaintiff sued her father for sexual abuse and her mother for connivance, meaning that she knew or should have known what was going on and did nothing to stop it, and sued for compensatory and punitive damages. The plaintiff also sued her father for support for the child which resulted from the incestuous relationship.

The underlying issue was never decided by the Court since the case really revolved around whether the tolling of the Statute of Limitations had occurred because of the lateness of the action by the plaintiff (Section 5.4), and whether her "insanity" brought by years of duress, deprived her of her free will to bring the action which would then be tolled. ***N.J.S.A.***2A:14-21 which tolls the Statute of Limitations for infants and people not of a sane mind. (Appendix G).

In the context of the case, you can read the sympathy of the Court with her plight and the footnotes indicate the existence of a cause of action for a "diminished childhood" and damages for an "impaired childhood" or what the Court called "wrongful life". As stated previously, the Court did not pass upon the validity

M. and wife v. Schmid Laboratories, Inc., 178 *N.J.Super* 122 (App.Div. 1981). A husband and wife brought a negligence and products liability action against the manufacturer of a contraceptive device (condom) marketed under the trade name of "Fourex Natural Skin" alleging that it was defective and caused the wife to become pregnant and give birth to normal, healthy twin daughters. The retailer, in addition to denying liability, filed a counterclaim against the husband, alleging negligence in his use of the condom and demanded contribution from him. The husband filed a motion for summary judgment to dismiss the counterclaim on the theory of interspousal immunity. The manufacturer moved for summary judgment limiting the parents' claims in damages to alleged "wrongful birth", and excluding all damages for wrongful life.

This case illustrates the fact that if in a matrimonial action you are going to include a tort action, then all the defenses of a tort action also come to play, including comparative negligence. The plaintiff husband sought to counter the defense and argued that since he was having intercourse with his wife in the privacy of his bedroom when the product defect caused the impregnation, his actions are cloaked with interspousal immunity and cannot be the basis of a claim for contribution based upon his alleged negligence.

Thus, although the action that he was suing from resulted from a private marital act, for which he sought compensation, he tried to use that same marital act as a defense against comparative negligence.

The Court stated:

"it is clear plaintiffs have lifted the veil of secrecy here and placed squarely in issue all the facts surrounding their use or misuse of the alleged defective product...In a products liability action, the details concerning the use or misuse of the product are both relevant and material and may constitute a defense to a claim for damages resulting from harm caused by a defective product." (citations omitted)

The Court then explored the claim for compensatory damages resulting from the birth of healthy children. The plaintiffs contended that these damages included the cost of rearing and educating the children. The plaintiffs acknowledged that their children were normal and healthy and admit that the pregnancy and delivery were normal and did not allege any accompanying mental anguish.

The Court cited the case of ***Berman v. Allan***, 80 *N.J.* 421, 404 *A2d*. 8 (1979), a medical malpractice action in which the Court rejected the costs to "properly raise, educate and supervise" a child because "such an award would be wholly disproportionate to the culpability involved, and that allowance of such a recovery would both constitute a windfall to the parents and place too unreasonable a financial burden upon physicians." at p. 431, 432.

The cases cited below are not all inclusive of all medical malpractice cases, but are a sampling of those matters which are most intimately connected with other causes of action mentioned in this book, and stand on their own and may be used as a comparison to those cases.

Berman v. Allan, 80 *N.J.* 421, 404 *A2d*. 8 (1979) A medical malpractice action in which the parents of a child afflicted with Down Syndrome sought damages from a doctor for the "wrongful birth" of a child to include the costs to "properly raise, educate and supervise" the child. The Court rejected this claim for the reason that "such an award would be wholly disproportionate to the culpability involved, and that allowance of such a recovery would both constitute a windfall to the parents and place too unreasonably a financial burden upon the physicians." at pp. 431, 432.

In that case, plaintiffs claim that as a result of defendant's malpractice, they were deprived of the right to abort the fetus. It was there held that recoverable damages include compensation for mental and emotional anguish resulting from the birth of the afflicted child, but not to those attributable to wrongful life.

Hume v. Bayer, 178 *N.J.Super* 310, 428 *A2d.* 966 (Law Div. 1980). For the first time the Court allowed recovery for the intentional infliction of emotional distress alone, without an additional underlying tort. Until then, usually there had to be some kind of a physical injury which had to accompany distress. In this case, parents were falsely told that their child had cancerous tissue. When it was excised and found to be non-cancerous, they were able to collect on the emotional distress theory.

P. v. Portadin, 179 *N.J.Super* 465 (App.Div. 1981). This was a suit against a doctor for emotional distress and medical malpractice action for negligent performance of an unauthorized sterilization which resulted in the birth of a normal child. The Court following ***Berman***, *supra*, prohibited any claims for medical expenses for future child rearing expenses, but allowed damages for emotional distress.

Giordina v. Bennett, 111 *N.J.* 412, 545 *A2d*. 139 (1988). This case recognized a parental claim for emotional distress arising out of the stillbirth of a baby, wherein the Court concluded that "the experience of pregnancy and childbirth itself constitutes the immediacy and presence of the claimant in the face of the inflicted personal injury or death of a loved one who was stressed in ***Portee***." at p.419-20. The Court also concluded that the "circumstances assured the genuineness of a resulting emotional injury and mental anguish, and thus they characterize the parents' medical malpractice claim as "direct" rather than as bystander, which holds it to higher care.

In all of these cases, Courts are concerned with balancing the emotional distress injuries which they refer to as "psychic injury" with "speculative result" for punitive liability. The Courts have been most reluctant in extending the liability for emotional distress except in most severe circumstances.

Frame v. Kothari, 115 *N.J.* 638, 560 *A2d.* 675 (1989). In this case, a 10 month old child fell down a 13 step stairway in his home and was taken by his parents to a doctor who misdiagnosed his condition as a virus. Later X-rays revealed a blood clot at the rear of the skull and the child died.

The basis for the emotional distress claim against the doctor was the parties' claim that the shock of discovering their son in a moribund condition after 4 hours caused the wife to become severely depressed and to suffer from nightmares and insomnia. She consulted a psychiatrist who diagnosed her condition as "a chronic post-traumatic stress disorder".

The Court after examining the history of negligent infliction of mental distress in the State of New Jersey, as well as similar cases across the country as to misdiagnosis stated:

"Although variously expressed, the common thread running through these cases is that a misdiagnosis normally does not create the horrifying scene that is a prerequisite for recovery. Rarely will a member of the patient's family contemporaneously observe the immediate consequences of the defendant's misdiagnosis, and even more rarely will the result of the misdiagnosis be the injury or death of a loved one contemplated by the gruesome scene portrayed in *Portee*."

The court noted that occasionally a case will present such aggravated facts justifying recovery, because of the specific chain of events In this case, the chain of circumstances, although deeply tragic, were not "shocking".

The Court conceded that the evaluation of a family member's claim for emotional distress involves drawing lines, and that whenever a Court draws lines, it risks the criticism of arbitrariness.

Again the Court established a higher standard needed for proving emotional distress in this case so as to protect the practice of medicine.

"Drawing lines, however, is the business of the Courts, and lines must be drawn to provide remedies for wrongs without exposing wrongdoers to unlimited liability. Our task is to draw the boundary of a claim that permits recovery for the added stress caused by medical misdiagnosis without unreasonably burdening the practice of medicine." at 649.

The concurring opinion by Justices Wilentz and Garibaldi echoed the concern for the risk of liability to the medical profession, and their prejudice against expanding the common law remedy for death or serious injury caused by the medical malpractice to include consequent emotional distress of family members. They stated that they would wait given the guidelines set forth in this case until "an appropriate case" came along.

They stated:

"We suspect that the cost to society of expanding medical malpractice liability to allow a family member to recover for his or her emotional distress as a result of a physician's improper diagnosis will outweigh the benefits to society. Possible costs to society include the increasing number of physicians who refuse to practice in certain fields, the cost in all fields, of an increase in 'defensive medicine,' and the increasing costs of medical treatment itself. The loss is for failure to compensate for the suffering of a family member arising from the death or serious injury of a loved one caused by medical malpractice. We do not believe that the majority achieves any additional deterrents given the present state of medical malpractice liability." at pp. 651-652.

They concluded by saying that society would not be served by allowing this type of recovery, and acknowledged that the trend of prior decisions in the area of bystander emotional distress has been to expand liability, but cautioned against following the trend towards expansion. The deterrence of fraud and collusion, and the protection of the family had little remaining validity. Referring to spousal tort immunity they noted that the widespread use of liability insurance had virtually nullified the threat that parent-child tort action would result in dissolution of the family and the ruination of family finances. The Court also reaffirmed its confidence in the judicial system that could expose most, if not all, collusive suits brought against insurance carriers by injured children and their parents.

The Court would not abrogate all parental immunity because they saw that there were valid reasons that justified the survival of limited immunity from matters concerning the "exercise of parental authority and adequacy of child care." They said specifically:

"There are certain areas of activities within the family sphere involving parental discipline, care, and control that should and must remain free from judicial intrusion. Parents should be free to determine how the physical, moral, emotional, and intellectual growth of the children can best be promoted. That is both their duty and their privilege. Indeed, every parent has a unique philosophy of the rearing of children. That philosophy is an outgrowth of the parent's own economic, educational, cultural, ethical, and religious background, all of which affect the parent's judgment on how his or her children should be prepared for the responsibilities of adulthood. Such philosophical considerations come directly to the fore in matters of parental supervision.

There is no recognized correct theory on how much freedom a parent should allow his or her children. Some parents believe that a child must be made self-reliant at an early age and accordingly give the children a great deal of independence. To outsiders, such independence may look like indifference or neglect. On the other hand, some parents believe that their children must be vigilantly monitored from infancy through adolescence. To outsiders, such vigilance and concern may appear to shelter the children from the world and to thwart their development.

As each parent is different, so is each child. There is no one ideal `formula' for how much supervision a child should receive at given age. What may be perfectly safe to entrust to one 5 year-old may be utterly dangerous in the hands of another child of the same age. This disparity often proves true even among siblings in the same household. The parent is clearly in the best position to know the limitations and capabilities of his or her own children. These intangibles cannot be adequately conveyed with the formal atmosphere of a courtroom. Nor do we believe that a court or jury can evaluate these highly subjective factors without somehow supplanting the parent's own individual philosophy.

These reasons justify the retention, to a certain extent, of the doctrine of parental immunity in the areas involving the exercise of parental authority or the provision of customary child care. Because there are so many various situations involving these matters, we do not here determine what, if any, further refinements upon the doctrine may be required in each of these unique situations. We commend that undertaking to our lower courts to determine on a case-by-case basis."

In this case, they determined that a parent's simple negligence in supervision is not actionable while a parent's willful or wanton misconduct is.

The Court further stated:

"We think that this holding represents a reasonable compromise between two legitimate aims: a parent's right to raise, free of judicial interference, his or her child as he or she deems best, and a child's right to receive redress for wrongs done to him or her."

The Court also noted that in assessing liability, the lower courts must also include the comparative fault of parents along with the faults of any third-party joint tortfeasors.

The Court also recognized that New Jersey courts have long made a distinction between willful or wanton conduct on the one hand, and mere negligence on the other, noting that wanton and willful misconduct does not require an establishment of a positive intent to injure, but the defendant must have a knowledge of the existing conditions and know or should have known that injury will likely result from either their conduct, their reckless indifference to the consequences, or by doing some wrongful act or omitting to do some act or some duty which produces an injurious result. This is judged by the reasonable man standard. Meaning, what would a reasonable man understand these conditions to be.

In the ***Foldi*** case, the Court determined that the mother's actions were mere negligence and thus not actionable.

The Court set forth the factors that were necessary in order to recover "bystander emotional distress damages".--

(1) A family member must witness the malpractice;

(2) They must observe the effects of the malpractice on the patient;

(3) Immediately connect the malpractice with the injury;

(4) Suffer severe emotional distress.

Carey v. Lovett, 132 *N.J.* 44, 622 *A2d.* 1279 (1993) This was an action by parents against a physician who mistakenly advised them that the fetus that the wife was carrying was dead. The baby in fact, was born alive, but in a vegetative state and was allowed to die.

The issue was whether the parents, without attempting to prove any physical injury to themselves, may recover for emotional distress caused by medical malpractice resulting in the premature birth and death of their baby.

Here the Court extended the doctrine in ***Frame*** as far as the mother was concerned, stating that mother and the fetus are so interconnected that the stress upon one must result upon the stress upon the other. Thus the court did not hold the mother to the same bystander emotional distress requirements as in ***Frame***, although they did hold the same standard for the father. In addition the court stressed that one of the requirements would be that "the injury to the victim should be `shocking' in the sense that the father did not have time to prepare for the injury." at p.61. The Court stated at p.62:

"In sum, to prove a claim for emotional distress arising out of the injury or death of a fetus, the mother must prove that she suffered emotional distress so severe that it resulted in physical manifestations or that it destroyed her basic emotional security. The father's emotional distress must be equally severe. The worry and stress that attend the birth of

every child will suffice. Nor will the upset that every parent feels when something goes wrong in the delivery room. In addition, the father must contemporaneously observe the malpractice and its effects on the victim. He must also be shocked by the results."

The Court found that the charge to the jury on the law was erroneous and remanded the case to the law division for trial on both liability and damages.

As to the claim for the baby's pain and suffering during her 10 day life, the court believed that a $550,000 amount was excessive.

The Court reached the same conclusion as to the $450,000 verdict for the baby's wrongful death, because such damages should be limited to economic matters as for example the pecuniary value of the child's help with household chores, the child's anticipated financial contribution, and the child's companionship including his or her advice and guidance.

Gendek v. Poblete, 269 ***N.J.Super,*** 599, 636 ***A2d.*** 113 (1994). In this case, an infant who appeared to be healthy when born, died as a result of malpractice. The parents sued for negligent infliction of emotional distress resulting from the malpractice. The court, distinguishing this case from *Carey, supra,* stated that the plaintiffs' claim for emotional distress arising from the son's death was not based upon negligence or malpractice directed to the mother during her pregnancy or the childbirth, but for emotional distress caused by malpractice on their infant who was born alive without complications.

The court applying the *Portee, supra* in a context of medical malpractice, and further using the logic of *Frame v. Kothari, supra,* the court rejected the claims of the parents for indirect infliction of emotional distress because of the malpractice and the results of the malpractice, did not manifest themselves immediately and may not be immediately shocking. The court stated that

"apparently not appreciating the impact of an act of malpractice or sufficiently connect the child's deterioration with the malpractice. In such a situation, a parent's distress may be as readily attributed to the grief over the loss of the child as to watching the child die and knowing that a doctor failed to diagnose the cause of death."

Therefore, adopting the logic of the *Frame* court, this court held that there must be an immediate, close, and clear involvement or connection with a person suffering emotional distress and the conduct of the health-care provider whose fault contributed to the grave or fatal injuries of the related loved one. The requisite high degree of involvement in connection with the act was absent in this case and there was nothing in the record that indicated that the plaintiffs' grief was especially augmented or that their emotional injury was uniquely exacerbated or intensified by the simultaneous awareness that their son's fatal condition was caused by the malpractice occurring in their presence."

See Practice Form #30.

4.6. Negligence: Attorney Malpractice.

There are many potential malpractice pitfalls for attorneys in tort cases. An attorney, as the primary professional, is the one who recommends the cause of action and the other professionals to be hired. If, in fact, there is an attorney/client relationship, that attorney owes a duty to the client to do the best job possible, and if one makes a mistake and the counsel's conduct is the proximate cause of the client's damages, the attorney will be liable.

Attorneys recommend accountants, mental health professionals, therapists and others in order to aid in the prosecution of the matrimonial case. If these people make a mistake, then the attorney also may be liable. While these professionals have malpractice insurance, your client, looking for "deep pockets," may use what the negligence attorneys call the "shotgun approach", shooting at as wide a target as possible and naming every potential defendant.

"An action for malicious abuse of process is distinguished from an action for malicious use of process in that the action for abuse of process lies for the improper, unwarranted and perverted use of process after it has been issued while that for the malicious use of it lies for causing process to issue maliciously and without reasonable or probable cause. (citations omitted).

Thus it is said, in substance, that the distinction between malicious use and malicious abuse of process is that the malicious use is the employment of process for its ostensible purpose, although without reasonable or probable cause, whereas the malicious abuse is the employment of a process in a matter not contemplated by law."

The ***Asch*** court went on to say:

"Courts do not favor actions for malicious use of process because of judicial indulgence accorded a person who resorts to court process for its intended purpose even though he did not have probable cause to do so. Because it is so often difficult to distinguish between a plaintiff who is naive and a plaintiff who is a knave, courts protect both indiscriminately by requiring a plaintiff bringing an action for malicious use of process to prove not only that the defendant brought the underlying action without probable cause, but also that it was actuated by malice, has been terminated favorably to the plaintiff, and that the plaintiff suffered a special grievance." ***The Penwag Property Co., Inc. v. Landau***, 148 *N.J.Super* 493, 500 (App.Div.1977)aff'd. 76 *N.J.* 595 (1978), at p.549.

The Court went on to state:

"To preserve the distinction between the two torts, we have emphasized the process has not been abused unless after its issuance the defendant reveals an ulterior motive he had in securing it by committing 'further acts' whereby he demonstrably uses the process as a

means to coerce or oppress a plaintiff." ***Gambocz v. Apel, et al***, 102 *N.J.Super* 123, 130-131 (App.Div. 1968), certif.den. 52 *N.J.*485 (1968).

The Appellate Court in reversing the trial court's granting of the dismissal on a motion for summary judgment, wanted a further explanation of whether there is a genuine issue as to whether the defendant attorney's "further acts" were maliciously intended as abuse of process. To do this, the plaintiff had to demonstrate that defendant had secured issuance of the process without reasonable or probable cause as evidence that his ultimate intent was to use it for the purpose ulterior to the one for which it was designed.

The Court warned "that the duty to represent a client does not shield an attorney from the consequences of offering evidence that he knows to be false". R.P.C.3.3(a)(4)

In *Ruberton v. Gabage*, 280 *N.J.Super* 125, 654 *A2d.* 1002 (App. Div. 1995) A claim against a defense attorney's threat against the plaintiff at a settlement conference to bring criminal charges against him, did not constitute malicious abuse of process since no "process" had been issued and that the so-called "threats" are protected by absolute immunity for judicial proceedings.

Under the New Jersey law, abuse of process concerns an "improper, unwarranted and perverted use of process" after process has been issued. There can be no abuse of process unless the defendant reveals, that after process is issued, that an ulterior purpose was conceived by committing additional acts that used the process to coerce or oppress him. There can be no claim of abuse without a "coercive or illegitimate use" of the process. New jersey law construes "process" narrowly to encompass the procedural devises used by courts to acquire or exercise jurisdiction over persons or property, including a summons, a mandate, a writ to compel appearance or compliance with orders, or a writ to compel appearance or compliance with orders, or a writ of execution. Since no process in fact was issued, there could therefore be no abuse of process. Nor were there any additional acts that showed an intent to use the process. Nor were there any additional acts that showed an intent to use the process in order to coerce the plaintiff.

The appellate division also concluded that the attorney's "threats" were protected by the absolute privilege that applies to judicial proceedings, even though the "threats" were tortious. The court stated that an absolute privilege and a complete immunity from liability to statements made in the course of judicial, administrative, or legislative proceedings. The privilege is based on the need for "unfettered expression" that is essential for advancing the government interest in these settings. The privilege applies to attorneys, and it extends to all statements and communications made in connection **at the** judicial proceeding. The "threats" made during the settlement conference were "unquestionably" made in the course of a judicial proceeding. In addition, the court found that attorneys must be free to advance their clients' cases candidly, objectively, and without fear that they may be subjected to tort actions.

In ***Aykan v. Goldzweig***, 238 *N.J.Super* 389, 569 *A2d.* 905 (Law Div. 1989) a client brought a malpractice action against her former divorce attorney for that attorney's failure

to select the most beneficial, allowable date for valuing an asset, and for failing to institute a separate tort complaint against the husband.

The defendant wife filed a counterclaim against her husband in the divorce action for extreme cruelty which included batteries. No separate tort claim was filed for these.

The Court dismissed the attorney's liability for incorrectly drafting the separation agreement and choosing the wrong date for equitable distribution, but allowed the claim for failure to plead a marital tort to continue.

The defendant did not even know she had a cause of action for a tort until she went to another attorney, James Yudes, Esq. who suggested to her the possibility that defendant may have committed malpractice in both choosing the date of separation as the effective date for equitable distribution and in not filing a tort claim for battery.

The Court stated that in professional negligence cases, where there is a continuing course of negligent treatment, the Statute of Limitations does not begin to run until treatment is terminated, unless the plaintiff earlier discovers such injury or fraudulent concealment is involved. This "negligent treatment" did not begin until the wife discovered that she did have a cause of action.

There are two basic elements in order to sustain the cause of action for abuse of process. They are:

(1) That the defendant made an improper, illegal and perverted use of the legal procedure that was neither warranted nor authorized by law.

(2) That the defendant had an ulterior motive in initiating the legal process such as to intimidate, harass and coerce the plaintiff for some kind of ulterior motive. ***Prosser on Torts,*** Chapter 22, Section 121 at 856-857 (4th ed. 1971).

False imprisonment also known as false arrest is the unlawful detention of an individual. "Detention" means the restraint of a person's personal liberty or freedom of movement and the word "unlawful" means without legal authority or justification. ***Restatement (Second) of Torts***, Section 42.

The unlawful detention can be of the briefest period of time but must be against the plaintiff's will.

For this tort to be actionable, the defendant in causing the false imprisonment or arrest must have done so intentionally. Malice need not be shown.

Obviously, the false imprisonment and arrest tort does not take place if the plaintiff is in violation of some valid order and the defendant was simply exercising his or her legal rights.

Detention itself need not be forcible, but threats of force either by the conduct of the party or words coupled with the apparent ability to carry out such threats are sufficient.

Jorgensen v. Penn R.R. 38 *N.J.Super* 317 (App.Div.1955) reversed on other grounds, 25 *N.J.* 541 (1958), 1 *Harper & James*, The Law of Torts (3rd. ed.) at 227; ***Prosser on Torts***, (3rd.ed.) at 57.

Punitive damages can also be awarded if there is a belief that the defendant's action resulting in the plaintiff's arrest was maliciously motivated. ***Price v. Phillips***, 90 *N.J.Super* 480, (App.Div. 1966); ***Barber v. Hohl***, 40 *N.J.Super* 526 (App.Div. 1956).

Lack of malice goes to the mitigation of damages. ***Prosser on Torts***, (3rd. ed.) at 61.

Jorgensen v. Penn R.R., 38 *N.J.Super* 317 (App.Div. 1955) reversed on other grounds, 25 *N.J.* 541 (1958).

1 *Harper & James*, The Law of Torts, (3rd ed.) at 227; ***Prosser on Torts***, (3rd ed.) at 57.

The damages arising from false imprisonment must arise as a proximate cause of plaintiff's injuries. Compensatory damages can be awarded for loss of time, any physical injuries or mental and emotional stress resulting from the indignity to which the party was subjected.

Punitive damages can also be awarded if there is a belief that the defendant's action resulting in the plaintiff's arrest was maliciously motivated. ***Price v. Phillips***, 90 *N.J.Super* 480, (App.Div. 1966), ***Barber v. Hohl***, 40 *N.J.Super* 526 (App.Div. 1956).

See **Practice Form #17.**

Tedards v. Audy, 232 *N.J.Super* 541, 557 *A2d.* 1030 (App.Div. 1989). A husband brought an action against his former wife's attorney for the improper use of a Writ of Ne Exeat. The Court stated that the purpose of the Writ of Ne Exeat is to compel a defendant's physical presence in court. After his arrest, the party may be released upon posting bail in the amount calculated to insure his presence.

In this case, it was shown that the husband posed no real threat to abscond and it appeared that the wife was using the Writ only as a means of coercing payment of a debt. The Appellate Court reversed the trial court's summary judgment in favor of defendant-attorney even though it felt that the husband's conduct was reprehensible in not paying the debt.

See ***Tedards v. Audy***, *supra*, and statements in the beginning of Section 4.5 above.

In ***Magierowski v. Buckley***, 39 *N.J.Super* 534, 121 *A2d*. 749 (App.Div. 1956), a father's action for criminal seduction, or loss of services of a daughter as a housekeeper, because of her impregnation by another, was denied because of the Heart Balm Act.

This represented a change from the view that had been held over the last 100 years.

A claim of tortious interference with custody as the basis of liability is primarily found in the ***Restatement of Torts (Second)*** 700, (1976) which provides for liability when a non-custodial parent deliberately takes the child away from the custodial parent or induces the child to leave home.

A tort of custodial interference requires two elements:

(1) An intentional interference with, and

(2) A parent's right to custody of the child.

Tortious interference with custodial relations and visitation has grown in recent years along with the growth of the father's rights movement. No long sitting back, and now proclaiming "I'm not going to take it any more," there has been an increasing amount of actions in State and Federal courts in which the deprived spouse, usually the father, seeks to get redress for the deprivation of custody or visitation rights.

The basis of liability is in ***Restatement (second). Torts***, Sec. 700 (1976) which provides for liability when the non-custodial parent deliberately takes the child away from the custodial parent or induces the child to leave home.

This tort is equally applicable against third parties who aid in the abduction and disappearance of the child, such as a grandparent, or private detective agency.

