

Bringing and Defending Domestic Tort Actions

By Elliot H. Gourvitz

In recent years domestic torts has been in the public forefront because of the issue of jury trials. In a series of cases ending with *Brennan v. Orban*, 145 N.J. 282 (1996). Under certain circumstances domestic torts cases are allowed to be tried by jury.

It is not the objective of this article to once more rehash *Brennan*, or set forth the standards enunciated in *Giovine v. Giovine*, 284 N.J.Super 3 (App Div 1985). Instead, the purpose here is to provide an overview of the law of domestic torts as it has developed over the years.

One commentator has noted:

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 becomes 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. Prosser, *Handbook on the Law of Torts*, 3-4 (5th Ed. 1984).

Domestic torts have been around since about 1961 in New Jersey, with the slow abrogation of interspousal tort immunity which ended in the case of *Tevis v. Tevis*, 79 N.J. 42 (1979). This

decision, while denying recovery to the plaintiff spouse, expanded the tort arena from negligent acts to intentional acts, where the wife sued the husband for physical beatings which occurred during the marriage. In doing so, the ruling explicitly abrogated the Interspousal Immunity Doctrine. From that date onward, domestic tort actions were dubbed Tevis complaints or a Tevis counts.

Although marital tort litigation may have begun with the assault and battery committed by one spouse against another as in Tevis, it now encompasses many causes of action and is not limited to actions between spouses.

The more ethereal types of domestic torts reported in New Jersey are the fraudulent inducement to marry, fraudulent inducement to continue a marital relationship, and the fraudulent inducement to procure settlement agreements.

The most publicized and envelope-pushing type of domestic torts comes out of domestic violence and involves the Battered Women's Syndrome. New Jersey courts first recognized the Battered Women's Syndrome in *State v. Kelly*, 97 N.J. 178 (1984), as a defense in a criminal case. The Syndrome itself is such that battered women exhibit common personality traits: low self esteem; traditional beliefs about a woman's role, family and home; female sexuality, tremendous feelings of guilt that their marriages are failing; and the tendency to accept responsibility for the

batterer's action. These battered women are paralyzed by the fear of their spouse's response should they attempt to leave the relationship.

In *Cusseaux v. Pickett*, 279 N.J. Super 335 (Law Div. 1994), the court established a tort for assaults and batteries over a period of time that are part of a continuous course of conduct and constitute a pattern of violent behavior which would not be defeated by applying a two year statute of limitations.

The Federal Government has enacted the Gender Motivated Bias Statute, the purpose of which is to protect the civil rights of victims of gender motivated violence and provide a Federal civil rights cause of action for victims of crimes and violence motivated by gender.

Battered Women's Syndrome and the Gender Motivated Bias Statute represented the New Jersey judiciary's and the Federal Government's reactions to the growing emergence of domestic violence. Thus, such attacks no longer lie hidden in the secrets of the family, but have emerged on the public landscape.

Marital rape and transmission of sexual diseases are two other torts which also are emerging from the secrecy and sanctity of the bedroom to become causes of action in which the victim spouse can finally be compensated.

Emotional and Financial Injuries

One of the most difficult torts to prove and the one perhaps most often rejected by the courts is that of the intentional infliction of emotional injury or distress. The difficulty is twofold. Since the injury cannot be readily seen without psychological testimony and testimony on the part of the defendants as to their subjective feelings, the injury seems unprovable and sometimes unquantifiable. In *Ruprecht v. Ruprecht*, 252 N.J. Super 230 (Ch. Div. 1991), the court found that there was 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. It noted that certainly mental and emotional distress is just as "real" as physical pain even though it is more difficult to prove.

In that case, the court found that for a matter to be actionable, the conduct must be regarded as "outrageous," meaning it would "exceed all bounds usually tolerated by decent society."

Another intangible tort is that of invasion of privacy which includes wiretapping, stalking, visual prying, eavesdropping and phone harassment. Such claims have been litigated with increasing frequency as technology advances and the means of detection of these torts keeps pace. Other affirmative torts include false arrest and imprisonment, defamation including libel and slander and interference with custody and visitation.

Certain torts are directed to the financial relationship between marriage of partners. Deceit and fraudulent representation, breach of fiduciary duty, fraudulent conveyance and conversion, intentional interference with business relationship and dissipation of marital assets are some of the actions that fall under this category.

Dissipation of assets is sometimes incorporated into a "flight plan" -- that is, a calculated and planned course of action on behalf of one spouse to either strip the assets of the marriage or secret them for his or her own favor in anticipation of divorce.

The injured spouse can bring an action to recover those assets for the marital pot, even if they are transferred to third parties such as brothers, sisters or partners.

Torts from other states and from other disciplines are poking into the marital tort arena. One example is spoliation of evidence.

A concept which arose in California and then arose in New Jersey in the non-matrimonial case of *Viviano v. CBS, Inc.*, 251 N.J. Super 113, (App. Div. 1991) cert. denied 127 N.J. 565 (1992), this tort involves the destruction or concealment of evidence involved in litigation. In matrimonial cases, it is usually pleaded in an amended complaint after attempts at discovery are thwarted by the disappearance and destruction of financial records.

Domestic torts are not limited to the relationship between

marital partners but extends to third parties. The abrogation of parental tort immunity allowed actions by children against their parents or other relatives. These torts include assault and battery and incest claims by children against their parents or other relatives.

Torts also include third party negligence claims which involve medical or legal malpractice, false arrest and imprisonment, malicious prosecution and abuse of process.

Third parties who help a parent to interfere with custody and visitation are subject to suit for their interference as well as intentional infliction of emotional distress.

A spouse who gives the victim spouse a sexual disease must have gotten it from someone else who is also liable in tort for the transmission of that disease and the damages which naturally follow.

Defenses

Unlike other fields of law, such as negligence, where an attorney specializes in representing either the tortfeasor or the defendant through their insurance company, a matrimonial litigator must be prepared to both advocate the tort and defend against it.

Some of the defenses they have to be aware of include the Entire Controversy Doctrine, statute of limitations, res judicata, laches, equitable estoppel and waiver, forum non conveniens,

arbitration and award, release, consent, advice of counsel, right of privacy and privilege, comparative negligence and statutory tort immunity.

The practitioner who has limited her practice to matrimonial law must become familiar with and master the tort concepts of damages. Knowing the difference between nominal, compensatory, punitive and statutory damages. They must become familiar with the measure of damages for physical injury and mental distress, physical pain and suffering and mental anguish, permanent disability, medical expenses, decreased quality of injured parties' lives, loss of wages and earnings, exacerbation and aggravation of preexisting injuries, disease or disability, loss of consortium and punitive damages.

They also must know about mitigation of damages and most importantly, causation. Without all of these elements, a successful marital tort action cannot be litigated.

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