Action can be taken either at the state level, or if the child is taken from the jurisdiction, in the federal courts under the Parental Kidnapping Prevention Act of 1980 (P.K.P.A.), 28 *U.S.C.* Sec. 1331. (*See* Appendix D).

The tort of child abduction goes back to the early English case of ***Hall v. Hollander***, 4 *B&C* 660, 661-662, 107 *Eng.Rep* 1206, 1206-7 (1825) where early English authorities permitted a parent to recover in tort for the abduction of a child if the parent suffered sufficient "loss of services".

In those days, children were viewed as a financial asset, someone who could earn money for the family and contribute to the family's.

New Jersey adopted this view in ***Magee v. Holland***, 27 *N.J.L.* 86, 96 (1858). In that case, the Court held that:

"One who, with knowledge that the parent does not consent, abducts or otherwise compels or induces a minor child to leave a parent legally entitled to its custody or not to return to the parent after it has been left him, is subject to liability to the parent."

In ***Magierowski v. Buckley***, 39 *N.J.Super* 534, 121 *A2d*. 749 (App.Div. 1956) the Court's view changed after l00 years. In that matter, a father's action for criminal seduction, or loss of services of a daughter as a housekeeper, because of her impregnation by another, was denied because of the Heart Balm Act.

N.J.S.A.2C:13-4 makes it a felony to unlawfully take, entice, keep or detain a child under the age of 18 from their legal guardian. New Jersey has passed a statute specifically dealing with interference with custody. This statute provides that a person commits a crime if he or she knowingly takes or entices a child under the age of 18 from the custody of the parent, guardian or other lawful custodian of the child, when the person has no permission to do so, or when he does so in violation of a court order. (*See* Appendix E).

Not only does the bill provide for those people who have received custody rights pursuant to court order, but parental kidnappings and third party interference with visitation or custody.

The problem with this rule is the reluctance of the county prosecutors to enforce and prosecute this bill. They would rather have a complainant seek civil remedies using the family court system. Prosecutors generally believe that they are being used as a non-essential tool to get the child back.

DiRuggiero v. Rogers, 743 *F2d.* 1009 (3rd Cir. 1984) This was a federal action by a father against a mother and other third parties including the mother's current husband and three State Court Judges under the Parental Kidnapping Prevention Act for interference with his custody rights.

The Court did not allow the domestic relations exception to the Federal (*See* Section 5.20) jurisdiction and allowed the suit to continue.

See **Practice Forms #21 and 22.**

Hume v. Bayer, 178 *N.J.Super* 310 (Law Div. 1980). Intentional infliction of emotional distress alone, without additional underlying tort, was allowed when the parents were falsely told that the child has cancer.

Giordina v. Bennett, 111 *N.J.* 412, 545 *A2d*. 139 (1988). This case recognized a parental claim for emotional distress arising out of the stillbirth of a baby, wherein the Court concluded that "the experience of pregnancy and childbirth itself constitutes the immediacy and presence of the claimant in the face of the inflicted personal injury or death of a loved one who was stressed in ***Portee***." at p.419-420. The Court also

concluded that the "circumstances assured the genuineness of a resulting emotional injury and mental anguish, and thus they characterize the parents' medical malpractice claim as "direct" rather than as bystander, which holds it to higher care.

In all of these cases, the Courts are concerned with balancing the emotional distress injuries which they refer to as "psychic injury" with "speculative result" for punitive liability.

The Courts have been most reluctant in extending the liability for emotional distress except in most severe circumstances.

Voorhees v. Preferred Mut. Ins. Co., 128 *N.J.* 165, 607 *A2d.* 1255 (1992), the plaintiff, a teacher, sued a child's parent for remarks that she made questioning her competency and fitness at an open school board meeting in which the defendant asked that her child be removed from the teacher's class. The teacher was relieved by the school board of her teaching duties pending the results of a psychiatric examination and local newspapers published stories regarding the incident.

The local paper published a quote by the defendant, who was speaking for the parents of some of the school children as indicated that she was glad that the board of education had finally "done something". The article went on to quote the defendant as stating "we have been warning them since September that there were serious problems which should be investigated. I'm just sorry it took an incident like the one on December 10th to convince them."

The teacher was relieved by the school board of her teaching duties pending the results of her psychiatric examination and then later reinstated to special assignment.

The teacher sued Voorhees, the local board of education, the superintendent of schools, the school principal, the local newspapers, and one other parent seeking compensation for the injuries she suffered due to their behavior.

Voorhees alleged that the parent's accusations and the school system's response caused her extreme emotional distress, which manifested itself in an "undue amount of physical complaints" including "headaches, stomach pains, nausea... and body pains..."

It is most interesting to note that the underlying claim settled for $750 but Voorhees spent more than $14,000 defending the suit.

This was an action for the breach of contract against the insurance company and originally came before the Court on cross motions for summary judgment. The trial court granted Preferred Mutual's motion for summary judgment based upon the fact that the alleged defamation was a cause of action not covered under the bodily-injury policy.

The Appellate Division reversed at 246 *N.J.Super* 564, 569, 588 *A2d*. 417 (1991). A split court decided that there was a possibility that the cause of action of outrage and the

negligent infliction of emotional distress might be causes of action that were covered under the phrase "bodily injury".

Because of the division in the court, the Supreme Court heard the case and framed the appeal as "whether a homeowner's insurance policy providing coverage for bodily injuries caused by the insured will cover liability for emotional distress accompanied by physical manifestations." The Court held that it would, and that the event causing the distress will be deemed an accidental occurrence entitling the insured to coverage where the insured's actions, although intentional, were not intentionally injurious.

The Court stated that the insurance company had a duty to defend if the complaint states a claim that it insured against, even if the actual claim is without merit. Even if the claim is a specious one, one whose cause is groundless, false or fraudulent, the insurance company's initial duty is to defend.

The Court then determined that the complaint did allege intentional and negligent infliction of emotional distress, no matter how badly drafted. It then decided that this allegation is covered under the bodily injury policy broadly interpreting "bodily injury" to include emotional distress which resulted in physical consequences, stating that the term was ambiguous and it can and often does have direct effect on other bodily functions; and an insured who is sued on account of injury involving physical symptoms could reasonably expect an insurance policy for liability for bodily injuries to provide coverage. It did not rule on what would have happened if it was purely emotional distress without any physical consequences, and saved that decision for another day.

Because there was an ambiguity they resolved it in favor of the insured.

Voorhees provides an excellent summary of the law regarding intentional actions that have led to unintentional injuries under New Jersey law when it stated at page 183:

"...The accidental nature of an occurrence is determined by analyzing whether the alleged wrongdoer intended or expected to cause an injury. If not, then the resulting injury is 'accidental,' even if the act that caused the injury was intentional. That interpretation prevents those who intentionally cause harm from unjustly benefitting from the insurance coverage while providing injured victims with the greatest chance of compensation consistent with the need to deter wrong-doing. It also accords with an insured's objectively-reasonable expectation of coverage for intentionally-caused harm."

In determining that Preferred Mutual had to the duty to defend Voorhees, the Court stated at page 185,

"Although Voorhees' statements were unquestionably intentional, there is little evidence that she intended or expected to injure the school teacher. Our impression is that she was motivated by concern for her child rather than by a desire to injure the teacher. Regardless of our impressions, the complaint itself included an allegation of negligent infliction of emotional distress. An allegation of negligence presumes the absence of an

intent to injure. Preferred Mutual thus had the duty to defend until the negligence claim has been dismissed....

'Moreover, the duty to defend also may have been triggered by the claim for intentional infliction of emotional distress, known as 'outrage' in New Jersey. Although 'outrage' is considered an intentional tort, it is recognized not only where conduct is intentional but also where it is 'reckless'....A 'reckless' act under tort law does not meet the subjective intent-to-injury requirement under insurance law. Therefore, under both the 'negligent infliction of emotional distress' and the 'outrage' allegations, Preferred Mutual had a duty to defend unless and until a subjective intent to injure had been demonstrated."

Recently the Supreme Court in ***Dunphy v. Gregor*** 136 N.J. 99, 642 A2d 372 (1994), expanded the definition of a family so that unmarried people can recover damages for negligent infliction of emotional distress.

The Court referred to the earlier case of ***Portee v. Jaffee***, cited earlier, and referred to the four-pronged test that established the elements for negligent emotional distress.

The Supreme Court said rather than looking at the "bright-line" distinction between married and unmarried people, the Court must apply the principles of tort law to determine whether a claimant is owed a "duty of care", and extended the case to unmarried people.

In the case, Eileen M. Dunphy sued Gregor, who was driving the vehicle that struck her fiance, Michael T. Burwell, as he changed a tire on the shoulder of Interstate 80 in Mt. Arlington. Dunphy and Burwell lived together, and she witnessed him being struck by the car and propelled 240 feet down the highway. Burwell died the next day, and since then Dunphy has undergone psychiatric and psychological treatment for depression and anxiety.

The Supreme Court established the standard to evaluate the relationship between the two people when determining bystander liability. Applying the standard of an "intimate familial relationship" to an unmarried cohabitant should be afforded the protection of bystander liability. The standards include the duration of the relationship, degree of mutual independence, extent of common contributions to a life together, extent of the quality of shared experiences, whether the parties were members of the same household, and emotionally reliant on each other.

See discussion under 2.8 and 2.9 *supra*.

Portee v. Jaffee, 84 *N.J.* 88, 417 *A2d*. 521 (1980). A mother claimed emotional distress arising out of her observations of the suffering and death of a child who was mortally injured in an elevator accident due to defendant's negligence. The Court set up four elements for such claim:

(1) The death or serious physical injury of another caused by defendant's negligence;

(2) A marital or intimate familiar relationship between the plaintiff and the injured person;

(3) Observation of the death or injury at the scene of the accident; and

(4) Resulting severe emotional distress.

Buckley v. Trenton Savings Fund, Inc. 111 *N.J.* 355 (1988).

In this case, the Supreme Court decided that a customer may not recover against a bank for mental anguish and punitive damages because of the bank's wrongful dishonor of the customer's check which was made payable to a third party.

At the trial in the Law Division, the plaintiff was awarded $25,000 for mental anguish to a jury. The Court dismissed his claim for punitive damages. The Appellate Division affirmed the dismissal for punitive damages claim and reversed and remanded the claim for mental anguish.

The Supreme Court after going through a history of the reluctant acceptance of emotional distress as a separate tort, stated that they were reluctant to allow compensation for intentional infliction of emotional distress when a bank wrongfully dishonored a check unless the bank's conduct is intentional as well as reckless or outrageous, and the distress is severe or results in bodily injury.

They then examined the threshold question of whether the distress caused to the plaintiff was severe or resulted in bodily injury. Because his complaints amounted to nothing more than aggravation, embarrassment, an unspecified number of headaches and loss of sleep, they decided that as a matter of law, that the mental distress was not beyond what a reasonable man could be expected to endure; and that the plaintiff had not proved the emotional distress sufficiently severe to justify submission of the case to the jury. They stated that the trial court should have granted the bank's motion to dismiss at the conclusion of the evidence.

Thus, because of policy considerations, and striking a balance between a bank which does tens of thousands of transactions, and a customer, they held the customer to a higher degree of proof than in other cases.

Because the plaintiff did not reach the threshold question of the severity of his injury, the Court did not need to look to *See* if the bank's conduct was intentional, reckless or outrageous.

In this case, the Court described the action by the customer against the bank as both a hybrid of contract and tort action.

***See* Practice Form #32.**

In order for the tort of defamation to arise, someone either has to say something or have put in print, thus communicating this lie to a third party.

W. Prosser & P. Keaton defined defamatory communication as

"one which tends to hold the plaintiff up to hatred, contempt or ridicule, or to cause him to be shunned or avoided, and which tends to injure a 'reputation' in the popular sense; to diminish the esteem, respect, good will or confidence in which a person is held, or to excite adverse, derogatory or unpleasant feelings or opinions against him." *Handbook on the Law of Torts*, Sec. 111 at 773 (5th ed 1984).

In this section we only deal with private defamation where the plaintiff, or complainant is a private person. Public persons are held to a different standard.

The general elements of defamation, which must be proven by a preponderance of the credible evidence comprise 5 elements:

(1) There must be a defamatory statement of fact.

A defamatory statement is a statement of fact which is injurious to the reputation of the plaintiff, or which exposes him/her to hatred, contempt or ridicule, or to loss of the good will and confidence felt toward them by others, or which has a tendency to injure them in their trade or business. ***Maressa v. New Jersey Monthly***, 89 *N.J.* 176 (1982); ***Dairy Stores, Inc. v. Sentenel Pub. Co.*** 104 *N.J.* 125 (1986); ***Restatement(Second) of Torts***, Section 559 (1977). A statement of opinion is not actionable. ***Restatement (Second) of Torts***, Section 563 (1977).

(2) The plaintiff must prove that the defamatory statement concerned him or her.

The statement must have been read or heard or understood by a third party to mean the plaintiff. Where the defamatory statement concerns a group or class of persons of which plaintiff is a member, the plaintiff must establish some reasonable application of the words to himself/herself. *See* ***Mick v. American Dental Ass'n.*** 49 *N.J.Super* 262, 285-87 (App.Div. 1958); ***Restatement (Second) of Torts***, Section 564A, (1977).

(3) The plaintiff must prove that the defamatory statement is false.

It is not necessary that the statement be true or false in every detail, but if it is substantially false, and the falsity goes to the defamatory gist or sting of the statement, there is liability. The statement must be considered in its entire context. ***Restatement (Second) of Torts***, Section 581A (1977).

(4) The plaintiff must prove that the defamatory statement was communicated to a person or persons other than the plaintiff.

It is not necessary that the defamatory statement be communicated to a large or even a substantial group of persons. It is enough that it is communicated to a single individual other than the plaintiff. However, if the defamatory statement is communicated only to a small group or single person, it is necessary that at least one of the recipients understood the statement in its defamatory sense. *See* comments B and C to ***Restatement (Second) of Torts***, Section 577 (1977).

(5) The plaintiff must prove that defendant actually knew the statement was false when they communicated it, or defendant communicated the statement with reckless disregard of its truth or falsity, or defendant acted negligently in failing to ascertain the falsity of the statement before communicating it.

Plaintiff can satisfy this element in one of three ways:

(a) by proving that defendant communicated the defamatory statement which they actually knew to be false, or

(b) by proving that defendant communicated defamatory statement with a high degree of awareness that it was probably false or with serious doubts as to the truth of the statement, or

(c) by proving that defendant acted negligently in failing to ascertain the falsity of the statement prior to communicating it.

In determining if the defendant acted negligently in failing to ascertain the falsity of the statement, the standard to be applied is whether defendant failed to act as a reasonably prudent person would have acted under like circumstances. What is to be considered is whether the defendant had reasonable grounds for believing that this statement was true, and whether defendant acted reasonably in acting on the truth or falsity of the statement, communicating it. The factors which play a role in this consideration include defendant's investigation or lack of investigation of the accuracy of the statement, the thoroughness of that investigation, the investigation, the nature and interest of the persons to whom the statement was communicated, the extent of damage that would be produced if the communication proved to be false, whether defendant had an honest but nevertheless mistaken belief in the truth of the statement. ***Restatement (Second) of Torts***, Section 580B, comments G and H. ***Model Jury Charges Civil***, 4th Ed. Section 3.11B, New Jersey Institute for Continuing Legal Education (1992, 1996).

As with any tort, once you prove the cause of action, you must now prove your damages. In defamation there can be both compensatory damages and punitive damages.

Compensatory damages (called special damages) are awarded for economic or financial losses suffered directly by the plaintiff as a proximate result of the injury to the plaintiff's reputation caused by the defamatory words. These damages are never presumed, but must be specified by the plaintiff and proven by the evidence. The plaintiff must show what the loss was and by what sequence of connected events it was produced by the defamatory

words. A plaintiff can only recover these damages if he can prove that the defendant's conduct was a substantial factor in causing them material, economical, financial losses.

There is also compensatory damages called general damages. These damages are in addition to the direct economic financial loss, which the law presumes to follow naturally and necessarily from either the publication of a libel, or the utterance of a slander, and which are recoverable by the plaintiff without proof of causation. This is so because the law recognizes that the damage to reputation caused by defamation may not always lend itself to proof by objective evidence. These type of damages include such things as loss of opportunity which may not be known; damage to reputation; or damage to a person's business or career. These damages may not be accurately measured, and can be more substantial and real than those which can be proved and measured accurately by a dollar standard.

In determining the amount of damages, one must take into consideration the manner in which the defamation was disseminated and the extent of its circulation, the injury to the character and reputation of the plaintiff, the bodily harm to the plaintiff and the mental anguish, suffering and emotional distress experienced by the plaintiff. The nature of the plaintiff's occupation must be considered and to the extent in which he/she may reasonably be expected to find that the defamation has interfered with the successful pursuit of an occupation. Also taken into consideration is the probable effect of whatever effort was made by the defendant to reduce the impact of the defamation upon the plaintiff's reputation including the effect of any public retraction, if same were made.

Let us examine Compensatory Damages for emotional suffering. Since an action for defamation is based on injury to reputation, part of the compensation may be to redress the consequences which follow. Accordingly, the plaintiff has a claim for emotional distress because of the ill effects that he/she may have experienced. A fine line must be drawn between emotional suffering caused by reading of the libel or hearing the slander which is not compensable and the publication's impact of the words impact upon one's reputation which is compensable.

Punitive Damages may also be awarded--not for the purpose of restoring to the plaintiff the amount of any loss sustained because of the libel or the slander; but to punish the defendant for willful or reckless conduct, to teach defendant not to do it again, to deter others from following defendant's example, and to vindicate the rights of the plaintiff in substitution for personal revenge.

Punitive Damages can be awarded whether or not compensatory damages are given. The punitive damages however should be of some reasonable relationship to the actual injury. The reasonableness of the relationship of punitive damages to actual injury must be considered in light of all the factors in the case. Some particular outrageous conduct may generate only minimal compensatory damages so that higher punitive damages might be more appropriate than when substantial compensatory damages were awarded. The consideration for punitive damages must depend upon all the circumstances of the case.

Whereas compensatory damages must be measured in terms of the injury to reputation suffered by the plaintiff, the amount of punitive damages should relate to the degree of wrongfulness shown by the defendant in delivering this injury.

In determining whether to award punitive damages, the Court should consider whether defendant was motivated by an actual desire to harm the plaintiff or a calculated disregard of the consequences. What is examined is whether the defendant in making the defamatory statement, and the circumstances surrounding it, shows ill feeling, personal hostility or spite, or a natural desire to hurt the plaintiff without belief or reasonable grounds to believe in the truth of the libelous or slanderous statement.

Whether punitive damages are allowable in these cases is based upon the sound discretion of the Court or the jury. In the exercise of this discretion, the court or jury examines all of the evidence surrounding the libelous slander including the nature of the wrongdoing, the extent of harm inflicted, the intent of the defendant, the financial resources of the defendant as well as any mitigating or extenuating circumstances that were offered by the defendant to reduce the amount of the damages. ***Model Jury Charges, Civil* (4th Edition)** 3.11C. New Jersey Institute for Continuing Legal Education (1992, 1996).

Stickles v. Manss, 36 *N.J.Super* 95, 114 *A2d.* 771 (Law Div. 1955). The plaintiff widow brought a libel action against her husband's mistress for some offensive writings that the mistress made. The Court rejected the defense of the Heart Balm Act.

In *Ward v. Zelikovsky*, 136 *N.J.* 516, 643 *A2d.* 972 (1994) A suit was filed by one neighbor against another for slander as a result of neighbor's allegations at a condominium association meeting that the female plaintiff was "a bitch" and that both plaintiffs hated or did not like jews and in which they sought not only special, and compensatory damages, but punitive damages. The Law Division entered a verdict in favor of the plaintiffs, the Apellate Division affirmed at 263 *N.J. Super* 497, 623 *A2d.* 285 (App.Div. 1993)

The actual words which were exchanged were at a condominium association meeting with approximately 100 other condominium residents present, in which the defendant in response to the plaintiffs' comments on his position stated "don't listen to these people. They don't like Jews. She's a Bitch. I will remember her. She's a Bitch." There was an ancillary assault and battery claim which was not subject of the appeal.

The plaintiff testified that the defendant's outburst caused her legs to start shaking, that she was terribly embarrassed, upset and frustrated. The plaintiff who was a realtor, was also afraid that the defendant's statement about her might affect her real estate activities, wherein they were about to buy a real estate company in the area.

At trial, Mrs. Ward testified that she had no idea whether or not the statements had caused her to lose business, but they did affect her life at the ocean club. She testified that she felt a "coolness" that had not existed prior to the statement and she stated that "we

weren't invited to things that we had been invited to before; and several people did mention it to me."

Mr. Ward testified that he found less enjoyment living at the condominium after the incident and testified that he "absolutely felt a chill and coolness of many relationships that he had and that he avoided certain functions that he knew that the defendant would frequent." He also noted that other owners had excluded he and his wife from a celebration party following an owner's board election.

The supreme court stressed that this involved a *verbal* dispute between neighbors and thus is different from libel cases involving media defendants. Noting that written words "assume a measure of thought where spoken words would have a lesser level of deliberation, and this is significant in that judging how a reasonable audience perceives the speech. The threshold inquiry then would be whether the language is reasonably susceptible of a defamatory meaning." Citing ***Kotlikoff v. The Community News***, 89 *N.J.* 622, 444 *A2d.* 1086 (1982).

Whether meaningless statement is susceptible of a defamatory meaning is a question of law for the court in which the court must consider the content, verifiability and context of the challenged statements.

In determining the content, the court must look to whether or not a statement is susceptible of a defamatory meaning by looking to the "fair and natural meaning which will be given it by reasonable persons of ordinary intelligence." Name calling, epithets and abusive language no matter how vulgar or offensive, are not actionable thus courts must distinguish between genuinely defamatory communications and name calling.

There are two tests for verifiability, to determine if a statement is capable of a defamatory meaning: (1) was the statement one of opinion or fact, or (2) was it one of fact or non-fact. The court noted that these distinctions have generally proven unsatisfactory and unreliable. Noting that if something is true or not is able to be factually determined, while opinion statements cannot be proven because they only reflect a person's state of mind. It is opinion statements which have received substantial protection under the law and the first amendment of the constitution.

As to context, the courts do not automatically decide a case upon the literal meaning of the words, but rather the impression created by the words as well as the general tenor of the expression.

The court opined that most courts have even ruled out allegations of racism, ethnic hatred and bigotry as not being defamatory and entitled to constitutional protection.

The supreme court disagreed with the appellate division's holding that "anti-semitic" statements fall within the doctrine of "slander per se which does not require specific proofs that the plaintiff suffered special damages as a prerequisite to any recovery."

The court reversed and remanded the case stating that special damages are a prerequisite to recovery in a slander action, and that punitive damage awards were also improper and only remanded the case for dismissal for failure to state a cause of action upon relief may be granted.

***See* Practice Form #33.**

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"Wiretapping" is the intercepting, or the attempting to intercept, or hiring another person to attempt to intercept any wire or oral communication. In layman's language, that is either a spouse tapping the phone themselves or hiring somebody else, i.e. a private detective to tap the phone for them. The prohibition against wiretapping only applies to a person who wiretaps a communication between two parties, and is not a party to the conversation. Thus, you can "tap" a telephone conversation in which you are one of the parties, but cannot do so if you are not.

Originally, there was only a federal statute 18 *U.S.C.A.* Par. 2510 *et seq.* until New Jersey passed its own similar statute, ***N.J.S.A***.2A:156-A(1) *et seq.* (*See* Appendix A).

There is a divergence of opinion in the various federal circuits as to whether or not "interspousal" wiretapping was subject to the Federal Act.

In New Jersey this question was resolved in favor of applicability of the state statute in ***M.G. v. J.C.*** 254 *N.J.Super* 470, 603 *A2d.* 990 (Ch.Div. 1991). This is the first case and only reported decision, and only a trial level case out of Monmouth County, that determined a husband's tapping of his wife's telephone line on a marital home, which he did by installing a recording device on a personal phone line and secretly recorded 8 hours of telephone conversation, was subject to the Act and compensatory.

In this matter, the husband found through wiretapping that his wife was having a homosexual affair, and he used this evidence to confront the wife with the tapes and to use in a custody battle and further destroy her reputation with friends, family and co-workers. The Court noted that the wife was absolutely devastated and that she suffered extreme emotional distress, severe personal change and required extensive psychological treatment.

He further offered to play the tapes to several close family friends, who declined the invitation but he did play them for the wife's sister. Not only was there interception of the phone conversations etc., but disclosure of the information.

The Court stated that the Federal Statute is virtually identifical to that of the State of New Jersey, recognized that Federal Courts were not unanimous as to whether or not interspousal exemption exists in wiretapping cases within the marital home, and found in this instance, there was no exemption.

The Court ordered not only compensatory damages of $10,000, but punitive damages of $50,000 as well as counsel fees of $5,000.

***See* Practice Form #34.**

In 1992, a statute, N.J.S.A. 2C-12-10, was enacted for the purpose of protecting victims who were repeated followed and threatened, and made "stalking" a crime. This bill was modeled on the California statute enacted in September of 1989 and provides that a person is guilty of stalking if he or she purposely and repeatedly follows or harasses another person and makes a credible threat with the intent to place that person in reasonable fear or death or serious bodily injury. The punishment for the crime would be imprisonment up to 18 months and a fine up to $7,500 or both.

In the event that there was an existing court order such as a restraining order out of a Domestic Relations Court, or if it was a second or subsequent offense, then the offense would be upgraded and the penalty would be 3 to 5 years and a fine of $7,500 or both.

The statute makes it clear that the threat could be either explicit or implicit. Specifically exempted from the Bill are any acts or conduct which occurs during organized group picketing, obviously in deference to the labor lobby.

Plaintiff in the case of ***Rumbauskas v. Cantor***, 138 *N.J.* 173, 649 *A2d.* 853 (1994) Sought to circumvent the two year statute of limitations for stalking and harassment, seeking damages for invasion of privacy alleging that there was a difference between "an injury to the person" under *N.J.S.A.2A:14-2* and "tortious injury to the rights of another" under *N.J.S.A.2A:14-1.* The appellate division agreed but the supreme court reversed and supported the law division's decision that the two year statute of limitations applied and not the six year statute.

In a convoluted decision, the court set forth the distinctions between two year statute of limitations and six year statute of limitations, and called this action "intrusion on seclusion, noting that it is an action which is comprised of not on tort but a complex of four.

The law of privacy comprises four distinct kinds of invasions and four different interests of the plaintiff which are held together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff " to be left alone"

(1) intrusion, such as intrusion on plaintiff's physical solitude, or by invading his or her home, illegally searching, eavesdropping or prying into personal affairs;

(2) public disclosure of private facts (e.g. Making public private information about the plaintiff);

(3) placing plaintiff in a false light in the public eye (which need not be defamatory, but must be something that would be objectionable to the ordinary reasonable person); and

(4) appropriation, for the defendant's benefit, of the plaintiff's name or likeness.

***See* Practice Form #35.**

Harassment

N.J.S.A.2C:33-4. In 1979, a harassment statute was passed as follows:

(a) Makes, or causes to be made, a communication or communications anonymously or at extremely inconvenient hours, or in offensively course language, or any other manner likely to cause annoyance or alarm;

(b) Subjects another to striking, kicking, shoving, or other offensive touching, or threatens to do so; or

(c) Engages in any other course of alarming conduct or of repeatedly committed acts with purpose to alarm or seriously annoy such other person.

Subsequent amendments in 1983 added:

A communication under subsection (a) may be deemed to have been made either at the place where it originated or at the place where it was received.

d. A person commits a crime of the fourth degree if in committing an offense under this section, he or she acted, at least in part, with ill will, hatred or bias toward, and with a purpose to intimidate, an individual or group of individuals because of race, color, religion, sexual orientation or ethnicity.

The original statute found as its target a finance corporation which was making harassing phone calls to one of its debtors while she was at work, defining this as "extremely inconvenient hours..." The Court in ***State v. Finance American Corp.***, 182 *N.J.Super* 33, 440 *A2d*. 28 (App.Div.1981) found that a harassing phone call was not entitled to protecting under the United States Constitution.

In ***State v. Halleran***, 181 *N.J.Super* 542, 438 *A2d.* 577 (App.Div. 1981), a woman was convicted under the statute for making anonymous telephone calls to her former husband for purposes of harassing him. The Court found that the calls came from her phone

number, and found her guilty despite the fact that her 11 year old daughter also lived at her address.

In 1989, in the case of ***State v. Fuchs***, 230 *N.J.Super* 420, 553 *A2d.* 853 (App.Div. 1989) the Court refused to use this statute against someone surreptitiously peering into dwellings from a fence, and noted that being a Peeping Tom does not fall within the sanctions of the statute.

***See* Practice Form #36.**

Tort Liability for transmission of sexual diseases is predicated on three theories.

(1) The liability may be based upon the traditional tort of battery, a non-consensual touching. Thus, even if a sexual partner has consented to intercourse, the assent was to this only, and not to the transmission of the disease. The theory is that the plaintiff would not have consented had he or she have known the facts that were known to the defendant. ***See* Prosser and Keaton, *Torts*** 120 (5th ed. 1984).

(2) Liability can be upheld on a negligence theory that people with dangerous contagious diseases have a duty to protect others who might be in danger of infection. It is clearly foreseeable that having intercourse with someone who does not have the disease creates a large risk of infection, a reasonable person would avoid sexual intercourse or warn a sexual partner about the disease.

(3) Liability may be had on a tortious fraud theory, where one partner has a duty to inform the other of the disease in order to protect the other party from injury. The failure to disclose equates to a representation that there is not a disease and therefore a claim exists for constructive fraud misrepresentation. Today, besides herpes, syphilis or gonorrhea, one has to be worried about the HIV virus and AIDS. The transmission of the disease by one party to the another could be without the knowledge, that they are transmitting it, because they might not have know that they have it themselves.

Earl v. Kuklo, 26 *N.J.Super* 471, 98 *A2d.* 107 (1953) is one of the only reported cases on the transmission of the disease tuberculosis. In that case, a landlord rented an apartment to a tenant without telling her that she was infected with tuberculosis. The tenant's daughter then contracted the disease and the Court found the landlord liable. While tuberculosis, genital herpes, syphilis and gonorrhea are under control, AIDS is on the rise.

Although there have been reported cases concerning the transmission of sexual diseases between spouses, ***J.Z.M. v. S.M.M.*** 26 *N.J.Super* 642, 545 *A2d.* 249 (Law Div. 1988) and ***G.L. v. M. L***. 228, *N.J.Super* 566, 550 *A2d.* 525 (Ch.Div. 1988), there is yet to be a reported case of transmission of sexual disease from a spouse's lover or between non-married partners.

Additional parties may also be liable. A doctor or a hospital may be liable for failure to diagnose and/or warn of the presence of the disease. The controversy then would be between the right of privacy and the duty to warn innocent victims. Is the doctor who diagnoses AIDS in a woman duty bound to tell her spouse that she has it or is he prohibited to do so by the patient's right of privacy?

N.J.S.A.26:4-27 defines venereal disease to include syphilis and gonorrhea; and ***N.J.S.A.***26:4-28 declares these diseases to be infectious and communicable.

N.J.S.A.26:4-15 requires that every physician shall within 12 hours after diagnosis, report such person who are ill or infected with such communicable disease to the State Department of Health.

The report is to be in writing and is to include the name of the reporting physician, the name of the disease, the name, age, and precise location of the person who is ill or infected with the disease. The Statute, ***N.J.S.A***.26:4-16 also requires that every house owner or householder who has reason to believe that any person living in or under his control has the disease, must also report that information to a local Board of Health.

Under the New Jersey Administrative Code, syphilis, gonorrhea and AIDS are listed as reportable diseases and the duty of the physician to report the disease to the State Department of Health is required in ***N.J.A.C.***8:57-1.4. The Court also requires in ***N.J.A.C.***8:57-1.10 that a health officer or State Department of Health official who receives a report of a communicable disease, establish such isolation or other restrictive measure required by law or regulation as may be necessary to prevent or control the disease.

The health officer has the power to restrict the individual from coming in contact or visiting with people in the hospital and to require that the victim take all measures necessary to prevent the transmission of the disease to other people.

Obviously, failure to do so would result in third party liability to the victim of the disease. The failure to report issue will be discussed in Section 4.17 which follows.

Other areas of potential liability are as follows:

(1) A physician's failure to inform a patient that he or she has a sexually transmitted disease, or the failure to diagnose that disease.

(2) A hospital or testing agency's failure to inform a patient that he or she has a sexually transmitted disease, or the failure to diagnose that disease.

***See* Practice Form #37.**

Failure to Enforce a Judicial Order and Failure to Protect a Victim. Failure of Doctor to Report Child Abuse.

N.J.S.A.9:6-1 *et seq.* defines what constitutes an abuse of a child (*See* Appendix H). The Act makes cruelty and neglect of children a crime, ***N.J.S.A.***9:6-3 (*See* Appendix H); defines abused child 9:6-8.9 (*See* Appendix H); and requires any person having reasonable cause to believe that a child has been subjected to child abuse to report it immediately to the Division of Youth and Family Services. ***N.J.S.A.***9:6-8.10.

The Statute then provides that anyone making a report under this Act shall have immunity from liability, civil or criminal (***N.J.S.A***.9:6-8.13 (*See* Appendix H), and makes any person knowingly violating the provision of this Act by not reporting child abuse, guilty of violation of the Act. 9:6-8.14 (*See* Appendix H).

The Act also requires any physician or hospital who examines a child to immediately take the child into protective custody if they *see* that the child has been abused (9:6-8.16), and gives them immunity from civil and criminal liability in the event that they do act. ***N.J.S.A.***9:6-8.20 (*See* Appendix H).

But what if someone knows about abuse and does not report it? Not only may they be guilty of a crime, but they may be guilty of a domestic tort and subject to civil and criminal liability.

(1) whether to confirm a person for mental illness or drug dependence;

(2) the terms and conditions of confinement for mental illness or drug dependence;

(3) whether to parole, grant leave of absence to, or release a person from confinement for mental illness or drug dependence.

In ***Rochinsky v. State of N.J. Dept. of Trans***. 110 *N.J.* 399, 541 *A2d*. 1029 (1988), the Supreme Court stated that "immunity is the dominant consideration of the Act."

Predoti v. Bergen Pines County Hosp., 190 *N.J.Super* 344, 463 *A2d*. 400 (App.Div.1983). Plaintiff was initially assigned to a closed ward, but after initially responding to treatment, was transferred to a less restrictive open ward. This transfer allowed him to take escorted walks on the hospital grounds, and during one such walk, he was injured by an automobile. Plaintiff subsequently brought suit alleging that the decision to transfer him to a less restrictive ward constituted a negligent treatment decision.

The Court in that case decided that the transfer was within the immunity set forth in the Statute, and the Court reasoned that "(b) why immunizing these difficult decisions, the Legislature allows them to be made at an atmosphere free from the fear of suit." *Id*. at 347-348, 463 *A2d*. 400.

McNesby v. Department of Human Services, 231 *N.J.Super* 568, 555 *A2d*. 1186 (App.Div.1988, certif. den. 117 *N.J.* 127, 564 *A2d.* 854 (1989. A patient who initially was admitted into the hospital with suicide precautions, was later allowed unsupervised access to the hospital grounds. He then attempted suicide by setting himself on fire and died two weeks later. In a suit by his estate, it was claimed that the hospital failed to supervise him and was negligent in transferring him to a less restrictive environment. The Court denied liability.

Other cases have supported the immunity doctrine and none so far has made an exception to it. *See* ***Ginanni v. County of Bergen***, 251 *N.J.Super* 486, 492, 598 *A2d*. 933 (App.Div. 1991) certif.den. 127 *N.J.* 565, 606 *A2d.* 375 (1992); ***Brown v. Brown***, 86 *N.J.* 565, 577, 432 *A2d*. 493 (1981); ***Delbridge v. Schaeffer***, 238 *N.J.Super*, 323, 350-351, 569 *A2d*. 872 (Law Div. 1989).

Immunity has also been given for failure to enforce a law which is the result of failure to act, and admission or non-action. ***Bombace v. City of Newark***, 125 *N.J.* 361, 367, 593 *A2d*. 335 (1991); and a public employee who fails to enforce law need not show good faith to enjoy absolute immunity. ***Marley v. Borough of Palmyra***, 193 *N.J.Super* 271, 283, 473 *A2d*. 554 (Law Div. 1993).

Perona v. Township of Mullica, 270 *N.J.Super* 19, 636 *A2d*. 535 (1994). The police were called to the Perona house in response to a domestic violence complaint. Upon their arrival, the wife told the police officers there was no domestic dispute, although she was having a problem in that she wanted to go for a walk and that the husband chased her and brought her back to the house. The husband showed the police officers a handwritten note of the wife which was a farewell note or a suicide note. The husband asked the police to take whatever steps were necessary to detain her, but the police being satisfied after questioning the wife that she simply may have wanted to leave the house and not return, did nothing and left.

Shortly thereafter, the wife left the home and attempted suicide, walking on to the highway and was struck by one vehicle, and then another while she was lying on the highway.

She survived and she along with her husband and her daughter, brought an action against the Township, the police department and the specific policemen for failure to protect and for failure to comply with ***N.J.S.A.***30:4-27.6 which imposes the appropriate standard of duty for a police officer to take a person into custody. That Statute provides in pertinent part:

"A State or local law enforcement officer shall take custody of a person and take the person immediately directly to a screening service if:

a. on the basis of personal observation the law enforcement officer has reasonable cause to believe that the person is in need of involuntary commitment;...

b. the involvement of law enforcement authorities shall continue at the screening center as long as necessary to protect the safety of the person in custody and the safety of the community from which the person was taken."

The statutory scheme in Title 30 also provides in ***N.J.S.A.***30:4-27.7a for immunity from civil and criminal liability for a law enforcement officer who in good faith "takes reasonable steps to assess, take custody of, detain or transport an individual for the purposes of mental health assessment or treatment...".

The Court stated that if the plaintiffs argue the applicability of a tort liability theory, it would be inconsistent not to apply the Tort Claims Act, ***N.J.S.A.***30:4-27.7a in defense of the action.

The plaintiff's argument was that this Statute affords law enforcement officers immunity if they take a person into custody, but does not address whether a law enforcement officer would be afforded immunity for failure to act in a particular situation which was the cause that they had sued for.

The Court decided that the Tort Claims Act applied to any public employee including police officers. The Court determined that discretionary decisions made by public employees are entitled to immunity and cited ***Longo v. Santoro***, 195 *N.J.Super* 507, 518, 480 *A2d*. 934 (App.Div.) certif. den., 99 *N.J.* 210, 491 *A2d.* 706 (1984), ***Expo, Inc. v. City of Passaic***, 149 *N.J.Super* 416, 424-425, 373 *A2d.* 1045 (Law Div.1977).

The Courts were first reluctant to impose vicarious liability upon government authorities for the failure to warn or protect victims against violent acts.

Goldberg v. Newark Housing Auth. 38 *N.J.* 578, 186 *A2d.* 291 (1962). The Court held that a municipal housing authority had no duty to provide police protection at the housing project and that it was not liable for injury sustained by the plaintiff while delivering milk to the tenants where he was beaten and robbed.

Macintosh v. Milano, 168 *N.J.Super* 466, 403 *A2d*. 510. This Court held that the physician/patient privilege contained in ***N.J.S.A.***2A:84-8-22.1 *et. seq*. is not absolute. This was an action brought against a psychiatrist who had treated a patient who killed his girlfriend. The Court in denying the psychiatrist's motion for summary judgment rejected his theory that he owed no duty to the plaintiff's decedent and her parents.

The plaintiffs allege that failure to warn the decedent of the killer's obsession with her, knowing of his behavior and violent propensities and having the knowledge that he also had a gun.

Viewing the statutory physician/patient privilege, they stated that the need for confidentiality cannot be considered absolute or decisive in this setting, and at most, there is a "limited right to confidentiality in extrajudicial disclosure" subject to exceptions

prompted by the interest of society. They further stated that whether the duty exists is a question of law and is extremely fact sensitive.

Czech v. Aspell Industrial Center, 145 *N.J.Super* 597, 600 (App.Div. 1976) *certif. den.* 73 *N.J.* 48, (1977).

***Beadling v. Sirotta*,** 41 *N.J.* 555, 197 *A2d*. 857 (1964)

As of this time, municipal police officers are immune from liability while lawfully exrcising their powers as well as protected from liability when prisoners escape from jail. ***N.J.S.A***.59:5-1, 2.

There is also tort immunity for failure to provide police protection or sufficient police protection or to arrest or retain a person in custody. ***N.J.S.A***.59:4-5.

All of the above are known as the New Jersey Tort Claims Act.

Lastly, Section 59:5-6 provides immunity from civil liability for public employees and public entities for injuries suffered by a motor vehicle driver upon his voluntary release after being arrested for driving while under the influence of intoxicating liquor or drugs. This immunity also applies to the passengers.

The rationale is that police officers do not have the authority to detain defendants who are charged with driving under the influence, or their passengers, after the defendant has been processed. These people must be released upon request.

Because of the high risk of harm that is presented when alcoholic beverages are made available, the Courts have enacted various laws including the "Dram Shop Act" which assesses liability for tavern owners, (not the subject of this book), and also creates vicarious liability for parents for the acts of their minors.

Social host liability was firmly established by the supreme court in the case of ***Kelly v. Gwinnell***, 96 *N.J.* 538, 648, 476 *A2d.* 1219 (1984) As well as the earlier law division case of ***Figuly v. Knoll***, 185 *N.J. Super* 477, 449 *A2d.* 564 (Law div. 1982).

In ***Kelly*** the liability was expressly a restricted to the facts of the case and the court held that "only that where a host provides liquor directly to a social guest and continues to do so even beyond the point in which the host knows the guest is intoxicated, and does this knowing that the guest will shortly thereafter be operating a motor vehicle, that host is liable for the foreseeable consequences to third parties that result from the guest's drunken driving. *Id* at 559, 476 *a2d.* 1219.

The supreme court further stated:

"not only do we limit our holding to the situation in which a host directly serves a guest, but we impose liability solely for injury resulting from the guest's drunken driving."

Thereafter, in 1987, our legislature codified social host liability in *n.J.S.A.*2A:15-5.5 To 5.8, Particularly *N.J.S.A.*2A:15-5.6A which states:

"exclusive civil remedy for damages in accident involving vehicle resulting from negligent provision of alcoholic beverages by social host to person of legal age; conditions for recovery; blood test presumptions.

A. This act shall be the exclusive civil remedy for personal injury or property damage resulting from the negligent provision of alcoholic beverages by a social host to a person who has attained the legal age to purchase and consume alcoholic beverages.

B. A person who sustains bodily injury or injury to real or personal property as a result of the negligence provisions of alcoholic beverages by a social host to a person who has attained the legal age to purchase and consume alcoholic beverages may recover damages from a social host only if:

(1) the social host willfully and knowingly provided alcoholic beverages either:

(a) to a person who was visibly intoxicated in the social host's presence; or

(b) to a person who was visibly intoxicated under circumstances manifesting reckless disregard of the consequences as affecting the life or property of another; and

(2) the social host provided alcoholic beverages to the visibly intoxicated person under circumstances which created an unreasonable risk of foreseeable harm to the life or property of another, and the social host failed to exercise reasonable care and diligence to avoid the foreseeable risk; and

(3) the injury arose out of an accident caused by the negligent operation of a vehicle by the visibly intoxicated person who was provided alcoholic beverages by a social host

C. To determine the liability of a social host under subsection b. Of this section, if a test to determine the presence of alcohol in the blood indicates a blood alcohol concentration of:

(1) Less than 0.10% By weight of alcohol in the blood, there shall be an irrebuttable presumption that the person tested was not visibly intoxicated in the social host's presence and that the social host did not provide alcoholic beverages to the person under circumstances which manifested reckless disregard of the consequences as affecting the life or property of another; or

(2) At least 0.10% But less than 0.15% By weight of alcohol in the blood, there shall be a rebuttable presumption, that the person tested was not visibly intoxicated in the social host's presence and that the social host did not provide alcoholic beverages to the person under circumstances which manifested reckless disregard of the consequences as affecting the life or property of another.

Morella v. Machu, 235 *N.J.Super* 604, 611, 563 *A2d* 881 (App.Div. 1989). Plaintiff was injured in an automobile accident with a careless minor who had become intoxicated at a party in the home of the teenage host's parent.

The Court held that parents had a duty--

"to exercise reasonable care to arrange for competent supervision of the teenagers while they were out of state on vacation. If they failed to do so, and if that breach of duty was the reasonable foreseeable proximate case of plaintiff's injuries, they must respond in damages.

Thompson v. Victor's Liquor Store, Inc., 216 *N.J.Super* 202, 523 *A2d*. 269 (App.Div. 1987). A seller of alcoholic beverages who sold to an underage person was held to be potentially liable for injuries to a minor with whom purchaser shared beverage where, while intoxicated by the beverage, minor injured himself by carelessly driving a car into a brick wall.

Macleary v. Hines, 817 *F.2d* 1081 (3rd Cir. 1987). A host of a party where alcoholic beverages were consumed, was held potentially liable for injuries to a minor guest, who as a result of becoming intoxicated there, carelessly entered a car being driven by a visibly intoxicated person, and was later injured when the driver drove the car into a tree.

See ***Finney v. Ren-bar, Inc.***, 229 *N.J. Super* 295, 551 A2d. 535 (App. Div. 1988) (Intoxicated minor allegedly served by defendant thereafter carelessly starts house fire); ***Linn v. Rand***, 140 *N.J. Super* 212, 356 *A2d.* 15 (App. Div. 1976); (Social host may be liable for injuries inflicted by negligent driving of obviously intoxicated social guest minor served by host).

This doctrine was further extended in ***Witer by Witer v. Leo***, 269 *N.J.Super* 380, (App.Div. 1994). This is a convoluted case which was remanded before the trial court on many instances but involved the possibility of a personal injury action by a boy who injured himself in the pool of the defendant mother, at a pool party which was given by defendant's son in her absence.

The boy who had been forbidden to come to the house by the mother, after drinking 5 cans of beer, attempted to jump from the roof of defendant's house into the adjacent pool. The Court found that the parents had a duty to provide for reasonable supervision of their minor child if it is reasonably foreseeable that, in their absence, the child would invite friends to a beer party at which one of the minor guests would become intoxicated and thereby injure themselves.

Dower v. Gamba, 276 *N.J.Super* 319, 647 *A2d.* 1364 (App.Div. 1994) The court interpreted and expanded the word "provide" in the social host liability statute, to include situations where the consumption of the alcohol occurs on the host-property, but the alcoholic beverage was not directly "served" by the host to the person who consumed it. Two sisters filed a complaint against five defendants, including the driver of the car in which they were injured and the four brothers who hosted a party at which the driver of their vehicle became intoxicated, driving his car into a tree causing the plaintiffs to suffer personal injuries.

The defendant driver left the barbecue hosted by the four brothers in which beer was "plentiful", was available to all including minors. The dispensing of beer was "without any control or supervision whatsoever" but there was never any proof that the brothers served the driver beer directly , only that it was there for the taking.

The court rejected a motion for summary judgment stating that there was a factual issue existing as to whether or not the brothers willfully and knowingly provided alcoholic beverages to the driver, while he was visibly intoxicated, under circumstances which created a reasonable risk of foreseeable harm to the life and property of another.

CHAPTER FIVE

When matrimonial attorneys enter the tort negligence arena, they must be aware as any good tort attorney is, of the defenses to tort actions and their specific courses of action.

There are defenses which are particular to the matrimonial courts, such as the Heart Balm Act, ***N.J.S.A.***2A:23-1; parental tort immunity, "simple domestic negligence", the right of privacy, the domestic relations exception to federal jurisdiction.

Other defenses to any tort action of course apply in the matrimonial context, including comparative negligence, self defense, consent, advice of counsel.

General concepts of law and rules of court also serve as defenses including the single/entire controversy doctrine, *res judicata*, limitation of actions, laches, equitable estoppel and waiver, lack of personal/subject matter jurisdiction, *forum non conveniens*, arbitration and award, and releases.

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State courts have resisted entertaining matrimonial causes of actions in light of the "**Heart Balm Act**", ***N.J.S.A.*** 2A:23-1, which will be discussed here and the federal court's denial of jurisdiction under the "domestic relations exception" which will be discussed in Section 5.20.

In 1935, the New Jersey Legislature in reaction to prolific litigation, barred any causes of action to recover monetary damages for "alienation of affections, criminal conversations, seduction or breach of contract to marry."

You can no longer sue the lover who wooed your spouse from you and thereby deprived you of love and affection; or the fiance for reneging on the marriage. The Courts view these causes, as they did all interspousal torts, and cases they call "fruitful sources of blackmail" as being subject to fraud ***Kleinow v. Ameika***, 19 *N.J.Super* 165, 88 *A2d*. 31 (Law Div. 1952); ***Hofner v. Hofner***, 135 *N.J.Super* 328, 343 *A2d.* 165 (Law Div.1975); ***Koslowski v. Koslowski***, 64 *N.J.Super* 162, 395 *A2d*. 913 (Ch.Div. 1978) aff'd. 80 *N.J.* 378, 403 *A2d* 698, (1979).

In ***Morris v. MacNab***, 25 *N.J.* 271, 135 *A2d*. 657 (1957), (see Section 2.1), A woman brought suit for the tort of fraudulently inducing her into marrying her spouse when he knew he was previously married and that he would be committing bigamy. Besides other relief, Morris sought compensatory and punitive damages for shame, humiliation and mental anguish which had been caused by the defendant's action to fraudulently induce her to enter into a marriage which he knew to be bigamous.

The defense of the **Heart Balm Act** was rejected by the Court on the basis that this was not one of the "well known evils" which the Legislature was seeking to eliminate in the passage of the **Heart Balm Act**.

In ***Devine v. Devine***, 20 *N.J.Super* 522, 90 *A2d*. 126 (Ch.Div. 1952), the Court allowed an injunction against a third party interfering in the relationship despite the **Heart Balm Act.**

Stickles v. Manss, 36 *N.J.Super* 95, 114 *A2d*. 771 (Law.Div. 1955) (*See* Section 3.7), which was an action by a widow against her deceased husband's mistress for libel. The Court allowed that action and said it did not fall under the **Heart Balm Act**.

Zaragoza v. Capriola, 201 *N.J.Super* 55, 492 *A2d*. 698 (Law Div. 1985) is an action by an unmarried cohabitant in which she sought *pendente lite* maintenance for herself, a natural child of the parties, and a child born to her of another marriage.

Addressing plaintiff's position that the man had asked her to marry him and later reneged and expressed a desire to end their relationship, the Court pointed to the defense of the **Heart Balm Act** whose aim was to "do away with excessive claims, coercive by their very nature and, frequently fraudulent nature."

The Court did not believe that the woman's claim for support was excessive or fraudulent but did give credence to the **Heart Balm Act** and found that any claim predicated upon his alleged failure to live up to his promises of marriage had to fall.

The defense of the **Heart Balm Act** was upheld in the case of the criminal seduction of a minor in ***Magierowski v. Buckley,*** 39 *N.J.Super* 534, 121 *A2d*. 749 (App.Div. 1956), where a father's action for criminal seduction, or the loss of services of his daughter as his housekeeper, which was caused by her impregnation by another, was denied because of the **Heart Balm Act**.

At this time, interspousal immunity is no longer in any respect a defense to torts between parties because of a long line of cases which ended with ***Mercado v. Mercado***, 76 *N.J.* 535, 388 *A2d.* 951 (1978) and ***Tevis v. Tevis***, 79 *N.J.* 42, 400 *A2d* 1189 (1979). (*See* Section 1.2).

On May 14, 1973, Mrs. Tevis, after returning home in the early morning after having spent the evening out, entered her house and her husband began to beat her. She suffered substantial injuries which were corroborated by the testimony of her treating physician and by photographs of her face and body taken shortly after the event.

On May 22, 1975, the parties were divorced. On July 7, 1975, some six weeks after the divorce, and over two years after the assault and battery, Mrs. Tevis brought her tort action against the defendant for personal injuries.

The Supreme Court reversed the Appellate Division judgment and stated that the action was "time-barred" and remanded the matter to the trial court for the entry of summary judgment in favor of the defendant husband. Because the action was brought more than two years after the incident, the court held that the Statute of Limitations applied. (***N.J.S.A.***2A:14-1, et seq. *See* discussion of Defenses under Section 5.4.)

The Supreme Court first said that the action was barred by the Statute of Limitations, and thus there would be no need to analyze the law. However, the Court then reviewed the history of the entire interspousal immunity doctrine, and concluded that since it had been partially abrogated ***Mercado v. Mercado***, 76 *N.J.* 535, 388 *A2d*. 951 (1970), there was no tolling of her cause of action, which was subject to the Statute of Limitations.

The history of the partial abrogation of parental tort immunity is set forth in Section 4.2.

For the first time in ***France v. A.P.A. Transp. Corp.***, 56 *N.J.* 500, 267 *A2d* 490 (1970), the doctrine of parental immunity was partially repudiated. There the Court held that an unemancipated child could sue a parent for injuries due to the parent's negligent operation of a motor vehicle. The Court recognized that the reasons typically given for retaining immunity for parental negligence, the preservation of domestic harmony, the deterrence of fraud and collusion, and the protection of the family exchequer had little remaining validity.

The specific holding in ***France*** was limited to the abolition of parental immunity in claims arising out of parent's negligent operation of a motor vehicle, but the Court nevertheless stated the general view that the immunity "should be abrogated in this state". at p. 506

In that case *in dictum* the Court further recognized that "there may be areas involved in the exercise of parental authority in care over a child which should not be justiciable in a court of law." at p. 507.

The Supreme Court in ***Foldi v. Jeffries***, 93 *N.J.* 533, 461 *A2d.* 1145 (1983) abrogated the parental immunity bar to a suit against a parent who has willfully or wantonly failed to watch over a child, thereby causing the child to be injured, but did not abrogate parental immunity if the parent's supervision was merely negligent.

In this case, a 2-1/2 year old child was being watched by her mother in the front yard of the family residence when she wandered out of the yard into the neighbor's residence two doors away, and was bitten on the face by a dog. The mother was unaware that her daughter had wandered off, but as soon as she disappeared, she began to search for her and found her 5 or l0 minutes later.

The child began a suit through a guardian ad litem against the owners of the dog, who in turn filed an answer and a third party complaint against the child's parents, alleging contributory negligence and seeking indemnification from them for resulting costs and damages. Thereafter, the guardian ad litem on behalf of the child filed an amended complaint adding her mother and father as defendants in her suit.

The Court in considering whether such parental negligence should remain immunized, noted the incongruity for disallowing this cause of action, while permitting a child to sue his parents in property or contract, ***In re Flasch***, 51 *N.J.Super* 1 (App.Div. 1958) certif. den. 28 *N.J.* 35 (1958), and to bring tort actions in cases where the parent had subsequently died, citing ***Palcsey***, *supra*; or where the child had become emancipated, ***Weinberg v. Underwood***, 101 *N.J.Super* 448 (Law Div.1968) or where parents had acted in *loco parentis*.

Mancinelli v. Crosby, 247 *N.J.Super* 456, 589 *A2d.* 664 (App.Div. 1991) wherein the Court held that the doctrine of parental immunity did not protect the mother's conduct in carelessly leading her child onto a busy street directly into the path of an oncoming vehicle. The Court found that such an action by the mother was "simple garden-variety negligence by the parent which exposed both the parent and the child to injury." Therefore the Court concluded that the "(d)enial of parental immunity...(did) not constitute judicial interference into a parent's philosophy of child rearing, but only simple recognition of the parent's breach of duty of due care which we all generally owe to both ourselves and others in the community."

In ***Horn by and through Kirsch v. Price***, 255 *N.J.Super* 350, 601 *A2d*. 274 (App.Div. 1992) an infant brought an action through her Guardian *ad litem* against her mother for personal injuries sustained as a result of an automobile accident under the theory of negligent supervision. Both the trial court and the Appellate Division refused to grant recovery because the child had failed to establish willful or wanton misconduct on the part of the mother as to abrogate the parental immunity doctrine.

The child was a passenger in an automobile driven by her mother which was being followed by her stepfather in a pick-up truck which was towing a 24 foot trailer, returning home from a family vacation. The parties pulled over to the side when the mother noticed something dragging underneath the trailer. The stepfather got out of the truck while it

was still running in order to fix the chain which had gotten loose. The child was told to stay in the mother's car by the mother, but she left the car anyway and was injured when the stepfather pulled his truck away.

Both the Courts determined that the mother's conduct did not constitute willful or wanton misconduct, and reaffirmed for public policy reasons, the retention of the doctrine of parental immunity from matters arising out of the exercise of a parental immunity.

This doctrine was further extended in ***Witer by Witer v. Leo***, 269 *N.J.Super* 380, 635 *A2d.* 580 (App.Div. 1994). This is a convoluted case which was remanded before the trial court on many instances but involved the possibility of a personal injury action by a boy who injured himself in the pool of the defendant mother, at a pool party which was given by defendant's son in her absence.

The boy who had been forbidden to come to the house by the mother, after drinking 5 cans of beer, attempted to jump from the roof of defendant's house into the adjacent pool. The Court found that the parents had a duty to provide for reasonable supervision of their minor child if it is reasonably foreseeable that, in their absence, the child would invite friends to a beer party at which one of the minor guests would become intoxicated and thereby injure themselves.

The purpose of the entire controversy doctrine is to the extent possible, to allow the Courts to determine the entire controversy in a single judicial proceeding, in which not only all claims are heard at one time, but all persons who have an interest in the controversy are heard at the same time. The doctrine seeks to avoid the waste of the Court's time by trying duplicate matters together , and thus promote efficiency and the avoidance of what has been called "piecemeal decisions".

It is the aim of the entire controversy doctrine to preclude later litigation involving the same essential claims or the same essential parties if these claims are not included in an original action.

In the Rules of Court, the entire controversy doctrine is referred to as either joinder or non-joinder. In ***Rules of Court 4:30A*** the Rule sets forth the doctrine by stating:

"Non-joinder of claims or parties required to be joined by the entire controversy doctrine shall result in the preclusion of the omitted claims to the extent required by the entire controversy doctrine except..."

The Rule itself does not define the doctrine but leaves it to case law.

Rule 4:30 entitled **Misjoinder and Non-Joinder of Parties** states that it is not a ground for dismissal of an action if a person is mistakenly included in the action and adds that "Parties may be dropped or added by court order on motion by any party or its own motion. Any claim against a party may be reserved or severed and proceeded with separately by court order."

The defense of the entire controversy doctrine must be pleaded as an affirmative defense, and if not pleaded, is considered waived. ***Rule 4:5-4*** states:

"A responsive pleading shall set forth specifically and separately a statement of facts constituting an avoidance or affirmative defense such as accord in satisfaction, arbitration and award, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations and waiver. If a party has mistakenly designated defense as a counterclaim or a counterclaim as a defense, the court, on terms if the interest of justice requires, shall treat the pleading as if there had been a proper designation."

Now this Rule does not specifically state that the entire controversy doctrine has to be set forth an affirmative defense, but if it is read in connection with other rules, intent is clear.

Rules of Court 4:6-2 states:

"Every defense, legal or equitable, in law or fact, to a claim for relief in any complaint, counterclaim, crossclaim, or third party complaint shall be asserted in the answer thereto, except that the following defenses may at the option of the pleader, made by motion, with briefs: (a) lack of jurisdiction over the subject matter, (b) lack of jurisdiction over the person, (c) insufficiency of process, (d) insufficiency of service of process, (e) failure to state a claim upon which relief can be granted, (f) **failure to join a party without whom the action cannot proceed**, as provided by ***R.4:28-1***..."

Rule 4:6-7 which is entitled **Waiver or Preservation of Defenses** refers to this Rule and states that the defense contained in (f) failure to join a party without whom the action cannot proceed, indicates that if the defense is not raised it is still preserved if it is made in subsequent pleadings or by a motion for summary judgment, or even at trial.

Thus, although the better practice is to raise the objection as an affirmative defense, the right to bring this defense is not waived and may be brought at a later time.

Sometimes it is not known in the initial pleadings that there was in fact another similar matter, or who the parties are to be joined until discovery is completed. This Rule then preserves that right until it is known.

It is best in all cases to set forth the general defense "defendant fails to state a cause of action upon which relief may be granted", which would generically cover the defense of the entire controversy doctrine or non-joinder of a party.

As stated in ***Tevis v. Tevis***, 79 *N.J.* 422, 400 *A2d.* 1189 (1979), the entire controversy doctrine does not bar component claims either unknown, unrisen, or unaccrued at the time of the original action.

In ***Chiacchio v. Chiacchio***, 198 *N.J.Super* 1, 486 *A2d.* 335 (App.Div. 1984), the Court decided that because the plaintiff brought a marital tort action against the defendant, and at the same time sought insurance coverage for the tort, that these claims "were improvidently joined with the matrimonial action", and allowed the insurer a right to jury trial.

The Court stated that the joinder of claims is a matter of judicial discretion and indicated that there were occasions when attorney's supplementary pleadings, "no matter how germane...may have greater potential for...for prejudice to the parties if they are joined with the original action." Because of this, the Court separated the actions.

In a non-matrimonial case of ***Cogdell v. Hospital Center at Orange***, 116 *N.J.* 7, 560 *A2d.* 1169 (1989) the entire controversy doctrine was held to only bar litigation of claims between those people who were already parties to the action.

Although the entire controversy doctrine does not apply to component claims which are unknown, or unarisen or unaccrued at the time of the original action, in ***Brown v. Brown***, 208 *N.J.Super* 372, 506 *A2d*. 29 (App. Div.1986) the court allowed a subsequent action to be included in the divorce action.

A wife, while separated from her husband, had the husband's brother appeal to her in asking her assistance in caring for the husband's mother. When the wife went to the mother-in-law's house in the Bronx and stayed there several days rendering such help as she could, the husband came and assaulted her by twisting her arm and pushing her to the ground.

As a result of the incident, she alleged that she sustained a chronic cervical strain and aggravation of her existing muscular dystrophy which required emergency medical care, eventual hospitalization, extended treatment and physical therapy.

Although her divorce case was pending, she did not include it in the divorce action, and put a settlement on the record. Distinguishing this case from ***Tevis v. Tevis***, *supra*, where the tort occurred prior to the institution of the divorce action, the court decided that the entire controversy doctrine did not apply and did not bar the wife from litigating this claim because this tort claim was sufficiently distinct and independent from the cause of action for divorce and equitable distribution to permit a separate adjudication without prejudicing the parties.

It further held that in the future, a party whose constituent claim arises during the pendency of the action, is lost unless he apprises the court and his adversary of its existence and submits to judicial discretion the determination of whether it should be joined in that action or reserved.

"A case cannot be made for damages in an action for personal injuries until the extent of the damages are known. The Act requires that a final hearing be held within l0 days of the filing of the domestic violence complaint and the complaint is usually filed the day of

or within days after the violence occurs. This expedited process is available for the protection of the victim and to prevent further acts of domestic violence. The process, however, is ineffective if the victim is forced to make a case for damages at that time as well... .

The court also rejected the defense of *res judicata*, (see Section 5.12) that the issue had already been litigated, because only the issue of liability was decided. The issue of damages could be decided at the divorce trial.

***See* Practice Form #5**

In ***B.P v. G.P.***, 222 *N.J. Super* 101, 536 *A2d*. 271 (App.Div. 1987), the Court held that a subsequent action under the Parentage Act was barred after the judgment in a divorce action had adjudicated custody and child support issues.

A mother, after a judgment of divorce in which she gained child custody and child support from her former husband, brought a subsequent action under the New Jersey Parentage Act, ***N.J.S.A.***9:17-38 *et seq* against a man other than her ex-husband who she alleged sired her son and from whom she sought support.

The trial judge granted summary judgment dismissing the complaint on the basis of the entire controversy doctrine, concluding that a prior divorce proceeding in which child custody and child support were at issue, even though resolved by settlement, by implication sufficiently involved the issue of paternity to act as a bar to further litigation on the issue.

The Appellate Division stated that the Parentage Act's language was clear and unambiguous in that it provides the complaint shall be joined with divorce proceedings and that they shall be governed by the Rules of Civil Procedure, R.4:1-1 et seq.. The Court therefore concluded that the single or entire controversy doctrine is applicable to Parentage Act proceedings and constitutes a bar to the action.

The specific wording of the Parentage Act that they noted was that it provided that complaints "shall be joined with divorce actions, which demonstrates a specific intent to have the issue of parentage dispute, if known to the parties at the time, resolved during the divorce proceedings."

The Court further found that the entire controversy doctrine, by virtue of its well-established precedent, (the law since the creation of our present court system under the 1947 Constitution), is part of the common law of this State.

***See* Practice Form #39.**

In ***J.Z.M. v. S.M.M.***, 206 *N.J.Super* 642, 646; 545 *A2d*. 249 (Law Div. 1988), a diagnosis of herpes was made 22 months after the dissolution of the marriage, but not diagnosed until after the divorce. The Court allowed this action despite defense of single/entire

controversy doctrine and stated that the herpes transmission from the husband to the wife was a cause of action and not discoverable until after the divorce action was completed.

In ***Baureis v. Summit Trust Company***, 280 *N.J. Super*, 654 *A2d.* 1017 (App. Div. 1995) involved a married couple who opened a joint investment review account at the Summit Trust Company which was funded with $5,000,000 from the other accounts that the husband maintained. The husband's accountant informed summit a year and a half later on that the joint account had been opened in error and the funds should be returned to their original sources, which it did without contacting the wife and made the transfer based upon the oral instructions of the accountant, confirmed by the husband. The wife knew of the change in the account about a year later on.

The defendant husband after 20 years of marriage, transferred $5,000,000 from his individual account to a joint account with his wife as a birthday present, at the summit trust company bank on which he served on the board of directors.

A year and a half later, the husband's accountant telephoned the Summit Bank and told them that the joint account had been opened in error and the funds should be returned to the husband's original account. The husband orally confirmed these instructions with the bank, who did not contact his wife and changed the account. The wife, although not contacted, knew about the change in the account approximately a year after, and before she filed her complaint for divorce.

In the complaint, she referred to the closing of the account. Defendant died before the divorce proceedings were concluded, and the wife did not continue a claim for equitable distribution or assert a claim for her elective share under the inheritance laws. She then filed an amended complaint against the estate of her husband, seeking to impose a constructive trust and this litigation was settled approximately two years after her husband's death and she received a settlement of $9,000,000 to resolve her claims against the estate, including her claim to the closed joint account.

Before she settled the case against the estate, she filed an action against the summit bank for damages resulting from the closing of the joint account, asserting breach of contract, conversion and negligence. The complaint did not mention the divorce action and in fact contained the certification of the wife's attorney that no other lawsuit or arbitration relating to the subject matter of the action was pending or contemplated and there were no other parties who should be joined.

On the bank's motion to dismiss the complaint, it argued that the wife should have joined the bank in the matrimonial litigation as to any claim against the bank for its handling of the joint account.

The wife argued to the trial court that the entire controversy doctrine did not apply because her clams against summit were not unique and did not arise out of "a family or family type relationship."

The Appellate Division disagreed, finding that her claims against the bank were inextricably intertwined with her claims against her husband, and found no reason why the wife having resolved her claims against the state, should be allowed to attempt to litigate in a separate proceeding against another defendant a nearly identical claim based on the same underlying facts.

The appeals court was satisfied that, pursuant to the case law, its "particularized evaluation" of this matter led to the conclusion that permitting this action to proceed passed a risk of "substantial unfairness" to summit, unreasonably fragmented litigation of the same issues, and imposed an unfair burden on judicial economy.

After detailing several elements of unfairness in this case, the appellate division stated that the husband's death severely prejudiced summit in its attempt to defend this action against the wife. The court also noted that had summit been joined in the earlier action, it could have asserted cross-claims or third-party claims against the parties who received the funds transferred from the joint account.

5.6. Res Judicata

Res judicata is an affirmative defense under ***Rules of Court 4:5-4*** and cannot merely be a conclusion, but must be based upon a statement of facts which show that the matter has already been litigated.

This affirmative defense need not necessarily be specially pleaded, or deemed waived, if somewhere in the other pleadings or defenses the issue is raised.

In ***Biddle v. Biddle***, 166 *N.J.Super* 1, 398 *A2d.* 1297 (App.Div. 1979) A mother brought an action against her son and his former wife to impose an equitable lien upon them based on an alleged purchase money resulting trust. The son defaulted and on the day of trial, the wife moved to dismiss the complaint which was granted.

The action arose out of money that the mother advanced her son and his wife for use as a payment on a lot and a home which was subsequently built. The wife claimed that the advance was not a loan but was an unconditional gift.

In a divorce action between the husband and wife, the mother moved to intervene to assert her claim against the property. Her motion to intervene was denied and no appeal or motion for leave to appeal was taken. At the trial of the divorce, the son argued that the mother's lien reduced the value of the premises subject to equitable distribution and increased the debts that he and his wife owed. The mother testified in the divorce action in support of her claim. The divorce court awarded the wife full title to the premises "free and clear of any alleged liens" of the husband or the mother. The divorce judgment was never appealed, and four months after the entry of the judgment, plaintiff filed a new action asserting her claim to a lien on the property. The trial judge granted the wife's

motion to dismiss the action, concluding that the judgment of divorce action barred relitigation of plaintiff's claim. The Appellate Division reversed.

The Court concluded that the mother's participation and presentation of her claim at the divorce trial as a witness, was not the submission of her claim to the divorce court, and did not preclude her from bringing a subsequent action.

The Court determined that neither her participation as a witness nor the familial relationship to the party, precluded her from bringing the action.

***See* Practice Form #40.**

The Statute of Limitations, the time in which a complaint must be filed, is the ultimate defense to a tort action and is set forth in statutes, as well as the Rules of Court.

R.4:5-4 requires that a responsive pleading set forth specifically the defense of Statute of Limitations if it exists.

The concept of the Statute of Limitations is that a party who has an action, should diligently pursue that action, and any delay beyond the designated period of time, would be unfair to the defendant and an injustice to the defendant because the facts which substantiate the case would be too distant, hard to prove, and the memories of the parties and the witnesses will have faded.

The specific Statute of Limitations which we deal with as set forth by statute are as follows:

N.J.S.2A:14-1 which sets forth a **six year** limitation for any:

"Trespass to real property, for any tortious injury to real or personal property, for taking, detaining, or converting personal property, for replevin of goods and chattels, for any tortious injury to the rights of others not stated in sections 2A:14-2 and 2A:14-3, or for recovery upon a contractual claim..."

Thus, certain actions for deceit and fraudulent representations, Section 2.1; Dissipation of Marital Assets, Section 3.1: Breach of a Fiduciary Duty; Fraudulent Conveyance and Conversion, 3.9, etc. would fall under this statute.

N.J.S.2A:14-2 sets forth a **two year** Statute of Limitation for

"every action at law or equity for an injury to the person caused by the wrongful act, neglect or default of any person..."

Most of the tort actions in this book fall within this section.

N.J.S.2A:14-3 sets forth a Statute of Limitation of **one year** for

"every action at law for libel or slander shall be commenced within one year next after the publication of the alleged libel or slander."

The statute also makes it clear that if the libel or slander actions which resulted in defamation was not an intentional tort, but a negligent action, it still must be instituted within one year. This would apply to any actions resulting out of wiretapping (Section 3.3 and Section 4.15) and defamation, libel and slander (Section 3.7 and Section 4.13).

As can be seen by the case of ***Tevis v. Tevis***, 79 *N.J.* 42, 400 *A2d. 1189* (1979), no matter how valid the claim, the Statute of Limitations serves as an **absolute bar** to this suit. As to the pleadings themselves, there is some leeway.

Williams v. Bell Telephone Laboratories,Inc. 132 *N.J.* 109, 118-120, 623 *A2d*. 234 (1993) held that the pleading of the Statute of Limitations defense in an answer is insufficient to preserve the defense if it is not referred to again during the discovery, pretrial motions and trial.

When the defense is raised, the burden is upon the person asserting the defense, to prove that it exists by the preponderance of evidence standard. ***Italian Fishermen v. Commercial Un. Assur.***, 215 *N.J.Super* 278, 282, 521 *A2d*. 912 (App.Div. 1987), certif. den. 107 *N.J.* 152, 526 *A2d*. 211 (1987).

Rule 4:6-7 which is entitled, " Waiver or Preservation of Defenses," states that the defense or objection or failure to state a legal defense to a claim, can be made in any pleading permitted or ordered, or by motion for summary judgment or at the trial of the merits. As has been construed as set forth above, that failure to state a legal defense to a claim, encompasses the defense of Statute of Limitation, as both go to the sustainability of the action, and thus both are preserved as a defense, even if not pleaded. ***Rappeport v. Flitcroft***, 90 *N.J.Super* 578, 580, 581, 218 *A2d*. 873 (App.Div. 1966); ***O'Connor v. Abraham Altus***, 67 *N.J.* 106, 116, 303 *A2d*. 329 (1975).

Exceptions to pleading the Statute of Limitations and preserving it as a defense are set forth in ***Rule 4:6-2(e)*** where it has been held that simply stating that failure to state a claim upon which relief can be granted is the same as pleading the Statute of Limitations and preserves that defense. ***Rappeport v. Flitcroft***, 90 *N.J.Super* 578, 580-81, 218 *A2d*. 873 (App.Div. 1966); ***O'Connor v. Abraham Altus***, 67 *N.J.* 106, 116, 303 *A2d.* 329 (1975), ***Vaccaro v. DePace, Inc.,*** 137 *N.J.Super* 512, 349 *A2d*. 570 Law Div. 1975).

The Statute of Limitations begins to run when the injured party had knowledge, or should have discovered by the exercise of reasonable diligence and intelligence, that there was a basis for an actionable claim against another person. ***Wade v. Armstrong World Industries, Inc.***, 746 *F.Sup.* 493 (*D.N.J.* 1990).

It is the knowledge that the injury itself occurred which begins the time in which the Statute of Limitations runs, and not necessarily that the injured party have knowledge of

the extent of the injury. ***P.T. & L. Const. Co. Inc. v. Madigan and Hyland, Inc.***, 243 *N.J.Super* 201, 348 *A2d*. 850 (App.Div. 1991).

The actual computation of the Statute of Limitations, excludes the first day of the happening of the event, and includes the last day, unless it falls on Sunday or a legal holiday, in which case the following day is included. ***State v. Rhodes***, 11 *N.J.* 515, 95 *A2d.* 383 (1959).

A claim for false arrest falls under 2A:14-2 and must be brought within two years of unlawful detention. ***Fleming v. United Parcel Service, Inc.*** 255 *N.J.Super* 108, 604 *A2d*. 657 (Law Div. 1992).

The New Jersey Supreme Court, in order to determine whether the Statute of Limitations applies, adopted what is now known as **"The Discovery Rule"** in ***Fernandi v. Strully,*** 35 N.J. 434, 173 *A2d* 277 (1961).

Under **The Discovery Rule**, a cause of action accrues when the injured party knows or has any reason to know that she may have the basis for an actionable claim. The discovery rule postpones the accrual of a cause of action, and thus the imposition of the Statute of Limitations, so long as the party reasonably is unaware either that she has been injured, or that the injury is due to the fault or neglect of an identifiable individual or entity. ***Abboud v. Viscomi,*** 111 N.J. 56, 62 543 *A2d* 29 (1988), ***citing Vispisiano v. Ashland Chemical Co.***, 107 N.J. 416, 426-427, 527 *A2d.* 66 (1987). It delays the statutory period from running until the plaintiff learns, or reasonably should learn, the existence of that *state of fact* which may equate in law with a cause of action. ***Burd v. New Jersey Telephone Co.***, 76 N.J. 284, 291 372 *A2d.* 1355 (1978). Invocation of the discovery rule may occur in a marital tort actiona depending upon the injuries sustained, i.e. if the injuries are of a magnitude in which the plaintiff is incapable of recognizing *at the time the tortious conduct occurs* that she may have the basis for a claim. In addition, on-going abuse may give rise to a continuous tort as as to toll the statute of limitations.

In ***Lopez v. Swyer***, 62 N.J. 267, 275, 300 *A2d*. 563 (1973) a determination of the applicability of the discovery rule should be made at a prliminary hearing. Generally, the issue will not be resolved on affidavits or depositions since demeanor may be an important factor where credibility is significant.

The ***Lopez*** court acknowledged that there may be different circumstances giving rise to the application of the discovery rule. A person may, for example, be unaware that she has sustained an injury until after the statute of limitations has run. In other cases, the damages may be apparent; however, the injuried person may not know that the injury is attributable to the fault or neglect of another.

Thus, the discovery rule may operate to toll the statute of limitations in a marital tort matter. In making a determination as to when plaintiff should reasonably have learned that she may have the basis for a claim, the Court must apply a subjective standard.. The subjective focus must be upon the nature and extent of her psychological conditions,

emotional stability and her state of mind. It is essential to provide the court with a chronology of plaintiff's personal history of trauma and emotional dysfunction which dates back to her childhold, as it directly relates to her emotional and mental condition during the time frame involved therein.

Lopez provides factors to consider in determining whether the discovery rule is available to a party. The factors, which are not all-inclusive, are as follows:

1. Nature of the alleged injury;

2. Availability of witnesses and written evidence;

3. Length of time that elapsed since the alleged wrongdoing;

4. Whether the delay has been to any extent deliberate or intentional;

5. Whether the delay may be said to have peculiarly or unusually prejudiced the defendants.

The burden of proof rests upon the party claiming the indulgence of the rule.

There are now three legal theories which justify tolling the statute of limitations. (1) insanity pursuant to *N.J.S.A.* 2A:14-21; (2) duress brought on by the acts of the defendant and (3) the continuous tort doctrine, i.e. the Battered Woman's Syndrome

The plaintiff's psychological condition may prevent her from realizing the acts of the defendant were wrong and formed the basis for a tort claim. *N.J.S.A.* 2A:14-21 provides in pertinent part:

If any person entitled to any of the actions or proceedings specified in sections 2A:14-1 to 2A:14-8 or sections 2A:14-16 to 2A:14-20... is or shall be, at the time of any such cause of action or right to title accruing, under the age of 21 years, or insane, such person may commence such action ... after his coming to or being of full age or of sane mind.

The application of the above statutory provisions to claims of discovery rule entitlement in an abuse action, is set forth in ***Jones v. Jones,*** 242 N.J. Super. 195, 205, 206, 576 A2d. 316 (App. Div. 1990). The Appellate Division stated that "mental trauma resulting from a pattern of incestuous sexual abuse may constitute insanity under N.J.S.A. 2A:14-21 so as to toll the statute of limitations." The resolution of the issue depends critically upon a determination of whiat is the plaintiff's state of mind. This is a subjective determination which is not appropriate for resolution by way of summary judgment.

In ***Kyle v. Green Acres at Verona, Inc.,*** 44 N.J. 100 (1965) 207 A2d. 513 , the Supreme Court held that N.J.S.A.2A:14-21 "foreclose[d] a tolling of the running of [the limitations

period] unless plaintiff was [insane] at the time the cause of action accrued..." *Id.* at 106-107. However, the Court carved out an equitable exception where the defendant's "negligent act brings about plaintiff's insanity." The Court concluded:

[If] plaintiff"s insanity was caused by defendant's wrongful act, it may be said that such act was responsible for plaintiff's failure or inability to institute her action prior to the running of the statute of limitations. We feel that justice here requires us to carve out an equitable exception to the general principle that there is no time out for the period of time covered by the disability if the disability accrued at or after the cause of action accrued. Thus, a defendant whose negligent act brings about the plaintiff's insanity should not be permitted to cloak himself with the protective garb of the statute of limitations. *Id.* at 116.

The ***Kyle*** Court adopted a two-part test wherein the court must determine (1) whether the insanity dveloped on or subsquent to the date of the alleged act of the defendant and within the period of limitations and if so, whether that insanity resulted from the defenant's bad acts; and (2) whether plaintiff's suit was started within a reasonable time after restoration of sanity. The *Kyle* Court concluded that the word "insane" in the statute of limitations "means such a condition of mental derangement as actually prevents the suffered from undersanding his legal rights or instituting legal action."

Recently, the reasoning of ***Jones*** was applied to toll the limitations period for a domestic abuse victim in ***Giovine v. Giovine,*** 284 N.J. Super 3, 663 A2d. 109 (App. Div. 1995). In ***Giovine***, plaintiff brought an action against her husband alleging the grounds for dissolution of themarriage and claims of tortious conduct arising from her husband's physical an psychological abuse. The defendant moved to strike all tortious claims occurring more than two years prior to the filing of the Complaint based upon the statute of limitations. The Law Division granted defendant's motion.

On appeal, the court revisted the issue of tolling the statute of limitations in situtations wherein the plaintiff claims a pattern of abuse. Specifically, the Appellate Division cited with approval to the **Jones** case, holding that a victim's emotional condition is a justification for tolling the statute of limitations. The court drew an analogy between the status of the ***Jones*** plaintiff and that of the ***Giovine*** plaintiff to find that the "psychological paralysis" which occurs in an abusive relationship can render the victime unable to take any action at all to improve or alter the situation.

The Appellate Division in ***Giovine*** cited to ***Lopez*** in further support of the application of the discovery rule, as well as to the two-part test of ***Kyle v. Green Acres,*** discussed *supra*, and modified the order of the Law Division. The court held that given the appropriate proofs, plaintiff was permitted to assert a claim for emotional distress, the Battered Woman's Syndrome, attributable to acts occurring more than two years before filing of the Complaint.

The statute of limitations may be tolled due to the infliction of duress by the defendant if the duress contributed to the plaintiff's deteriorated mental and psychological condition and prevented her from realizing that she had the bais for an actionable claim.

Duress as a means to toll the statute was addressed in the same line of cases discussed *supra*. In ***Jones,*** citing ***Lopez***, the court acknowledged that New Jersey case law has a "long history of instances where equity has interposed to bar the statute of limitations... where some conduct on the part of the defendant... has rendered it inequitable that he be allowed to avail himself of the defense". The principle is grounded in equitable considerations; therefore, "the exact contours of the doctrine defy rigid definition". The rule has been applied in a variety of factual and legal settings.

The ***Jones*** court cautioned that the doctrine should not be applied whenever a plaintiff claims that his or her failure to initiate suit in a timely fashion was caused by a defendant's wrongful act. However, the court was of the view that, within certain limits, a prospective defendant's coercive acts and threats may rise to such a level of duress as to deprive the plaintiff of [her] freedom of will and thereby toll the statute of limitations.

In ***Jones***, since the claim of duress to toll the statute was an issue of first impression in New Jersey, the court looked to decisions in other jurisdictions which generally accepted the theory. They incorporated an additional requirement that both a subjective and objective standard must be satisfied in order for the plaintiff to prevail. The proofs must show that:

the duress and coercion exerted by the prospective defendant must have been such as to have actually deprived the plaintiff of his freedom of will to institute suit in a timely fashion, and it must hve risen to such a level that a person of reasonable firmness *in the plaintiff's situation* would have been unable to resist. at p. 209.

The language set forth in ***Jones*** clearly indivates that the reasonableness of the plaintiff's actions must take into account the "situation" of the plaintiff. This gives rise to a subjective determination as to the plaintiff's mental state to recognize the situation and her ability and capacity to pursue her lawful rights.

The Appellate Division in ***Giovine*** also addressed the duress issue and looked to the holding in **Jones** for guidance. The court found justification for tolling the statute of limitations when a victim plaintiff is placed under physical and psychological duress by the defendant.

The basic factual scenario in which there is a claim of duress and/or coercion is usually accompanied by actual or threatened physical abuse. However, it should not be limited to that fact pattern. Duress can result from psychological as well as physical abuse.

The continuous tort doctrine was initially discussed by the Supreme Court in ***Tortorello*** 6 *N.J.* 58 (1950). ***Tortorello*** was a medical malpractice action wherein plaintiff claimed that the defendant's negligence in performing plastic surgery and follow-up care resulted in a permanent facial disfigurement. Plaintiff's Complaint was filed roughly 2 years and 6 weeks after defendant's claimed last date of treatment.

Defendant moved for summary judgment claiming that the action was time-barred. Plaintiff contended that the negligent operation in August 1946 and the post-operative treatment, whether negligent or not, comprised a single continuous tort and her cause of action accrued when the treatment ended in the fall of 1947. The Supreme Court determined that an action accrues when a right first arises to institute and maintain an action against the wrongdoer. . However, the Court suggested:

"an exception is ordinarily made where the injurious consequences arise from a continuing course of negligent treatment and not from single or isolated acts of negligence or breach of duty. In such a situation, the statute does not ordinarily begin to run until the injurious treatment is terminated unless the patient discovered or should have discovered the injury before that time. The malpractice in such cases is regarded as a continuing tort because of the persistence of the physician...in continuing and repeating the wrongful treatment."

More recently, the Appellate Division is ***Giovine*** also adopted the continuous tort/treatment doctrine espoused in ***Tortorello***. The mental trauma involved in ***Giovine*** was Battered Women's Syndrome. The court stated that this syndrome is a recognized medical condition resulting from continued acts of physical or psychological misconduct. The resulting psychological state is comprised of varied, but identifiable, characteristics. The syndrome is a productof at least two separate and distinct physical or psychological acts occurring at different times.

See ***Aykan v. Goldzweig***, 238 *N.J.Super* 389, 569 *A2d.* 905 (Law Div. 1989) in which a client brought a malpractice action against her former divorce attorney for that attorney's failures to select the most beneficial, allowable date for valuing an asset; and for failing to institute a separate tort complaint against the husband.

The defendant wife filed a counterclaim against her husband in the divorce action for extreme cruelty which included batteries. No separate tort claim was filed for these.

The defendant did not even know she had a cause of action for a tort until she went to another attorney, James P. Yudes, Esq. who suggested to her the possibility that her attorney may have committed malpractice in both choosing the date of separation as the effective date for equitable distribution and in not filing a tort claim for battery.

The Court dismissed the attorney's liability for incorrectly drafting the separation agreement and choosing the wrong date for equitable distribution; but allowed the claim for failure to plead a marital tort to continue.

The Court stated that professional negligence cases, where there is a continuing course of negligent treatment, the Statute of Limitations does not begin to run until treatment is terminated, unless the plaintiff earlier discovers such injury or fraudulent concealment is involved. This "negligent treatment" did not begin until the wife discovered that she did have a cause of action.

In ***Mustilli v. Mustilli,*** 287 *N.J. Super.* 605, 671 *A2d.* 650 (Chan. Div. 1995), the plaintiff husband filed a complaint for divorce against the wife for extreme cruelty and among the allegations was that his wife had a sexually transmitted disease and that he had to take certain pills to protect himself from that disease. Later the plaintiff moved to amend the complaint to include a claim for damages bases on the marital tort, repeated the same allegations but at the same time sought compensatory and punitive damages caused by the event. The family court denied the motion because the tort claim should have been done originally. The plaintiff's reasoning for not originally bringing the action as a tort was that he was psychologically paralyzed, a theory which the court rejected and simply chose not to ask for compensatory or punitive damages at the time of the original complaint. The court also imposed the statute of limitations because the action related back to the action for dissolution which was filed before the expiration of the obligable two year statute. The trial court also pointed out that the assertion of a tort claim for damages required discovery into the allegations of the original complaint, which had not previously been required because neither party demonstrated any interest in contesting whether the marriage should be dissolved. This would involve medical and/or psychiatric experts and possibly a need for a trial by jury. The court concluded by stating that the plaintiff's damages based on marital tort was distinctly new and different from his actions seeking a dissolution of the marriage, and therefore the amendment could not relate back to the original filing date of the complaint, and was barred by the statute of limitations.

Recognizing in this day and age the unique nature of sexual abuse, a new statute was enacted, ***N.J.S.A***.2A:61-b-1 which states that a civil suit for sexual abuse shall be accrued at the time of reasonable discovery of the injury and as a causal relationship to the act of sexual abuse. An action must be brought within two years of reasonable discovery of this sexual abuse.

This Act established a statutory civil action for sexual abuse. It recognized the fact that sexual abuse victims may bring suit against their abusers under legal theories of assault, battery and intentional infliction of emotional distress as well.

The Act defines sexual abuse as an act of sexual contact or sexual penetration between an adult and a child under the age of 18. It also makes liable any person in a position of parental authority who permits or acquiesces in sexual abuse by the other parent or by any other person who commits sexual abuse. Thus, if a mother stands by, and knows that the father is sexually abusing their daughter, she is guilty under this Act.

The Act also recognized that since personal injury Statute of Limitations runs for only two years, because of the unique nature of sexual abuse, which may only be discovered by an adult victim after years of repression, the bill provides that a civil suit for sexual abuse shall accrue at the end of reasonable discovery of the injury in its causal relation to the act of sexual abuse. It further provides that any action must be brought within two years after reasonable discovery.

The Act also provides as will be discussed in ***Jones***, *infra*, that the Statute of Limitations in a particular case can be suspended, or tolled, because of the plaintiff's insanity, duress by the defendant, or on any other equitable grounds.

This Act also provides a provision which is similar to the "Rape Shield Law", ***N.J.S.A.***2C:14-7 that evidence of the victim's previous sexual conduct is normally not admissible except under certain restricted circumstances.

The Statute further provides that a judge may order that the testimony of a victim who is 16 or younger, may be taken on closed circuit television at the trial, out of the view of the jury, defendant or spectators; that portions of the trial may be closed to the public, upon court review, if the trial involves a victim age of 16 or younger, and that a victim or a defendant's name, address and identity will not appear on a complaint or any other public record, unless the victim consents, or unless the Court orders the disclosure following a hearing.

The Statute also provides for damages in the amount of $10,000 plus reasonable attorney's fees, or actual damages whichever is greater. Actual damages would consist of compensatory and punitive damages and costs of suit, including reasonable attorney's fees. Compensatory damages may include, but are not limited to, damages for pain and suffering, medical expenses, emotional trauma, diminished childhood, diminished enjoyment of life (not defined), costs of counseling and lost wages.

N.J.S.2A:14-21 provides for the tolling of the Statute of Limitations for infants and people not of a sound or sane mind. This Statute on its face tolls any cause of action for infants until they are 21 years of age.

In January of 1973, the Legislature lowered the age of majority in New Jersey from 21 to 18. ***N.J.S.A.***9:17B-1 to 3, the purpose was to extend to 18 year olds, the basic civil and contractual rights and obligations that previously had only been available to those 21 years of age or older.

The Supreme Court in ***Green v. Auerbach Chevrolet Corp.***, 127 *N.J.* 591, 606 *A2d*. 1093 (1992) concluded that although the Legislature did not specifically amend the tolling statute to reduce it to 18 years of age from 21 years of age, that the tolling provision and the age majority statute, read together, reflect a clear legislative purpose to lower the age majority to 18 for all purposes, including the establishment of 18 as the age until which the Statutes of Limitations would be tolled. The Court did hold that this rejection would apply prospectively only, because in the interest of fairness and justice, although most judicial decisions are retroactive in application, they were not going to do so in this instance.

The question of whether or not an action fell under "an injury to the person" which would be governed by the two year statute of limitation *N.J.S.A.2A:14-2* or "tortious injury to the rights of another, under *N.J.S.A.2A:14-1* was explored in the convoluted case of ***Rumbauskas v. Cantor***, 138 *N.J.* 173, 649 *A.2D* 853 in which the supreme court reversed

the Appellate Division and upheld the law division's decision that the two year statute of limitations applied.

This case involved a stalking and harassment action by one suitor against another and the court stated that the law of privacy comprises four distinct kinds of invasions and four different interests of the plaintiff, and that this one clearly fell within the two year statute of limitation. (See stalking 4.15).

See **Practice Form #41**.

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The essence of equitable estoppel is that one party misrepresents to another, or conceals facts from them, and because of this action, the second party relies upon the misrepresentation, or acts not knowing of the concealment to his or her prejudice. ***Carlsen v. Masters, Mates and Pilots Pension Trust,*** 80 *N.J* 3034, 403 *A2d*. 880 (1979).

In ***Miller v. Miller***, 97 *N.J.* 154, 478 *A2d.* 351 (1984) and in ***M.H.B. v. H.T.B.***, 100 *N.J.* 567, 498 *A2d*. 775 (1985), the Court recognized that the doctrine of equitable estoppel could probably be applied in the context of a matrimonial controversy in which the interests of children were at stake. In both cases, there was reliance by one party upon the representations concerning continuous support, the representation that the man was the father of the child and the harm that would come to the child and to the mother if equitable estoppel was not applied.

The doctrine of equitable estoppel has also been used to stop a husband from repudiating his marriage to his wife because of an invalid Mexican degree, ***Raspa v. Raspa,*** 207 *N.J.Super* 371, 504 *A2d*. 683 (Ch.Div. 1985); and to stop a putative father from seeking relief from child support obligations after 13 years, ***T.W. v. A.W.***, 224 *N.J.Super* 675, 541 *A2d.* 265 (App.Div. 1988), but has yet to be applied as a defense in a domestic tort case.

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Lack of personal jurisdiction is contained in ***Rules of Court 4:4-4 and 4:6-2***. The defense may be raised in the answer, or at the option of the pleader by motion with briefs. Unlike the defense of subject matter jurisdiction, which is not waivable, the defense of lack of personal jurisdiction is waivable and is waived when the defendant appears without objection. *See* generally ***Squitieri v. Squitieri***, 196 *N.J.Super* 76, 481 *A2d.* 585 (Ch.Div. 1984) for the difference between *in personam* jurisdiction and *in rem* jurisdiction.

Rules of Court 4:6-2 provides that this defense may be asserted in the answer or at the option of the pleader by motion with briefs. Subject matter jurisdiction is a non-waivable defense and has been applied in the family law situation in the case of ***In the matter of the adoption of an Indian child***, 219 *N.J.Super* 28, 543 *A2d.* 925 (App.Div. 1987) where a state court was denied jurisdiction over an Indian child subject to the Federal Indian Child Welfare Act of 1978, but has not been used in a matrimonial tort setting.

***See* Practice Form #42.**

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The essence of the doctrine is that the trial court may decline jurisdiction whenever the "ends of justice" indicate a trial in the forum selected by the plaintiff would be inappropriate, which usually means inconvenient to the parties.

Obviously, there must be another forum which would be more convenient to the parties. Firstly, to invoke the doctrine, a party must show that there is a real hardship, or some other compelling reason not to have the matter tried in the present location. Secondly, the present place of litigation must be shown to be inappropriate. The trial judge is the one who makes this decision, which is only appealable if there is a showing of a clear abuse of discretion. *See* ***D'Agostino v. Johnson & Johnson, Inc.***, 225 *N.J.Super* 250, 542 *A2d.* 44 (App.Div. 1988), 115 *N.J.* 491, 559 *A.* 420 (1989) and ***El-Maksoud v. El-Maksoud***, 237 *N.J.Super* 483, 568 *A2d.* 140 (Ch.Div. 1989). *See* also ***List v. List***, 224 *N.J.Super* 432, 540 *A2d.* 916 (Ch.Div. 1988) which was a post-judgment application in which the Court declined to exercise its jurisdiction under the doctrine of forum non conveniens, where although the parties were divorced in New Jersey, both had relocated to North Carolina since the judgment was entered.

***See* Practice Form #43**.

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This defense centers on the issue whether the matter in litigation has already been the subject matter of arbitration where an award has been made.

In ***Wertlake v. Wertlake***, 127 *N.J.Super* 595, 318 *A2d.* 446 (Ch.Div. 1974) modified 137 *N.J.Super* 476, 349 *A2d.* 552 (1975), the Court refused to enforce an arbitration decision in respect to issues relating to child custody, visitation and support.

Even l0 years later in ***Faherty v. Faherty***, 97 *N.J.* 99, 447 *A2d*. 1257 (1984), the Court held that family disputes are arbitrable by agreement, but that the Court should specifically scrutinize child support awards, and that custody and visitation agreements still could be judicially reviewed *de novo*.

It wasn't until ***DeLorean v. DeLorean***, 211 *N.J.Super* 432, 511 *A2d*. 1257 (Ch.Div. 1986) that the Court finally recognized a decision that was arbitrated, in this matter, a provision of antenuptial agreement, and refused to litigate the matter again.

The Court found that the agreement was voluntarily entered into with no fraud or duress; that the agreement was not unconscionable and that full disclosure was made.

The Court upheld that provision of the antenuptial agreement which compelled arbitration in the matrimonial case.

***See* Practice Form #44.**

Robert G. Spector, Professor of Law at the University of Oklahoma, in the many articles that he has written about marital torts, constantly warns the practitioner about releases, specifically the waiver clauses that are included in property settlement agreements.

At the present time in New Jersey, once a divorce case is completed under the single controversy doctrine, if you have not brought up a tort action in that litigation, it will be barred. (*See* Section 5.5)

Provisions in divorce settlement agreements providing in essence that the agreement is for "full settlement of all claims between the parties," or as "full, final and complete settlement of all property matters and other matters between the parties," will effectively preclude litigation of tort actions, even if a final judgment of divorce has not been entered.

This may be the case even when the tort is discovered after the divorce, as in the transmission of a venereal disease which is not discovered until a much later date.

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While no one has a right to attack another, someone who is attacked does not have to submit meekly to being set upon, but may resist the use of force upon them with as much force as is reasonably necessary to protect themselves. Once this defense is raised, it is the burden of proof upon the person raising it to establish the facts. Thus, in proving the defense, two elements are necessary:

1. That the circumstances gave rise to the necessity to use force to meet force;

2. That the exercise of the resisting force was reasonable under the circumstances for the purposes of self protection.

These two standards are viewed by the trier or fact, whether it be judge or jury, not from the standpoint of one who has the leisure to make a calm unhurried judgment; but from the prospective of the defendant at the time the attack was made, if in fact you were in their shoes. ***Restatement (Second) of Torts***, par. 63(1); ***Model Jury Charges, Second Edition, Sec. 3.10b***.

These defenses would be raised as a counter to assault and battery. (*See* Section 2.4), and there is yet to be a New Jersey reported case in which this defense was upheld.

Coupled with this defense, is the additional defense of defense of another.

Restatement (Second) of Torts, Sec. 76 states that a person may intervene in the defense of a third person who is in actual or apparent imminent danger. Then using this defense, is an additional burden of proof besides that of self defense. Not only must you prove the reasonableness of the act and the degree of force, but also the reasonable basis to believe that the third party needed protection.

Deadly force, one in which the defense is such that the person who is attacking, dies as a result of the defense, can only be used if the person who is being attacked, has a reasonable belief that they are being attacked with deadly force. In New Jersey where a person's means of self defense would involve the use of deadly force or serious bodily harm, the law requires that the defendant first attempt to make a reasonable attempt to escape from the situation before using the deadly force. The only exception is that a person does not have an obligation to retreat from his or her own home. ***State v. Abbott***, 36 *N.J.* 63, 671, 174 *A2d*. 881 (1961); ***Hagopian v. Fuchs***, 66 *N.J.Super*, 374, 381, 169 *A2d.* 172 (App.Div. 1961).

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Restatement (Second) of Torts, 77, states that reasonable force may be used to recapture goods that were wrongfully taken, at the moment they were taken. Thus, if the seizure was rightful or legal, or the goods or chattels were taken a while ago, not falling in what's been called the "fresh pursuit" provision, no force can be used and only legal means to secure their return are allowed.

As an example, one spouse may go back to the marital abode, to take some personal property. At that time, the other spouse has a right to prevent the removal of that property with as much force as is reasonably necessary.

Even under these circumstances, the person acting in self defense must make a request for the return of the property before resorting to any force, unless such a force would be useless or dangerous, or futile under the circumstances.

One can envision many scenarios under the assault and battery context of domestic torts and domestic violence cases.

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Consent to an action, may be loosely referred to as a defense, although it is not really an affirmative defense in these actions.

The ***Restatements (Second) of Torts*** Section 8, 9 to A(1) states that: "One who effectively consents to conduct of another intended to invade his interests, cannot recover in an action of tort for the conduct or the harm resulting from it."

Consent is not necessarily a subjective matter, and the defendant is entitled to act upon the reasonable appearances in applying plaintiff's consent. Consent induced by fraud is not effective if it goes to the essence of the matter.

Consent was used as an ineffective defense in ***G.L. v. M.L.***, 228 *N.J. Super.* 566, 550 *A2d*. 525 (Ch.Div. 1988) where a husband raised the defense in a personal injury action claim again him by his wife because he transmitted genial herpes to her during sexual intercourse. The Court conceded that the sexual act itself was consented to, but the transmission of the disease was not.

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The defense of advice of counsel is an affirmative defense and the burden is on the defendant to show by preponderance of the credible evidence that he acted on that advice. ***Cabakov v. Thatcher***, 37 *N.J. Super* 249, 117 *A2d.*, 298 (App.Div. 1955).

The advice of an attorney will not protect a party who consults an attorney unless all the material facts are presented to the attorney. If the Court finds from the evidence that in seeking the advice of counsel, the defendant did not make a full, fair and complete disclosure of all the material facts within their knowledge, the advice of counsel is not a defense.

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The defense of right of privacy can be raised as a defense, and it was ineffectively invoked originally to bar any actions between spouses. The abrogation of spousal immunity put an end to this defense in actions between husbands and wives.

When invoked against third parties (see Section 3.2) generally the State's interests or the determination of paternity as a public policy, were deemed to have far greater weight than the person's right to privacy.

In ***M. and wife v. Schmid Laboratories, Inc.*** 178 *N.J.Super* 122, 428 *A2d.* 515 (App.Div. 1981) when a husband and wife brought a negligence products liability matter against the manufacturer of a contraceptive device (condom) for its defectiveness which caused the wife to become pregnant and give birth to normal, healthy twin daughters, the defense of privacy was raised to counter the comparative negligence aspect of the case, i.e. that the husband did not know how to use the device effectively.

The Court rejected the husband's defense of privacy in his bedroom, stating:

"It is clear plaintiffs have lifted the veil of secrecy here and placed squarely in issue all the facts surrounding the use or misuse of the alleged defective product... In a products liability action, the details concerning the use or misuse of the product are both relevant

and material and may constitute a defense to a claim for damages resulting from harm caused by a defective product." (citations omitted).

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In 1982, the Legislature enacted the comparative negligence statute which replaced contributory negligence as a measure of the liability of individuals as defendants in tort actions.

The statute, ***N.J.S.***2A:15-5.2 states that in all negligence actions in which the question of liability is in dispute, the trier of fact, whether judge or jury, should make the following findings:

a. The amount of damages to be recovered by the injured party both economic and non-economic.

b. Then, after that amount has been determined, that is the full value of the injured party's damages, the extent to which each party's negligence, including that of the plaintiff, as the percentage of the whole contributed, to the injuries of the plaintiff.

In a practical sense, if the monetary injuries to the plaintiff are $10,000, that amount has to be first decided, and then the percentage that is attributable to the defendants, as well as to the plaintiff. In this example, perhaps there were two defendants and each were liable 50%, then each one of them would be liable for $5,000.

If on the other hand, the plaintiff contributed to the negligence, for example 20%, then the other two defendants may have contributed 40% each, then they would pay $4,000 each. As long as the plaintiff's negligence is less than or equal to the combined negligence of the defendants, the plaintiff will be able to recover.

Before the 1982 change, in the case of ***Van Horn v. William Blanchard Company,*** 88 *N.J.* 91, 438 *A2d*. 552 1981, the Court interpreted the prior New Jersey comparative negligence act to permit the plaintiff to recover only from those defendants who were **more** negligent than himself, even if the aggregate of the negligence was less than the total percentage fault of all of the defendants.

The defense then is if the negligence of the plaintiff is more than the negligence of the defendant or defendants, it bars recovery.

Rules of Court 4:5-4 Affirmative Defenses includes "Contributory Negligence", which must be set forth specifically, but note #8 makes it clear that it applies to the newer statutory designation of Comparative Negligence.

See **Practice Form #47.**

Once it is determined that there is liability on the part of the defendants, ***N.J.S.***2A:15-53 further defines the percentages of liability for people who are joint and severally liable. If one of the defendants is found 60% or more liable in a personal injury or wrongful death action, and the other defendant although found liable has no money, then the plaintiff may collect the total award from the 60% or more defendant. Then it is incumbent upon that 60% defendant to seek from the other defendants or co-tortfeasors, their proportionate share of the award.

With the amendment of the Act, also came a statutory extension of liability to the so called "social host", that is a person who invites another into their home, provides alcoholic beverages, and then a person goes out and sustains injuries.

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Various public and semi-public groups have been tort exempt or granted immunity from liability because of passage of specific statutes.

The charitable immunity statute, ***N.J.S.***2A:53A-7 and 7.1 exempts non-profit associations which are organized for religious, charitable, educational or hospital purposes from tort liability if the tort that is committed is within the scope of their activity. The purpose of this act was to codify the common law immunity doctrine and protect these organizations from future tort liability. Some of the organizations which exemplify this are churches, temples, town councils, hospitals, Y's, Boy Scouts, school little leagues, nursing homes, and cemeteries. This liability is not absolute and when the organization which may be non-profit in itself, enters into an arena in which it is making profits, it then opens itself up to liability.

In ***Kasten v. Y.M.C.A.***, 173 *N.J.Super* 1, 412 *A2d*. 1346 (App.Div. 1980), the Y.M.C.A. was held liable for injuries that resulted by its operation of a commercially promoted ski area. In ***Kirby v. Columbian Institute***, 101 *N.J.Super* 205, 243 *A2d.* 853 (Law Div. 1968), the organization was held liable when it operated a public bar and bowling alley.

Non-members of this group were not deemed to be the "beneficiary" of the organization and were not exempt from suit.

N.J.S.2A:53A-7.1 also exempt from liability the trustees, its directors, officers and volunteer members of these organizations as long as the tort action dealt with the exercise of their judgments or discretion in connection with the duties of their office, with the only exception being that if there was evidence of reckless disregard for their duties, they would then be liable, or by their "willful, wanton or adversely negligent act of commission or omission," nor was there immunity for any negligent operation of motor vehicle.

The rationale was that non-profit organizations experience difficulty in attracting and keeping qualified individuals to serve as officers and on boards of directors because of the potential exposure to law suits. That would put these individuals' own assets in

jeopardy and as a result, many people had been reluctant to subject themselves to such risk. By giving immunity to these people, these charitable and non-profit organizations would be able to attract people to serve in these volunteer capacities.

An amendment to the Act in 1988 also included individuals serving in the same capacity who operated or maintained a cemetery or those who were volunteers of any kind of governing board or non-profit corporation whose purpose was the encouragement of economic development in a municipality or a county.

This amendment was thus providing immunity for individuals from damages resulting from the exercise of their position to a broader group of volunteers.

Besides the charitable immunity acts, there is also the New Jersey Tort Claims Act, ***N.J.S.A.***59:1-1, *et seq*. which protects public entities and police from tort liability. The Act passed in 1972 and had as its purpose "that public entities shall only be liable for the negligence with the limitations of this Act in accordance with the fair and uniform principles established herein."

The Act in its many parts provides for tort immunity for public entities and their employees for any injury which arises out of an act or omission. This immunity extends to an employee failing to inspect or negligently inspecting property, (***N.J.S.A.***59:2-6); for failure to provide supervision in a public recreational facility, except as it applies to protect against a dangerous condition, (***N.J.S.A.***59:2-7); the wrongful termination of public assistance benefits, (***N.J.S.A.***59:2-8).

It protects the employee also from injuries resulting from any of their discretionary activities, (***N.J.S.A.***59:3-2); from liability for the enforcement and execution of laws, (***N.J.S.A.***59:3-3); the adoption or failure to adopt any law (***N.J.S.A.***59:3-5); the issuance, denial, suspension or revocation of a permit or a license, etc., (***N.J.S.A.***59:3-6); and misrepresentation by a public employee, (***N.J.S.A.***59:3-10).

The Act does make the public entity liable in the event that they had actual notice or constructive notice of a "dangerous condition", and the failure to exercise due care once they knew or should have known about the condition and its dangerous character (***N.J.S.A.***59:4-3).

These public entities are also liable for failure to provide emergency warning signals (***N.J.S.A.***59:4-4) but not being liable for failure to provide ordinary traffic signals. (***N.J.S.A.***59:4-5). The Act exempts the public entity for liability for injury caused by weather conditions or wear and tear on streets and highways because of weather conditions, (***N.J.S.A.***590:4-7) and protect against liability for the condition of unimproved and unoccupied portions of tidelands and submerged lands, and the beds of navigable rivers, streams, lakes, bays, estuaries, inlets, straits owned by the state. (***N.J.S.A.***59:4-8).

Further tort immunity is provided to correction and police activities. Under ***N.J.S.A.***59:5-1, failure to provide a person or equip it adequately is exempt from tort liability, while the act of releasing on parole a prisoner or their escape from prison, and the consequence of any injury which they may inflict, is not actionable against the public entity under ***N.J.S.A.***59:5-2.

N.J.S.A.59:5-4 provides immunity for a public entity and/or public employees for failure to provide any, or insufficient police protection.

Goldberg v. Newark Housing Auth. 38 *N.J.* 578, 186 *A2d.* 291 (1962). The Court held that a municipal housing authority had no duty to provide police protection at the housing project and that it was not liable for injury sustained by the plaintiff while delivering milk to the tenants where he was beaten and robbed.

N.J.S.A.59:5-5 provides immunity for failure to make an arrest or retain a person arrested in custody.

Under these sections, originally in 1992 in ***Fagen v. City of Vineland***, *D.N.J.* 1992, 804 *F.Supp.* 591, the Court found that a police officer's involvement in high speed pursuit resulting in a fatal automobile collision did not "shock the conscience" as required to support the substantive due process claim; although the officers may have shown poor judgment into entering pursuit of the vehicle that had been observed and running stop signs. It was determined that their actions in pursuing the vehicle, partially blocking road and signaling vehicle to stop, and blocking traffic from entering the path of pursuit, was allowed.

N.J.S.A.59:6-1 *et seq* gives the same tort immunity to a public entity and a public employee for failure to provide a medical facility or mental institution, or if so provided, to sufficiently provide it with sufficient equipment and personnel, (***N.J.S.A.***59:6-2); or for preventing disease or the communication of disease; (***N.J.S.A.***59:6-3); or for failure to make a physical or mental examination or making inadequate physical or mental examination. (***N.J.S.A.***59:6-4). It was made clear in this statute that immunity pertains to the failure to perform adequate public health examinations, such as public tuberculosis examinations, physical examinations that determine the qualifications of boxers and other athletes, and eye examinations for vehicle operator applicants. It does not apply to examinations for the purpose of treatment such as ordinarily made in doctors' offices and public hospitals.

N.J.S.A.59:6-5 gives tort immunity for a public entity or a public employee for either failing to diagnose or incorrectly diagnosing a mental illness or drug dependency. The statute makes it clear that once a public employee decides to prescribe for mental illness or drug dependents, or when a public employee administers any treatment so prescribed, this statute does not apply and the physician is subject to the normal malpractice principles of liability.

N.J.S.A.59:6-6 provides immunity for the discretionary acts of determining whether to confine mentally ill or drug dependent people, and the acts that may result because of their parole, release or granting leaves of absence.

At times, the legislature has excepted gross negligence from statutory grants of immunity where deemed it appropriate, but the court has held that a grant of immunity under the charitable immunity act extends to gross negligence. ***Monaghan v. Holy Trinity Church***, 275 *N.J. Super* 594, 646 *A2d.* 1130 (App. Div. 1994), (Slip and fall case in church parking lot due to poor maintenance).

Predoti v. Bergen Pines County Hosp., 190 *N.J.Super* 344, 463 *A2d*. 400 (App.Div.1983). Plaintiff was initially assigned to a closed ward, but after initially responding to treatment, was transferred to a less restrictive open ward. This transfer allowed him to take escorted walks on the hospital grounds, and during one such walk, he was injured by an automobile. Plaintiff subsequently brought suit alleging that the decision to transfer him to a less restrictive ward constituted a negligent treatment decision.

The Court in that case decided that the transfer was within the immunity set forth in the Statute, and the Court reasoned that "(b) by immunizing these difficult decisions the Legislature allows them to be made at an atmosphere free from the fear of suit." *Id*. at 347-348, 463 *A2d*. 400.

McNesby v. Department of Human Services, 231 *N.J.Super* 568, 555 *A2d*. 1186 (App.Div.1988), certif. den. 117 *N.J.* 127, 564 *A2d.* 854 (1989. A patient who initially was admitted into the hospital with suicide precautions, was later allowed unsupervised access to the hospital grounds. He then attempted suicide by setting himself on fire and died two weeks later. In a suit by his estate, it was claimed that the hospital failed to supervise him and was negligent in transferring him to a less restrictive environment. The Court denied liability.

Other cases have supported the immunity doctrine and none so far has made an exception to it. *See* ***Ginanni v. County of Bergen***, 251 *N.J.Super* 486, 492, 598 *A2d*. 933 (App.Div. 1991) certif.den. 127 *N.J.* 565, 606 *A2d.* 375 (1992); ***Brown v. Brown***, 86 *N.J.* 565, 577, 432 *A2d*. 493 (1981); ***Delbridge v. Schaeffer***, 238 *N.J.Super*, 323, 350-351, 569 *A2d*. 872 (Law Div. 1989).

Immunity has also been given for failure to enforce a law which is the result of failure to act, and admission or non-action. ***Bombace v. City of Newark***, 125 *N.J.* 361, 367, 593 *A2d*. 335 (1991); and a public employee who fails to enforce law need not show good faith to enjoy absolute immunity. ***Marley v. Borough of Palmyra***, 193 *N.J.Super* 271, 283, 473 *A2d*. 554 (Law Div. 1993).

In ***Perona v. Township of Mullica***, 270 *N.J.Super* 19, 636 *A2d*. 535 (1994), the police were called to the Perona house in response to a domestic violence complaint. Upon their arrival, the wife told the police officers there was no domestic dispute, although she was

having a problem in that she wanted to go for a walk and that the husband chased her and brought her back to the house. The husband showed the police officers a handwritten note of the wife which was a farewell note or a suicide note. The husband asked the police to take whatever steps were necessary to detain her, but the police being satisfied after questioning the wife that she simply may have wanted to leave the house and not return, did nothing and left.

Shortly thereafter, the wife left the home and attempted suicide, walking on to the highway and was struck by one vehicle, and then another while she was lying on the highway.

She survived and she along with her husband and her daughter, brought an action against the Township, the police department and the specific policemen for failure to protect and for failure to comply with ***N.J.S.A.***30:4-27.6 which imposes the appropriate standard of duty for a police officer to take a person into custody.

That Statute provides in pertinent part:

"A State or local law enforcement officer shall take custody of a person and take the person immediately directly to a screening service if:

a. on the basis of personal observation the law enforcement officer has reasonable cause to believe that the person is in need of involuntary commitment;...

b. the involvement of law enforcement authorities shall continue at the screening center as long as necessary to protect the safety of the person in custody and the safety of the community from which the person was taken."

The statutory scheme in Title 30 also provides in ***N.J.S.A.***30:4-27.7a for immunity from civil and criminal liability for a law enforcement officer who in good faith "takes reasonable steps to assess, take custody of, detain or transport an individual for the purposes of mental health assessment or treatment...".

The Court stated that if the plaintiffs argue the applicability of a tort liability theory, it would be inconsistent not to apply the Tort Claims Act, ***N.J.S.A.***30:4-27.7a, in defense of the action.

The plaintiff's argument was that this Statute affords law enforcement officers immunity if they take a person into custody, but does not address whether a law enforcement officer would be afforded immunity for failure to act in a particular situation which was the cause that they had sued for.

The Court decided that the Tort Claims Act applied to any public employee including the police officers. The Court determined that discretionary decisions made by public employees are entitled to immunity and cited ***Longo v. Santoro***, 195 *N.J.Super* 507, 518,

480 *A2d*. 934 (App.Div.) certif. den., 99 *N.J.* 210, 491 *A2d.* 706 (1984), ***Expo, Inc. v. City of Passaic***, 149 *N.J.Super* 416, 424-425, 373 *A2d.* 1045 (Law Div.1977).

In ***Tice v. Cramer***, 133 *N.J.* 347, 627 *A2d.* 1090 (1993), the court held that a police officer is immune from a suit if his negligence in pursuing a fleeing motor vehicle causes the fleeing vehicle to collide with and injure innocent third parties. This immunity was further extended for the police officer and the municipality's immunity under the tort claims act of motor vehicle cases by ***Fielder v. Stonack,*** 141 ***N.J.*** 101, 661 *A2d* 231 (1995) where the police officer's vehicle collided with and injured a third person. The court, basing its decision under **N.J.S.A.59:5-2(b)** Upheld the immunity to the public entity and employee for any injury caused by an escaping or escaped person resisting arrest.

The court wanted to allow a police officer to pursue a wrongdoer and to vigorously enforce the law without being inhibited by the threat of a potential of a civil liability for injuries if their actions thereafter are deemed to have negligently caused those injuries. Only the most egregious police conduct is actionable, and only when the court finds that the officer's conduct constitutes "willful misconduct" can liability be attached to his actions. The court further held that "willful misconduct" is in police pursuit cases is limited to circumstances in which an officer knowingly violates the command of a superior or standing order of the department. This "willful misconduct" in a police vehicular case has two elements: (1) disobeying either a specific lawful command of a superior or a specific lawful standing order and (2) knowing of the command or standing order, and knowing that it is being violated and, intending to violate it.

A third element tacitly understood, is that in order for the officer's conduct to be willful, he must knowingly violate a command or order that does not allow for his discretion or judgment in interpreting how to act.

In ***Campbell v. Campbell***, *N.J. Super , A2d.* (Law Div. 1996) Arose out of an incident where police officers failed to arrest the estranged husband of the plaintiff, even though the officers ordered him to leave the premises. There was a domestic violence final restraining order in effect, and afterwards, the plaintiff was shot by the estranged husband. In the action for damages against both her estranged husband and the plainfield police department, she alleged that the officers had been negligent in failing to arrest her husband and that this negligence was the proximate cause of her injuries.

Macintosh v. Milano, 168 *N.J.Super* 466, 403 *A2d*. 510. This Court held that the physician/patient privilege contained in ***N.J.S.***2A:84-8-22.1 *et. seq*. is not absolute. This was an action brought against a psychiatrist who had treated a patient who killed his girlfriend. The Court in denying the psychiatrist's motion for summary judgment rejected his theory that he owed no duty to the plaintiff's decedent and her parents.

The plaintiffs allege that the psychiatrist failed to warn the decedent of the killer's obsession with her, knew of his behavior and violent propensities and knew that he also had a gun.

Viewing the physician/patient privilege of statute, they stated that the need for confidentiality cannot be considered absolute or decisive in this setting, and at most, there is a "limited right to confidentiality in extrajudicial disclosure" subject to exceptions prompted by the interest of society. They further stated that whether or not the duty exists is a question of law and is extremely fact sensitive.

Lastly, ***N.J.S.A.***59:6-7 provides immunity from any injury caused by an escaping prisoner from a mental illness or drug dependency facility.

Other provisions in Chapters 7, 8 and 9 of the Tort Claims Act, ***N.J.S.A.***59:7-1 *et seq,* set forth with more particular, the means of making claims against public entities, such particulars as a date of accrual of cause of action, conditions of suit and judgment, all of which are not the subject matter of this book.

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As can be seen from the affirmative tort sections, many causes of action where there is diversity of jurisdiction, can be brought in federal court.

It also may be more strategic to bring a wire tapping case under the federal statute while at the same time bringing the divorce action in state court. In this way, you are compelling the defendant to fight his battle on two fronts, dividing his resources and adding to his litigation burden. The federal courts may be less jaundiced towards legitimate wire tapping claims against spouses or third parties, and not let it get lost in protracted matrimonial litigation where fair value may not be received for your wire tapping claim.

Any action brought in federal court would subject the plaintiff to the invocation of the domestic relations exception to diversity jurisdiction which is invoked in federal courts.

This domestic relations exception has its roots in federal case law where the federal courts are loathe to become involved in matrimonial litigation, and opt out in favor of state courts on the rationale that because there are such a large number of cases, that the federal courts are not only ill-equipped to handle the litigation, but they do not have any professional social service staff to help enforce or monitor the case when decided. The Courts point out that in divorce, alimony, child support, child custody and visitation, continuing supervision is necessary. They have declined to take any divorce or alimony cases. ***Barber v. Barber*** 62 *U.S.* 582, 16b *L.Ed.* 226 (1959).

In ***DiRuggerio v. Rogers***, 743 *F.2d*. 1009 (3rd Cir. 1984) the Court did not invoke the domestic relations exception to jurisdiction in an action brought by a father against a mother and other third parties including the mother's current husband and three State Court judges under the Parental Kidnapping Prevention Act for interference with custody rights.

CHAPTER SIX

The concept of damages is alien to the matrimonial practitioner who thinks instead in terms of alimony, child support, equitable distribution and the award of counsel fees.

What separates us as matrimonial practitioners even more from this concept is the fact that in most reported matrimonial cases, even dealing with tort actions, there are very few specific references to damages, or the amount of damages awarded. Instead, the case law decisions in matrimonial torts usually limit themselves to the fact that the tort existed, and should have been decided by the trial court; or that a wrong decision had been made, either including or excluding a cause of action.

In my review of the cases, only in one case, ***Morris v. MacNab***, 25 *N.J.* 271, 135 *A2d*. 657 (1957) is there a specific award of damages. The plaintiff received $1500 in compensatory damages and $1000 in punitive damages, for her shame and humiliation because of the defendant's inducement to have her enter into a marriage which he knew to be bigamous; and $6,400 for compensatory damages and $600 for punitive damages for the monies that she advanced him. (*See* Section 2.8).

Having acknowledged that the concept of damages is alien to the matrimonial practitioner, a thorough review of the types of damages, and various concepts dealing with damages i.e. mitigation of damages, and the elements which encompass compensatory and punitive damages must be explained.

Most if not all of the cases which serve as examples to explain the damages concept, for reasons stated above, are non-matrimonial cases. Eventually, there will be reported decisions giving us examples in a matrimonial setting.

There are basically four categories of damages.

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These are damages that are awarded usually of a trivial amount where the extent of the loss cannot be determined or is not substantial. For example, if the plaintiff suffers an injury, as a result of an assault, and complains of the action and the pain and suffering on the day that the incident occurred, but did not incur any medical bills, any lost wages, or

any permanent injuries, they may be legally vindicated by finding that the defendant was at fault, and a nominal amount of money given to them as compensation.

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These are damages to compensate the plaintiff for actual physical or mental injury and sequalae for pecuniary loss, with a money award. The elements which comprise the amount of compensatory damages will be discussed in 6.2.

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Punitive damages, also called exemplary damages or "smart money", are monies which are awarded above compensatory damages as a punishment to the defendant for particularly egregious conduct and to act as a deterrent against future conduct. In some instances, punitive damages may be awarded even if there were no compensatory damages.

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Those particular damages established by the Legislature and enacted into statute would set forth a particular amount for a violation of the statute. For example, under the sexual abuse statute, ***N.J.S.A.***2A:61-b-1, there is a minimum statutory damage of $10,000 plus reasonable attorney's fees, which may be awarded regardless of the amount of actual damages. In the event that actual damages are greater, then the actual damages would be payable.

Compensatory damages, also called special damages, are awarded for physical or financial losses suffered by the plaintiff as a proximate result of the injury to the plaintiff. Unlike nominal damages, which are minor in nature and may be presumed, these damages must be specified by the plaintiff and proven by the evidence. It is the plaintiff's obligation to show what the loss was, and what sequence of connected events produced these damages. A plaintiff can only recover these damages by proving that the defendant's conduct was a substantial factor in causing them material, economical, financial losses, physical pain and suffering, and emotional damages. The damages claimed must be shown to have been "proximately caused" by the actionable tortious conduct of the defendants.

There is also another category of compensatory damages called general damages. These damages are in addition to the direct provable physical or economic financial loss, which the law presumes to follow naturally and necessarily from the tortious act of the defendant. The plaintiff is not held to the strict standards of proof because the law recognizes that certain types of damages are not capable of being proven and quantified. For public policy reasons, in an attempt to balance the equities on both sides, the law

essentially presumes that certain consequences can reasonably be expected to flow from certain proven conduct.

An example of this is libel and slander where the plaintiff need not show proof of damages, because the law recognizes that damage to reputation caused by defamation may not always lend itself to proof by objective evidence. This type of damages includes such things as loss of opportunity which may be known; damage to reputation; or damage to a person's business or career. These damages may not be capable of being accurately measured, and can be more substantial and real than those which can be proved and measured accurately by a dollar standard.

(*See* Section 3.7, Defamation, Libel and Slander for more particulars on damages in this matter.)

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A plaintiff has a right to be compensated for physical injuries or mental distress suffered as a result of the tortious act of the defendant. It is of course easier to show a physical injury which can be seen and objectively discussed, than mental distress which can only be alleged to a third party and is subjective in nature. Physical injuries such as broken legs and bruises are called objective injuries because they can be seen. Stress, mental suffering and anguish, are called subjective injuries because they can only be related. In either case, the fact that there is an injury in itself entitles the plaintiff to some award of monetary damages as compensation for that injury.

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A plaintiff has a right to be compensated for physical and mental suffering. The problem is how do you assess in monetary terms an amount of money, when calculated to an award of money damages which is supposedly paid to restore the plaintiff to the condition they would have been, but for the injury?

There are no hard and fast figures, there are no charts to follow, and there are no rules of thumb. It is up to the trier of fact, usually the judge, to assess an amount that is considered to be what a reasonable man deems to be fair compensation for that injury.

As with a jury, a judge brings to that determination his own personal history and biases. In personal injury accident cases, through experience, judges and experienced attorneys have been able to calculate within certain ranges, what an injury is worth. A soft tissue injury may be worth 5,000 to $10,000, while a lost foot may be worth $25,000. At this stage in the matrimonial domestic tort field, we have no experience or history to be able to calculate these amounts. It is up to the practitioner, depending on whether they represent the plaintiff or the defendant, to maximize or minimize the value given to a particular injury by presenting the case in the best light possible.

In personal injury cases, the Judge will "charge" or tell the jury that there is no magic formula; that they know the function and value of money; they know pain and suffering and that the task of equating the two requires a high order of human judgment. Matrimonial judges will likewise have no concrete guidelines.

At the present time, the awards for domestic torts in this area are either too low or non-existent or astronomically high. Judges at this stage have a tendency to either dismiss the cause of action almost entirely, saying that it has no place in a matrimonial court, feeling imposed upon by an attorney bringing it into the court; or are so incensed by the action of the tortfeasor, that they overcompensate the victim.

A plaintiff has a right to be compensated for the pain and suffering experienced in the past, present and in the future. Thus, if they get to court two years after the incident occurred, they have a right to be compensated for the pain and suffering they felt two years ago, which was usually the most intense because it was the time of the occurrence of the incident, (except in mental distress cases); present pain and suffering, as well as what is anticipated in the way of future suffering.

If a wife has been thrown down a flight of stairs by her husband in an act of domestic violence, her pain and suffering at the time is one element. Two years later, her bruises and contusions may have disappeared but she may have residual back pain as a result of the incident. Likewise, because of the intensity of the injury, she can anticipate into the future, more pain and suffering, if the pain ever goes away, or pain and suffering forever because of the nature of the injury.

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The plaintiff is entitled to compensation for permanent disability as a result of the act of the defendant which adversely affects health, and limits one's participation in past usual activities. Elements that go into the amount of award of damages include the degree of disability, that is how much the plaintiff is restricted, and the probable duration of the disability.

As with pain and suffering, the plaintiff is entitled to compensation for the disability suffered in the past, present and the future. Unlike pain and suffering, the greater measure of damages is the disability that the plaintiff will suffer permanently, in the future as a result of the incident.

This element of compensatory damages, referred to sometimes as "permanency" is usually the largest element in an award of damages.

The inability to drive a car; the inability to sit for great periods of time; the necessity to walk with a cane for the rest of one's life, all are elements which affect the degree of the

permanent disability, and thus the amount of compensation. The greater the disability, the longer the duration, the more the monetary recovery.

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A plaintiff can be compensated for all past, present and future medical expenses which are reasonably necessary to cure or alleviate plaintiff's injuries and disabilities. Past and present medical expenses, are usually discernible because you have the medical bills and the costs at time of trial. The plaintiff is awarded these expenses dollar for dollar. Future medical expenses must be reasonably probable to be incurred, and may have to be estimated within a reasonable range.

If a person has been injured, for example scarred on the face as a result of a domestic tort, future plastic surgery may be necessary. In that case, a bill may be gotten from a plastic surgeon estimating the cost of their services, what the hospital stay would be and the cost for the stay, and what the recuperation time will take after the operation. Future psychological counselling is necessary, twice a week for the next ten years, an amount can be calculated within reason as to what that cost will be.

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This element of compensatory damages is one of the most difficult to determine, even more so than pain and suffering. Despite the difficulty of calculation, this concept has begun to imbed itself into the fabric of damages both in common law and in statute. In ***N.J.S.A.***2A:61-b-1, the statute tolling the time for a civil suit for sexual abuse, mentions as part of the compensatory damages, damages for "diminished childhood" and "diminished enjoyment of life" without defining either. (*See* Section 5.7).

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This is another ethereal damage claim which should be established through the testimony of the plaintiff as well as expert witnesses. This would involve the psychological future trauma to the plaintiff caused by the injury. For instance, if the injury was a scarred face, which was unable to be operated on, the knowledge that the plaintiff has of his or her disfigurement, is an element of damages to be compensated for. Another example would be if the person had the telephone wiretapped, and now has an aversion to speaking on the telephone. More importantly, in a marital rape case or an incest case, where the trauma of the injury has so traumatized the plaintiff that he or she is unable to engage in future meaningful sexual relations, it is a probable element of damages.

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Calculations by actuaries as to life expectancies of individuals is firmly entrenched in tort law. These experts testify based upon the present age of the party, what are the remaining average number of years of life remaining for the individual. The source for some of these tables is the United States Decennial Life Tables, published by the National Center

for Health Statistics from the United States Printing Office. (*See* Lawyers Diary and Rules of Court for copies).

For example, at birth at the present time, based upon the present tables, you can expect to live 73.88 years. If you are between 48 and 49 years of age, you can expect to live another 29.65 years or 78.65 years in total. Even at 84 to 85 years of age, based upon these tables, you can be expected to live another 6.32 years.

There are more sophisticated charts which decrease the life expectancy based upon certain diseases and certain injuries, and these are called mortality tables.

Both life expectancy and mortality tables have been held relevant and material to show the average life expectancy and the present value as such items as income.

Once it is established what the normal life expectancy would be, and that is compared to the shortening of life expectancy because of the tortious event, it is more subjective to calculate what a lost year, or years, are worth. This at least gives an objective starting point to calculate this loss.

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The amount of time lost from work as a result of a tortious action is easily calculable with a wage earner. Simply add the amount of time the person is out of work due to the injury, hospitalization time, and recovery time, and multiply it by their wages per week. Note those wages are net of taxes, because any recovery for injuries are non-taxable, and since the person would not be paying taxes on these monies in lieu of earnings, the tax consequences may be deducted from the entire earnings.

More difficult questions are presented when a person is not a W-2 wage earner, is self-employed, or operates a business which may not pay the person directly, but who might participate in the share of the profits. Accountants must be brought in to show what the normal profits would have been had they worked in the business, compared to the loss because of their inability to work because of the tortious act.

Then there may be a period of time when there is limitation on the person's working ability, working at 25% or 50% of capacity, and these are also subject to compensation.

The basic rule is that if loss of profits are capable of being estimated within a reasonable degree of certainty, (profits which are not remote, speculative or uncertain), these constitute elements of damages.

Loss of earnings of a family member in supplying care for the injured member of the family, so long as it does not exceed reasonable costs of providing alternate health care as provided by a trained medical person, and provided that such health care is necessary is also compensable. ***Byrne v. Pilgrim Medical Group, Inc.***, 187 *N.J.Super* 386, 454 *A2d*. 920 (Law Div. 1982)

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A negligent act which causes the plaintiff to experience pain and suffering and increased bodily injury and permanency, etc. is also recoverable. Thus, the injury need not be new, but aggravate a preexisting condition, and that aggravation is itself compensable. In ascertaining damages, recovery is based not just for the increase in injury, but for the total condition, the whole resulting injury.

If a person walked with a cane, now cannot walk at all, it is not the measure of damages between him walking with a cane and not walking at all, but the fact that he can't walk at all that becomes the standard for the measure of damages.

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The inability of a plaintiff to be a companion to their spouse, do household services and perform sexually is also an element of compensatory damages. This claim is called loss of consortium or a per quod claim, is proven by direct testimony of the spouse as to what activities the plaintiff performed previous to the incident, and how the incident has limited their ability to perform those activities now.

As another element of compensatory damages, the past time of the disability, the limitation of the disability at the present time, and the future inability or limitation of ability are all taken into account.

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Rule 4:42-11(b) provides for prejudgment interest in tort actions, starting with the date of the filing of the complaint, but no earlier than six months after the cause of action accrues. In essence, if you wait longer than six months to file the complaint, you lose the benefit of pre-judgment interest for that period. The rate fluctuates with general interest rates, and was 7.5% in 1992 and 5.5% in 1993.

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Punitive damages, also called exemplary damages or "smart money" can be awarded in addition to compensatory damages, not for the purposes of restoring the plaintiff the amount of any loss sustained because of the injury, but to punish the defendant for willful or reckless conduct, to teach the defendant not to do it again, to deter others from following defendant's example, and to vindicate the rights of the plaintiff.

Punitive damages can be awarded whether or not compensatory damages are awarded. Thus, if there are no actual damages, and nominal damages are awarded, punitive damages can be used to compensate the plaintiff.

Again we get into the area where there are no easy calculations, charts, or rules of thumb that can be easily followed.

An allowance for punitive damages depends upon an evaluation of the nature of the conduct of the defendant, the wisdom of some form of pecuniary punishment for this aggravated misconduct; and the advisability of awarding damages as a deterrent against others from taking the same course of action.

The act by the defendant can either be a deliberate or an intentional one, meant to cause injury or damage; or can be so reckless that the defendant should know that this act would result in a high degree of probability of harm, what has been called a "reckless indifference to the consequences." The classic hornbook example of the latter would be firing a rifle into a passing train.

Although there is a lack of any clear standard to judge the amount, the cases hold that the amount must have some reasonable relation to the injury suffered. A sprained finger would not result in a million dollars worth of punitive damages; but a wiretapping of the spouse's phone, and the dissemination of the information contained therein, although perhaps only nominal damages could be shown by the plaintiff, could result in $100,000.00 worth of punitive damages.

Especially egregious conduct, even if it only generates minimal compensatory damages, can result in the award of higher punitive damages. ***Fischer v. Johns-Manville Corp.***, 103 *N.J.* 643, 512 *A2d.* 466 (1986).

In determining whether to award punitive damages, the trier of fact should consider whether defendant was motivated by an actual desire to harm the plaintiff, or a calculated disregard of the consequences. Did the defendant have ill feeling, personal hostility or spite, or a natural desire to hurt the plaintiff?

In determining the amount of punitive damages, the defendant's finances are important and discovery can be made of his finances, so the trier of fact can determine whether this award will serve as a punishment and a deterrent against the defendant.

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The doctrine of mitigation of damages states that one who has suffered an injury as the proximate result of a tort must by reasonable diligence and ordinary care, and not by an extraordinary or impractical efforts, try to ameliorate damages as a result of the tort.

For example, if a person is injured, and does not seek medical treatment in a timely basis, which causes the aggravation of the injury, their failure to do so would go to reduce the amount of the damages that they would receive, but does not go to the existence of the cause of action itself.

If a person discovers that their spouse is dissipating marital assets, and sits back and does nothing in order to stop the further dissipation, the duty of mitigation may be violated. A

person who is falsely arrested and imprisoned, and out of principle decides that they were not going to post bail, as a result stays longer than they need to, may also lose the right to claim the unnecessary additional damage.

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A few more tort concepts and conclusions should be introduced to the reader. In order that a plaintiff have a cause of action against a defendant, the defendant must have committed either an intentional act, or a non-intentional act, or a failure to act or a breach of duty, which results in adverse consequences, injury or harm to the plaintiff.

This conduct must in itself be the proximate cause, meaning the direct, natural and probable cause of the damage. In determining whether it is the natural consequence, the trier of fact must use logic and common sense; public policy as to rational limitations of liability from unforeseeable consequences frames the determination.

The essence of tort liability is legal fault, as could be determined by the rational thinking of the ordinary man. Every person is answerable for the consequences of their actions or failure to act which are the proximate cause of reasonably foreseeable harm to others.

The initial tortfeasor is potentially liable for all natural and proximate injuries that have occurred as a result of that intentional act.

Thus, if a sexual disease is transmitted, and as a result there is sterility, that lack of being able to conceive, would be a foreseeable consequence of the conduct.

If a defendant slanders a plaintiff, as a result of which not only is his reputation ruined, but he loses a job or business opportunity, that element of damage is recoverable.

Remote consequences, those that are not foreseeable, are not recoverable. For example if there is a result of one of the two above events, the person commits suicide, an action by their heirs may not be successful, because it would not naturally flow from the transmission of the disease or the maligning of the name, that the person would commit suicide.

The gauntlet of proximate cause is a balancing of fairness to the injured party with the protection of the tortfeasor from unanticipated and unfair liability. Both the legal principles and the fact-finder's analysis will center around fairness and propriety.

In the case of ***2175 Lemoine Avenue Corp. v. Finco, Inc.***, *N.J.Super , A2d* , (App. Div. 1994) reported in the New Jersey Lawyer on June 13, 1994, the Appellate Division voided a damage award for legal malpractice because the client failed to prove that the attorney's malpractice was the proximate cause of the client's loss.

The appeals court used the standard of care established in ***McCullough v. Sullivan***, 102 *N.J.L.* 381 (E&A 1926) which holds that an attorney can be accountable for the

consequences if the attorney fails to use in work undertaking "that reasonable knowledge and skill exercised by lawyers of ordinary ability and skill."

Although the Court found that there was evidence to support the trial court's finding of legal malpractice in connection with a loan transaction, there was not proof of the client's loss which was proximately caused by the attorney's legal malpractice.

NOTES

NOTES

NOTES

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2. Damages.

3. A source of recovery.

Besides actions against third parties, creative minds have been trying to apply various insurance policies to the domestic torts field. Among the attempted sources of recovery, are the following:

1. **Standard comprehensive general liability and homeowners' insurance policies.** These policies are a potential source of recovery because they usually cover personal injury or bodily injury to another person.

2. **Life insurance and accidental death policies**. Most life insurance policies have an accidental death benefit to be paid as a result of death caused by an accident.

3. **Automobile accident insurance policies**, and the personal injury protection provisions.

4. **Professional malpractice insurance policies** for doctors, lawyers, accountants and other professionals. These were discussed in previous chapters and will not be dealt with here.

The wording of insurance policies are interpreted according to their plain and ordinary meaning. If a phrase in that contract is ambiguous, as in all contract law, the ambiguity is resolved against the drafter, in this case, the insurance company, and in favor of the insured. The public policy concept is that there should be a principle of fairness, and that the insured should reasonably receive those benefits that he expected when he contracted with the insurance company.

But, when language in an insurance policy is included because of statutory mandate, i.e. that the legislature requires certain language to be included, the courts can no longer construe the policy against the insurer; and the rules of ordinary statutory construction would then apply. *Paul Revere Life Ins. Co. v. Haas*, 137 *N.J.* 190, 644 *A2d.* 1098 (1984).

In the beginning there was coverage for some domestic torts liability under the standard comprehensive general liability and homeowners insurance policy. This was based upon the theory that the policy covered all damages as a result of an "occurrence", which is an accident which results in bodily injury. Our courts have held that if the person or incident was not excluded, then the policy would be construed against the insurance company and coverage would be granted.

At this time, most comprehensive general liability homeowners insurance policies contained exclusions which prohibited coverage. Almost all homeowners policies exclude coverage for intentional acts committed by an insured where the result is intended.

In 7 *Appleman Insurance Law and Practice,* par. 4492 at 14 (1979), a discussion regarding the issue of **accidents vs. intentional injuries** indicates that there are few terms used in insurance that have provoked more controversy and litigation than the word "accident".

Appleman states:

"When used without restriction or qualification, it has been held to be broader than the restrictive definition of an event happening suddenly and violently."

The definition of "accident" has been altered during the various revisions of the standard Comprehensive General Liability policy as a result of which at this time "occurrence" now means:

"An accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured."

Appleman at par. 4501.9 in discussing whether there is coverage for intentional acts states that many intentional acts produce "Unexpected results and comprehensive liability insurance would be somewhat pointless if protection were excluded in such cases."

Typical examples of intentional acts that would be covered because they produce an unexpected result would be an injury to someone as a result of a practical joke; where an activity is directed towards one person but causes injury to another; when there is an intent only to warn or touch someone and a serious injury results.

"In furtherance of that justifiable end, under most circumstances it is equitable and just that the insured be indemnified by the insured for the payment to the injured party. In subrogating the insurer to the insured person's right so that the insurer may be reimbursed for its payment of the insurer's debt to the injured person, the public policy to which we adhere, that the assured may not be relieved of financial responsibility arising out of his criminal act is honored. The insurer's discharge of its contractual obligation by payment to an innocent injured third person will further the public interest in compensating the victim." at p. 484.

The insurance carrier then had a right to try to recover its loss from the insured for his intentional act.

Thus, coverage was given in ***Ambassador*** because although the insured intended to commit arson, an intentional act, he did not intend to hurt to infant. A counter argument certainly can be made that the mere fact that the insured committed arson, his reasonable expectation would be that somebody would be injured and thus through reckless indifference of the consequences, he meant to injure if not the infant, someone else, and thus coverage should have been denied.

Analogously, if a spouse in a fit of anger throws a pot of boiling water at the wall and in doing so severely burns his or her spouse, can the spouse recover under the homeowners insurance because of the unintentional act. The argument can certainly be made that although the act of throwing the pot was intentional, the result was not intended.

Voorhees v. Preferred Mut. Ins. Co., 128 *N.J.* 165, 607 *A2d.* 1255 (1992), the plaintiff, a teacher, sued a child's parent for remarks that she made questioning her competency and fitness at an open school board meeting in which the defendant asked that her child be removed from the teacher's class. The teacher was relieved by the school board of her teaching duties pending the results of a psychiatric examination and local newspapers published stories regarding the incident.

The local paper published a quote by the defendant, who was speaking for the parents of some of the school children as indicated that she was glad that the board of education had finally "done something". The article went on to quote the defendant as stating "we have been warning them since September that there were serious problems which should be investigated. I'm just sorry it took an incident like the one on December 10th to convince them."

The teacher was relieved by the school board of her teaching duties pending the results of her psychiatric examination and then later reinstated to special assignment.

The teacher sued Voorhees, the local board of education, the superintendent of schools, the school principal, the local newspapers, and one other parent seeking compensation for the injuries she suffered due to their behavior.

Voorhees alleged that the parent's accusations and the school system's response caused her extreme emotional distress, which manifested itself in an "undue amount of physical complaints" including "headaches, stomach pains, nausea... and body pains..."

Voorhees, the parent, was insured under a homeowners policy issued by Preferred Mutual Insurance Company which obligated the insurer to--

"pay...all sums for which any insured is legally liable because of bodily injury...caused by an **occurrence** to which the coverage applies (and to) defend any suits seeking damages, providing the suit results from **bodily injury** ...not excluded under this coverage."

Under its definition of bodily injury, it stated that it meant "bodily harm, sickness or illness to a person including it required care, loss of services and death resulting therefrom." It further defined **occurrence** as an accident. The policy had a provision which excluded coverage for liability "caused intentionally".

Voorhees requested Preferred Mutual to defend her against the school teacher's suit. The carrier refused on two grounds:

1. The policy expressly excluded coverage for liability created by an intentional act; and

2. That the teacher's claim founded in libel and/or slander causes of action that result in "personal" rather than "bodily" injury claims, and are therefore not covered under the policy.

It is most interesting to note that the underlying claim settled for $750 but Voorhees spent more than $14,000 defending the suit.

This was an action for the breach of contract against the insurance company and originally came before the Court on cross motions for summary judgment. The trial court granted Preferred Mutual's motion for summary judgment based upon the fact that the alleged defamation was a cause of action not covered under the bodily-injury policy.

The Appellate Division reversed at 246 *N.J.Super* 564, 569, 588 *A2d*. 417 (1991). A split court decided that there was a possibility that the cause of action of outrage and the negligent infliction of emotional distress might be causes of action that were covered under the phrase "bodily injury".

Because of the division in the court, the Supreme Court heard the case and framed the appeal as "whether a homeowner's insurance policy providing coverage for bodily injuries caused by the insured will cover liability for emotional distress accompanied by physical manifestations." The Court held that it would, and that the event causing the

distress will be deemed an accidental occurrence entitling the insured to coverage where the insured's actions, although intentional, were not intentionally injurious.

The Court stated that the insurance company had a duty to defend if the complaint states a claim that it insured against, even if the actual claim is without merit. Even if the claim is a specious one, one whose cause is groundless, false or fraudulent, the insurance company's initial duty is to defend.

The Court then determined that the complaint did allege intentional and negligent infliction of emotional distress, no matter how badly drafted. It then decided that this allegation is covered under the bodily injury policy broadly interpreting "bodily injury" to include emotional distress which resulted in physical consequences, stating that the term was ambiguous and it can and often does have direct effect on other bodily functions; and an insured who is sued on account of injury involving physical symptoms could reasonably expect an insurance policy for liability for bodily injuries to provide coverage. It did not rule on what would have happened if it was purely emotional distress without any physical consequences, and saved that decision for another day.

Because there was an ambiguity they resolved it in favor of the insured.

Voorhees provides an excellent summary of the law regarding intentional actions that have led to unintentional injuries under New Jersey law when it stated at page 183:

"...The accidental nature of an occurrence is determined by analyzing whether the alleged wrongdoer intended or expected to cause an injury. If not, then the resulting injury is 'accidental,' even if the act that caused the injury was intentional. That interpretation prevents those who intentionally cause harm from unjustly benefitting from the insurance coverage while providing injured victims with the greatest chance of compensation consistent with the need to deter wrong-doing. It also accords with an insured's objectively-reasonable expectation of coverage for intentionally-caused harm."

In determining that Preferred Mutual had to the duty to defend Voorhees, the Court stated at page 185,

"Although Voorhees' statements were unquestionably intentional, there is little evidence that she intended or expected to injure the school teacher. Our impression is that she was motivated by concern for her child rather than by a desire to injure the teacher. Regardless of our impressions, the complaint itself included an allegation of negligent infliction of emotional distress. An allegation of negligence presumes the absence of an intent to injure. Preferred Mutual thus had the duty to defend until the negligence claim has been dismissed....

'Moreover, the duty to defend also may have been triggered by the claim for intentional infliction of emotional distress, known as 'outrage' in New Jersey. Although 'outrage' is considered an intentional tort, it is recognized not only where conduct is intentional but also where it is 'reckless'....A 'reckless' act under tort law does not meet the subjective

intent-to-injury requirement under insurance law. Therefore, under both the 'negligent infliction of emotional distress' and the 'outrage' allegations, Preferred Mutual had a duty to defend unless and until a subjective intent to injure had been demonstrated."

Automobile insurance may be a better source of recovery, especially the Personal Injury Protection provisions (PIP) than any other source of insurance.

N.J.S.A. 39:6A-4 provides that for every automobile liability insurance policy issued or renewed after January 1, 1991 which insures an automobile, the insurer must provide personal injury protection coverage, which are payments of benefits without regard to negligence, liability or fault. These payments are made to the named insured and members of their family residing in their household who sustain bodily injury as a result of an accident while **occupying, entering into, alighting from or using an automobile, or as a pedestrian**, caused by an automobile or an object propelled by or from an automobile. It also provides protection to other persons who sustain bodily injury or in the same position as the insured or operates the automobile with the permission of the insured or to pedestrians.

The PIP coverage under the present law provides reasonable medical expenses up to $250,000 per person, income continuation benefits, essential services benefits, death benefits and funeral expense benefits.

Pennsylvania Nat'l. Mutual Cas.Co. v. Miller Est., 185 *N.J.Super* 183, 447 *A2d* 1344 (App. Div. 1992). The issue was whether an intentional act by the driver, but wholly unexpected from the standpoint of the victim, was "an accident" providing personal injury protection benefits to the injured parties.

The owner of the vehicle permitted her estranged husband to drive her car in which she and her daughter were passengers. The husband intentionally drove the vehicle off the road into the Delaware River, killing himself and the insured wife. The daughter survived the accident. The jury determined that the husband had intentionally caused the accident.

The Court determined that the estate of the deceased wife and the surviving daughter were entitled to PIP benefits, interpreting the language "without regard to...fault of any kind," to include fault which arose from an intentional act and denied the insurance company exclusion from coverage under its policy.

The Appellate Division in affirming the trial court determined that the statute did not expressly exclude intentional acts and in fact, in finding coverage, found that the statute excludes consideration of "negligence, liability or fault of any kind."

Coverage has also been found under the liability provision of an automobile policy. ***Wolfe v. State Farm Ins. Co.***, 224 *N.J.Super* 348, 540 *A2d* 871 (App. Div. 1988). A woman died from being exposed to carbon monoxide while she sat in a car belonging to

the owner. The woman's father pulled her from the car, carried her into the house and called the local first aid squad. The father and mother, as well as their children, watched helplessly as the first aid squad's attempt to revive her failed.

They filed claims for wrongful death, survivorship and emotional distress against the estate of the man whose car she was in. His insurance carrier disclaimed liability and sought recovery based on the family members claims for emotional distress derived solely from watching their daughter die, under the bodily injury provision of the automobile policy.

The claim itself revolved around whether there was one injured or two injured, under the provisions of the policy. Because the insurance company's definition of "bodily injury" was deemed by the Court to be unclear, it was construed against the insurer and coverage was allowed.

Allstate Insurance Co. v. Malec, 104 *N.J.* 1, 514 *A2d* 832, (1986) The Supreme Court interpreted an Allstate Insurance Policy that specifically excluded liability coverage for its insured's intentional wrongful act, and allowed the specific exclusion in the automobile liability insurance policy, stating that it neither violated public policy or the statutory scheme of the New Jersey No Fault Act and was thus valid.

New Jersey has codified the preexisting law to state that a person who criminally and intentionally kills another, is not entitled to be the beneficiary of the victim's life insurance policy.

N.J.S.A.3B:7-3 provides:

"A named beneficiary of a bond, life insurance policy or other contractual arrangement who criminally and intentionally kills the principal obligee or the person upon whose life the policy is issued, is not entitled to any benefit under the bond, policy or other contractual arrangement, and it becomes payable as though the killer had predeceased the decedent."

Also under the statute, a surviving spouse, heir or devisee, who kills the decedent, is not entitled to any benefits under a testate or intestate estate. Further, if the individual is a joint tenant or tenant by the entirety, the wrongdoer's interests are severed and the share of the decedent passes as though the wrongdoer had no right of survivorship. See ***N.J.S.A.***3B:7-1 through 7.

The only case at this point specifically interpreting this statute is ***In re List Estate***, 176 *N.J.Super* 342, 423 *A2d.* 323 (Law Div. 1980). In this case John List murdered all of his children who were the insured and was the sole beneficiary of the policy. The Court held that if no one other than the murderer had an interest in the policy, the company was relieved of its obligation since said obligation was contractual, and since the murderer cannot take the proceeds of the policy, there was no reason why the estate of the insured should collect.

In re Vadlamudi Estate, 183 *N.J.Super* 342, 443 *A2d*. 1113 (Law Div. 1982) the question before the Court was if a person kills another while insane and is acquitted of the murder because of reason of insanity, is the wrongdoer entitled to collect under a life insurance policy.

The beneficiary of an insurance policy killed her husband with an axe, and was found not guilty by reason of insanity. The Court determined that a perpetrator of a homicidal act committed while the person is legally insane, cannot as a matter of law, be one who "intentionally kills" within the meaning of the statute and that the acquittal of a homicidal act in a criminal proceeding by reason of insanity has no conclusive effect for the purposes of ***N.J.S.***3A:2A-83.

Since this Statute (similar to ***N.J.S.A.*** 3B:7-6) merely speaks of a final judgment of conviction and does not state that an acquittal is conclusive, there would be coverage if she was insane at the time of the commitment of the act.

The Court therein determined that it would hold a hearing on the issue of the sanity of the insured at the time she killed her husband.

For further discussion, for cases where abused wives in retaliation to a beating and in self defense, have killed their husbands wherein the wives were named beneficiaries of life insurance policies, and where the courts held that the death was the result of accidental bodily injury within the meaning of a policy, see: ***Insurance Counsel Journal, Thopson, Domestic or Family Altercations and Accident Death Benefits Under the Life Insurance Contract: Is it an Accident?*** 53 *Ins. Couns.* J 351 (1986).

NOTES

NOTES

NOTES

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The definition of "accident" has been altered during the various revisions of the standard Comprehensive General Liability policy as a result of which at this time "occurrence" now means:

"An accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured."

Appleman at par. 4501.9 in discussing whether there is coverage for intentional acts states that many intentional acts produce "Unexpected results and comprehensive liability insurance would be somewhat pointless if protection were excluded in such cases."

Typical examples of intentional acts that would be covered because they produce an unexpected result would be an injury to someone as a result of a practical joke; where an activity is directed towards one person but causes injury to another; when there is an intent only to warn or touch someone and a serious injury results.

"In furtherance of that justifiable end, under most circumstances it is equitable and just that the insured be indemnified by the insured for the payment to the injured party. In subrogating the insurer to the insured person's right so that the insurer may be reimbursed for its payment of the insurer's debt to the injured person, the public policy to which we adhere, that the assured may not be relieved of financial responsibility arising out of his criminal act is honored. The insurer's discharge of its contractual obligation by payment to an innocent injured third person will further the public interest in compensating the victim." at p. 484.

The insurance carrier then had a right to try to recover its loss from the insured for his intentional act.

Thus, coverage was given in ***Ambassador*** because although the insured intended to commit arson, an intentional act, he did not intend to hurt to infant. A counter argument

certainly can be made that the mere fact that the insured committed arson, his reasonable expectation would be that somebody would be injured and thus through reckless indifference of the consequences, he meant to injure if not the infant, someone else, and thus coverage should have been denied.

Analogously, if a spouse in a fit of anger throws a pot of boiling water at the wall and in doing so severely burns his or her spouse, can the spouse recover under the homeowners insurance because of the unintentional act. The argument can certainly be made that although the act of throwing the pot was intentional, the result was not intended.

Voorhees v. Preferred Mut. Ins. Co., 128 *N.J.* 165, 607 *A2d.* 1255 (1992), the plaintiff, a teacher, sued a child's parent for remarks that she made questioning her competency and fitness at an open school board meeting in which the defendant asked that her child be removed from the teacher's class. The teacher was relieved by the school board of her teaching duties pending the results of a psychiatric examination and local newspapers published stories regarding the incident.

The local paper published a quote by the defendant, who was speaking for the parents of some of the school children as indicated that she was glad that the board of education had finally "done something". The article went on to quote the defendant as stating "we have been warning them since September that there were serious problems which should be investigated. I'm just sorry it took an incident like the one on December 10th to convince them."

The teacher was relieved by the school board of her teaching duties pending the results of her psychiatric examination and then later reinstated to special assignment.

The teacher sued Voorhees, the local board of education, the superintendent of schools, the school principal, the local newspapers, and one other parent seeking compensation for the injuries she suffered due to their behavior.

Voorhees alleged that the parent's accusations and the school system's response caused her extreme emotional distress, which manifested itself in an "undue amount of physical complaints" including "headaches, stomach pains, nausea... and body pains..."

Voorhees, the parent, was insured under a homeowners policy issued by Preferred Mutual Insurance Company which obligated the insurer to--

"pay...all sums for which any insured is legally liable because of bodily injury...caused by an **occurrence** to which the coverage applies (and to) defend any suits seeking damages, providing the suit results from **bodily injury** ...not excluded under this coverage."

Under its definition of bodily injury, it stated that it meant "bodily harm, sickness or illness to a person including it required care, loss of services and death resulting therefrom." It further defined **occurrence** as an accident. The policy had a provision which excluded coverage for liability "caused intentionally".

Voorhees requested Preferred Mutual to defend her against the school teacher's suit. The carrier refused on two grounds:

1. The policy expressly excluded coverage for liability created by an intentional act; and

2. That the teacher's claim founded in libel and/or slander causes of action that result in "personal" rather than "bodily" injury claims, and are therefore not covered under the policy.

It is most interesting to note that the underlying claim settled for $750 but Voorhees spent more than $14,000 defending the suit.

This was an action for the breach of contract against the insurance company and originally came before the Court on cross motions for summary judgment. The trial court granted Preferred Mutual's motion for summary judgment based upon the fact that the alleged defamation was a cause of action not covered under the bodily-injury policy.

The Appellate Division reversed at 246 *N.J.Super* 564, 569, 588 *A2d*. 417 (1991). A split court decided that there was a possibility that the cause of action of outrage and the negligent infliction of emotional distress might be causes of action that were covered under the phrase "bodily injury".

Because of the division in the court, the Supreme Court heard the case and framed the appeal as "whether a homeowner's insurance policy providing coverage for bodily injuries caused by the insured will cover liability for emotional distress accompanied by physical manifestations." The Court held that it would, and that the event causing the distress will be deemed an accidental occurrence entitling the insured to coverage where the insured's actions, although intentional, were not intentionally injurious.

The Court stated that the insurance company had a duty to defend if the complaint states a claim that it insured against, even if the actual claim is without merit. Even if the claim is a specious one, one whose cause is groundless, false or fraudulent, the insurance company's initial duty is to defend.

The Court then determined that the complaint did allege intentional and negligent infliction of emotional distress, no matter how badly drafted. It then decided that this allegation is covered under the bodily injury policy broadly interpreting "bodily injury" to include emotional distress which resulted in physical consequences, stating that the term was ambiguous and it can and often does have direct effect on other bodily functions; and an insured who is sued on account of injury involving physical symptoms could reasonably expect an insurance policy for liability for bodily injuries to provide coverage. It did not rule on what would have happened if it was purely emotional distress without any physical consequences, and saved that decision for another day.

Because there was an ambiguity they resolved it in favor of the insured.

Voorhees provides an excellent summary of the law regarding intentional actions that have led to unintentional injuries under New Jersey law when it stated at page 183:

"...The accidental nature of an occurrence is determined by analyzing whether the alleged wrongdoer intended or expected to cause an injury. If not, then the resulting injury is 'accidental,' even if the act that caused the injury was intentional. That interpretation prevents those who intentionally cause harm from unjustly benefitting from the insurance coverage while providing injured victims with the greatest chance of compensation consistent with the need to deter wrong-doing. It also accords with an insured's objectively-reasonable expectation of coverage for intentionally-caused harm."

In determining that Preferred Mutual had to the duty to defend Voorhees, the Court stated at page 185,

"Although Voorhees' statements were unquestionably intentional, there is little evidence that she intended or expected to injure the school teacher. Our impression is that she was motivated by concern for her child rather than by a desire to injure the teacher. Regardless of our impressions, the complaint itself included an allegation of negligent infliction of emotional distress. An allegation of negligence presumes the absence of an intent to injure. Preferred Mutual thus had the duty to defend until the negligence claim has been dismissed....

'Moreover, the duty to defend also may have been triggered by the claim for intentional infliction of emotional distress, known as 'outrage' in New Jersey. Although 'outrage' is considered an intentional tort, it is recognized not only where conduct is intentional but also where it is 'reckless'....A 'reckless' act under tort law does not meet the subjective intent-to-injury requirement under insurance law. Therefore, under both the 'negligent infliction of emotional distress' and the 'outrage' allegations, Preferred Mutual had a duty to defend unless and until a subjective intent to injure had been demonstrated."

Automobile insurance may be a better source of recovery, especially the Personal Injury Protection provisions (PIP) than any other source of insurance.

N.J.S.A. 39:6A-4 provides that for every automobile liability insurance policy issued or renewed after January 1, 1991 which insures an automobile, the insurer must provide personal injury protection coverage, which are payments of benefits without regard to negligence, liability or fault. These payments are made to the named insured and members of their family residing in their household who sustain bodily injury as a result of an accident while **occupying, entering into, alighting from or using an automobile, or as a pedestrian**, caused by an automobile or an object propelled by or from an automobile. It also provides protection to other persons who sustain bodily injury or in the same position as the insured or operates the automobile with the permission of the insured or to pedestrians.

The PIP coverage under the present law provides reasonable medical expenses up to $250,000 per person, income continuation benefits, essential services benefits, death benefits and funeral expense benefits.

Pennsylvania Nat'l. Mutual Cas.Co. v. Miller Est., 185 *N.J.Super* 183, 447 *A2d* 1344 (App. Div. 1992). The issue was whether an intentional act by the driver, but wholly unexpected from the standpoint of the victim, was "an accident" providing personal injury protection benefits to the injured parties.

The owner of the vehicle permitted her estranged husband to drive her car in which she and her daughter were passengers. The husband intentionally drove the vehicle off the road into the Delaware River, killing himself and the insured wife. The daughter survived the accident. The jury determined that the husband had intentionally caused the accident.

The Court determined that the estate of the deceased wife and the surviving daughter were entitled to PIP benefits, interpreting the language "without regard to...fault of any kind," to include fault which arose from an intentional act and denied the insurance company exclusion from coverage under its policy.

The Appellate Division in affirming the trial court determined that the statute did not expressly exclude intentional acts and in fact, in finding coverage, found that the statute excludes consideration of "negligence, liability or fault of any kind."

Coverage has also been found under the liability provision of an automobile policy. ***Wolfe v. State Farm Ins. Co.***, 224 *N.J.Super* 348, 540 *A2d* 871 (App. Div. 1988). A woman died from being exposed to carbon monoxide while she sat in a car belonging to the owner. The woman's father pulled her from the car, carried her into the house and called the local first aid squad. The father and mother, as well as their children, watched helplessly as the first aid squad's attempt to revive her failed.

They filed claims for wrongful death, survivorship and emotional distress against the estate of the man whose car she was in. His insurance carrier disclaimed liability and sought recovery based on the family members claims for emotional distress derived solely from watching their daughter die, under the bodily injury provision of the automobile policy.

The claim itself revolved around whether there was one injured or two injured, under the provisions of the policy. Because the insurance company's definition of "bodily injury" was deemed by the Court to be unclear, it was construed against the insurer and coverage was allowed.

Allstate Insurance Co. v. Malec, 104 *N.J.* 1, 514 *A2d* 832, (1986) The Supreme Court interpreted an Allstate Insurance Policy that specifically excluded liability coverage for its insured's intentional wrongful act, and allowed the specific exclusion in the automobile liability insurance policy, stating that it neither violated public policy or the statutory scheme of the New Jersey No Fault Act and was thus valid.

New Jersey has codified the preexisting law to state that a person who criminally and intentionally kills another, is not entitled to be the beneficiary of the victim's life insurance policy.

N.J.S.A.3B:7-3 provides:

"A named beneficiary of a bond, life insurance policy or other contractual arrangement who criminally and intentionally kills the principal obligee or the person upon whose life the policy is issued, is not entitled to any benefit under the bond, policy or other contractual arrangement, and it becomes payable as though the killer had predeceased the decedent."

Also under the statute, a surviving spouse, heir or devisee, who kills the decedent, is not entitled to any benefits under a testate or intestate estate. Further, if the individual is a joint tenant or tenant by the entirety, the wrongdoer's interests are severed and the share of the decedent passes as though the wrongdoer had no right of survivorship. See ***N.J.S.A.***3B:7-1 through 7.

The only case at this point specifically interpreting this statute is ***In re List Estate***, 176 *N.J.Super* 342, 423 *A2d.* 323 (Law Div. 1980). In this case John List murdered all of his children who were the insured and was the sole beneficiary of the policy. The Court held that if no one other than the murderer had an interest in the policy, the company was relieved of its obligation since said obligation was contractual, and since the murderer cannot take the proceeds of the policy, there was no reason why the estate of the insured should collect.

In re Vadlamudi Estate, 183 *N.J.Super* 342, 443 *A2d*. 1113 (Law Div. 1982) the question before the Court was if a person kills another while insane and is acquitted of the murder because of reason of insanity, is the wrongdoer entitled to collect under a life insurance policy.

The beneficiary of an insurance policy killed her husband with an axe, and was found not guilty by reason of insanity. The Court determined that a perpetrator of a homicidal act committed while the person is legally insane, cannot as a matter of law, be one who "intentionally kills" within the meaning of the statute and that the acquittal of a homicidal act in a criminal proceeding by reason of insanity has no conclusive effect for the purposes of ***N.J.S.***3A:2A-83.

Since this Statute (similar to ***N.J.S.A.*** 3B:7-6) merely speaks of a final judgment of conviction and does not state that an acquittal is conclusive, there would be coverage if she was insane at the time of the commitment of the act.

The Court therein determined that it would hold a hearing on the issue of the sanity of the insured at the time she killed her husband.

For further discussion, for cases where abused wives in retaliation to a beating and in self defense, have killed their husbands wherein the wives were named beneficiaries of life insurance policies, and where the courts held that the death was the result of accidental bodily injury within the meaning of a policy, see: ***Insurance Counsel Journal, Thopson, Domestic or Family Altercations and Accident Death Benefits Under the Life Insurance Contract: Is it an Accident?*** 53 *Ins. Couns.* J 351 (1986).

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CHAPTER NINE

DISCOVERY

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Every case that comes in to your office is not a viable domestic torts case. The first area to explore is whether or not a cause of action exists. Even if there is a cause of action it is not enough to make a viable domestic torts case. There must be damages or there can be no recovery (see Chapter 6). There must be a source of recovery from a tortfeasor or their insurance coverage. (See Chapter 7).

If the case does not rise or have the above elements and you and/or your client decide not to pursue it, then make sure that you receive a waiver from your client to the effect that they have been informed that although there is a cause of action, that they have decided not to pursue it because of certain particular factors. (See Appendix and Check List of Cause of Actions and Waiver). In the event that there is a cause of action, then the next

step is to conduct a detailed client interview to gather information and proofs of your case.

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A domestic tort may be an event that occurred once, several times, or over the course of years (i.e. The Battered Women's Syndrome).

It is important to gather information and proofs of the plaintiff's complete cause of action, prior marital history, educational background, and medical and psychological history. All of these may have a bearing on their case and an impact on the damage aspect of the marital torts claim.

As to each possible cause of action, obtain the following information:

1. Description of the incident(s) giving rise to the cause of action;

2. Chronology of event(s) including date(s), time(s), place(s) and other details;

3. Prior proceedings and other suits;

4. Name(s), address(es) and phone number(f) of witness(es); i.e. friends, neighbors or relatives who have witnessed the event(s).

5. Name(s), address(es) and phone number(s) of potential third parties;

6. Determine whether there is any physical evidence e.g. photos, tape recordings.

7. Determine whether there was agency involvement e.g. police, courts. If so, get releases signed and get records and reports, orders and transcripts.

8. Determine whether there was medical/psychological involvement e.g. hospital, psychologist, family doctor. If so, get releases signed and get the records; get current and past medical/psychological history, prior complaints, illnesses and diagnosis, names of all treating doctors, doctors' notes, emergency room records, hospital admission records, diagnostic studies and imaging films; prior family or individual counselors.

9. The resultant effects of the tort to the client such as:

(a) Pain and suffering; past, present and future;

(b) Wage loss;

(c) Past and future out of pocket expenses;

(d) Future medical or psychological treatment;

(e) Impact upon income potential;

(f) Dissipation of an asset; other financial loss;

(g) Change in lifestyle.

10. Employment history including where worked, for what periods of time, reasons for departure, and whether or not any wages or business opportunities were lost as a result of the incident(s). Get the clients to sign releases and secure records.

11. Determine whether or not your client or any defendants have any criminal history, arrests or prior convictions.

12. Determine what the defendant's assets and other sources of collection such as insurance are. Do/did the parties and/or the prospective defendant carry homeowner's and medical insurance? If insurance is involved, make sure you put the carrier on notice that there is a claim once you have obtained the name of the carrier(s). Find out the following information:

(a) Agent;

(b) Policy number;

(c) Period of coverage; and

(d) Amount of coverage;

(e) Type of coverage;

(f) Whether there is a domestic tort exception or any other exception to the policy.

13. Assess the client in terms of demeanor, attitude, truthfulness, credibility as a witness/litigant.

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Once all this information is gathered, you will then have to either by yourself, or after hiring the necessary experts, do an evaluation as to whether or not there is a viable domestic tort action in which there is, besides a cause of action and liability, damages which can be translated into monetary recovery which is collectible.

Candidly explain to your client potential causes of action in the case and your opinion of the likelihood of success. After also examining your client's damages as it translates into money damages, as well as the potential sources of recovery, a final determination must be made whether pursuing the course of action is worth pursuing. You must make your client aware of the fact that there are no guarantees, the time that must be dedicated to the suit by both you and them, the aggravation factors; as well as the defenses that are available to defeat the action even if viable, and the possibility that they may be leaving themselves open to counterclaims.

The client should also be made aware of the fact that besides time and aggravation, there are costs involved for which they are responsible including court costs, deposition fees and expert reports and testimony. Lastly, a fee arrangement must be made with the client as described below.

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There are two options that are available to the client and yourself concerning the fee arrangement as to the domestic torts case: an hourly rate or a contingent fee arrangement.

Your fee arrangement with your client concerning the rest of the marital case is on an hourly basis. You might want to continue with this arrangement on behalf of the client, but you may also provide them with the contingent fee option.

The Rules of Professional Conduct, specifically R.P.C. 1.5(d)(1) provides that a lawyer may not enter into a contingent fee arrangement with a client in any domestic relations matter, which fee arrangement is contingent upon them securing a divorce, or upon the amount of alimony, child support or property settlement that they are to receive.

On the other hand, a contingent fee is a permissible arrangement as to equitable distribution of property in a matrimonial case. In ***Salerno v. Salerno***, 241 *N.J. Super* 536, 575 *A2d* 532 (Ch. Div. 1990), the court upheld the ability of the attorney to charge a contingent fee as to the equitable distribution aspect of the case so long as the retainer agreement complies with R.P.C. 1.5(c).

That Rule provides that the contingent fee arrangement must be:

(1) In writing;

(2) State the method by which the fee is to be determined, including the percentages that will accrue to the attorney;

(3) Specify the litigation expenses and whether expenses are deducted before or after the contingency fee is assessed.

At the end of the case, the attorney utilizing a contingent fee agreement, must provide the client with a written statement showing the method of determining the fees to the attorney, the expenses and the client's share.

Although there is no specific case on point as far as domestic tort is concerned, this would seem to be no different than any other negligence or tort action subject to the same fee arrangements as R.P.C. 1.21-7(b).

Another consideration may be whether or not you want one attorney, or one firm to handle the matrimonial matter and another firm or another attorney to handle the negligence action so there can be complete dichotomy of billing.

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Once you have completed all your fact finding and receive complete copies of all pertinent records, it would be wise to retain the services of appropriate experts, particularly in the medical and psychological professions. The medical expert is needed to establish the nature and extent of the physical injuries and the psychological expert must set forth the emotional injuries sustained as a result of the abusive conduct. Both experts must be able to causally relate the respective injuries to the action of the tortfeasor.

In selecting the expert, consider the impact that they will have on the trier of fact, whether it be a judge or a jury. The ideal expert is one who has impeccable credentials, holds membership in the relevant medical/psychological societies, and is board certified in the particular medical/psychological discipline, and is recognized in the community as an expert in their field. They should hold positions on boards who review committees with the specialty area, authored writings on the medical/psychological condition, and be actively engaged in the relevant practice area.

If you are choosing a psychological expert, it is important you select one who has experience working with domestic violence victims and someone who is familiar with the Battered Women's Syndrome.

These experts should review all of the documents with you and to meet and examine your client. If they are psychological experts, they should not be the same doctor who has treated your client because of the prohibition found in *Specialty Guidelines for Psychologists, Custoday/Visitation Evaluations by the Board of Psychological Examiners of the Division of Consumer Affairs*. These experts should review all of the documents and be prepared to render a written report and be able to testify in court.

APPENDIX

J. *Brennan v. Orban*, 145 N.J. 282 (1996)

Brennan and Orban, two attorneys, were married in January 1991 and resided in the marital home until their separation in September of 1994. That separation was triggered by Brennan obtaining a Domestic Violence Temporary Restraining Order against Defendant. The Order prevented defendant from having any contact with plaintiff and granted the plaintiff exclusive possession of the marital home. In October, Plaintiff-Wife filed complaint in the Chancery Division for

divorce on grounds of extreme cruelty and then two weeks later filed a complaint in the Law Division to recover for mental and physical abuse.

Family part granted husband's motion to consolidate the two actions and denied wife's motion to have her tort claim heard by a jury. The Appellate Division granted wife's motion for leave to appeal from denial of a jury trial and reversed and remanded.

The question in this appeal is whether a marital tort that is joined with other claims in dissolution of marriage should be tried by a Judge or Jury. The Supreme Court affirmed and modified the lower decision, holding that:

1. When vindication of public policy against domestic violence outweighs in its significance to the family the other matters awaiting disposition by the Family part, the marital tort claim shouls, at the request of a victim, be tried by a civil jury.

2. Joinder under the Entire Controversy Doctrine was appropriate.

3. To resolve the question of whether claimants are entitled to try their tort claims before a jury, the Family Part must determine if the tort claims are ancillary and incidental to the underlying divorce action.

4. When issues of Child welfare, child support, and parenting are intertwined with dissolution of the marriage and the necessary resolution of the marital tort, the Family Part may conclude that the marital tort should be resolved in conjunction with the divorce action.

5. The decision as to where the jury trial of the marital tort will take place should rest within the sound discretion of the Family Part Judge.

6. The Judge may order that the marital tort action be severed and the tort claims transferred to the Law Division for trial in accordance with the regular Civil Division procedures.

The Court further went on to say that they are aware that traditionally responses to marital tort actions characterize them as ancillary to divorce actions, not separte torts. To combat this the legislature has taken the lead, stating categorically that "the official response to domestic violence shall communicate the attitude that violent behavior will not be excused or tolerated, and shall make clear the fact that the existing criminal laws and civil

remedies created under this act will be enforced *without regard to the fact that the violence grows out of a domestic situation."*

On issues such as this, the importance of judicial economy and efficiency pales in comparison to the judiciary's higher responsibility to respond to the scourge of domestic violence by according its victims the same right that our civil law affords to every other victim of an unlawful assault and battery - that being a trial before a Jury. That the victim is also engaged in a divoce action with the perpetrator of the tort should be irrelevant to the remedy afforded by law to the tort victim. Moreover, if the tort claim were tried by the judge trying the divorce action, the damages awarded on the tort claim inevitably would be influenced by the judge's overriding obligation to resolve all of the financial issues in the divorce case. A separate jury trial on the tort claim, however, would focus only on the claim and the damages necessary for its vindication. The likelihood that a jury trial of the tort claim ordinarily would result in a more generous damages award underscores the judiciary's obligation to respond clearly and evenhandedly to the claims of domestic vilence, affording them no less than the panoply of remedies avaialble to other citizens.

K. PRACTICE TIP--QUESTIONS FOR THE CLIENT--DOMESTIC TORT CHECKLIST.

DOMESTIC TORTS MALPRACTICE CHECKLIST

NOT INFORMING AN INSURANCE COMPANY WHICH MIGHT HAVE COVERAGE

NOT ESTABLISHING DAMAGES

NOT ASKING FOR THE RIGHT DAMAGES - COMPENSATORY, PUNITIVE, ETC.

NOT PLEADING A DEFENSE, NOT PLEADING THE CORRECT DEFENSE

NOT PROVING AN ELEMENT OF YOUR CASE

NOT ASKING FOR A JURY TRIAL

NOT KNOWING HOW TO TRY A TRIAL BY JURY