Prosser & Keeton on Torts 901 (1984)

Husband and Wife

The older common law was founded on the idea that upon marriage, the wife's legal identity merged with that of her husband. The effect of this was to place the wife under a number of disabilities.[2] She could not enter contracts; her husband was entitled to the possession and the profits of her property; there were restrictions on her power to litigate. For the same reason, neither spouse could maintain a tort action against the other, for either personal[3] or property torts.[4] It was often said, perhaps with more accuracy than humor, that at common law the husband and wife were one, and the husband was that one.

About 1844 the states began to pass Married Women's Property Acts, which now exist in some form in all American jurisdictions.[5] The central aim of these statutes, the details and language of which differ a great deal, is to secure to a married woman a separate legal identity, with her own rights in property and her own capacity to sue and be sued.

Courts generally agreed that these statutes permitted the wife to maintain a tort action against her husband to vindicate her property interests. Thus she could recover for conversion,[6] fraud,[7] trespass to land[8] and for negligent injury to her property.[9] Since the statutes destroyed the unity of persons, the husband was held to have similar rights against the wife for torts to his property.[10]

But the Married Women's Acts were held not to destroy the spousal immunity when it came to personal torts, and during the remainder of the 19th and most of the 20th century courts refused to permit recovery against a spouse for either negligent[11] or intentional[12] torts. Though the legal identity of the spouses was destroyed by the statutes, courts found two major new arguments in favor of the immunity. The first was that suits between husband and wife would be fictitious and fraudulent.[13] The second, inconsistently, was that spousal actions would be all too genuine and would destroy the peace and harmony of the home.[14]

Almost no legal writer has had any use for these arguments, and under repeated criticism and reiterated attacks on them in the courts, judicial perception of these arguments has slowly shifted. The danger of fraud has come to seem no greater than in many other cases where suit is allowed, such as the host-guest case or the suit between friends,[15] and in any event it is now thought that the remedy for fraudulent claims is to expose the fraud rather than to discard all

42 Barb. 641; Libby v. Berry, 1883, 74 Me. 286; Peters v. Peters, 1875, 42 Iowa 182; Nickerson v. Nickerson, 1886, 65 Tex. 281.

4. See Kelley v. Kelley, 1931, 51 R.I. 173, 153 A. 314; Plotkin v. Plotkin, Del.1924, 2 W.W.Harr. 455, 125 A. 455; Smith v. Gorman, 1856, 41 Me. 405; Howe v. Blanden, 1849, 21 Vt. 315.

5. H. Clark, 1968, Domestic Relations 222; McCurdy, Property Torts Between Spouses, 1957, 2 Vill.L.Rev. 447, 461.

6. Hamilton v. Hamilton, 1950, 255 Ala. 284, 51 So. 2d 13; Madget v. Madget, 1949, 85 Ohio App. 18, 87 N.E.2d 918; Eddleman v. Eddleman, 1937, 183 Ga. 766, 189 S.E. 833, conformed to 55 Ga.App. 333, 190 S.E. 365; Carpenter v. Carpenter, 1908, 154 Mich. 100, 117 N.W. 598.

7. Langley v. Schumacker, 1956, 46 Cal.2d 601, 297 P.2d 977; Adams v. Adams, 1883, 51 Conn. 135; Whiting v. Whiting, 1916, 114 Me. 382, 96 A. 500; Heckman v. Heckman, 1906, 215 Pa. 203, 64 A. 425; Moreau v. Moreau, 1924, 250 Mass. 110, 145 N.E. 43; see Keen v. Coleman, 1861, 39 Pa. 299; Note, 1956, 4 U.C.L.A. L.Rev. 114. See Note, 1963, 38 Wash.L.Rev. 371.

8. Weldon v. De Bathe, 1884, 14 Q.B.D. 339; Larison v. Larison, 1881, 9 Ill.App. 27.

9. Hubbard v. Ruff, 1958, 97 Ga.App. 251, 103 S.E.2d 134; cf. Vigilant Insurance Co. v. Bennett, 1955, 197 Va. 216, 89 S.E.2d 69.

10. Mason v. Mason, 1892, 66 Hun 386, 21 N.Y.S. 306 (conversion); Shewalter v. Wood, Mo.App.1916, 183 S.W. 1127 (same); Lombard v. Morse, 1891, 155 Mass. 136, 29 N.E 205 (fraud); Hedlund v. Hedlund, 1930, 87 Colo. 607, 290 P. 285 (replevin); Vigilant Insurance Co. v. Bennett, 1955, 197 Va. 216, 89 S.E.2d 69 (negligence).

11. Rubalcava v. Gisseman, 1963, 14 Utah 2d 344, 384 P.2d 389; Campbell v. Campbell, 1960, 145 W.Va. 245, 114 S.E.2d 406.

12. Thompson v. Thompson, 1910, 218 U.S. 611, 31 S.Ct. 111, 54 L.Ed. 1180; Fisher v. Toler, 1965, 194 Kan. 701, 401 P.2d 1012.

13. "* * * and this would add a new method by which estates could be plundered." Abbott v. Abbott, 1877, 67 Me. 304. No wife would want to sue her husband for a negligent tort except as a "raid on an insurance company." Newton v. Weber, 1922, 119 Misc. 240, 196 N.Y.S. 113.

14. Ritter v. Ritter, 1858, 31 Pa. 396: "The flames which litigation would kindle on the domestic hearth would consume in an instant the conjugal bond, and bring on a new era indeed—an era of universal discord, of unchastity, of bastardy, of dissoluteness, of violence, cruelty, and murders."

15. Immer v. Risko, 1970, 56 N.J. 482, 267 A.2d 481.

the honest claims along with the bad ones.[16] Similarly, it has come to seem doubtful that peace and harmony of the home can be preserved or restored by refusing to redress a palpable wrong or to compensate a genuine injury, and there is no reason to believe that personal injury claims are more disruptive than property claims, which are actionable.[17]

As the arguments for immunity have come to seem less weighty, the principle of compensation for tort has acquired a preeminent position in the solution of the problem,[18] and by 1970 about a dozen courts had rejected any universal principle of immunity between spouses.[19] In the decade that followed more than a dozen other courts joined them in abrogating the immunity,[20] including courts in community property states where special problems created practical difficulties in discarding the immunity.[21] The movement to abolish the unqualified immunity has continued,[22] and it now appears that spousal actions will be permitted for personal injuries in a majority of the states, at least in some circumstances, though some courts have indicated that they will scrutinize such actions with care or that immunity might be retained in some class of case,[23] and that there might well be conduct that would be tortious among strangers that is still not actionable between spouses.[24]

This leaves a respectable minority of courts that continue to provide for an absolute immunity between spouses in personal tort actions.[25] In these states the injured spouse may, however, find some comfort in one of the recognized exceptions to immunity. It has been held that a spouse may recover against the other spouse for pre-marital torts.[26] A few courts have permitted recovery for torts during or before the marriage once the marriage is terminated by di-

16. Klein v. Klein, 1962, 58 Cal.2d 692, 26 Cal.Rptr. 102, 376 P.2d 70; Beaudette v. Frana, 1969, 285 Minn. 366, 173 N.W.2d 416.

17. Cramer v. Cramer, Alaska, 1963, 379 P.2d 95; Brooks v. Robinson, 1972, 259 Ind. 16, 284 N.E.2d 794.

18. See Lewis v. Lewis, 1976, 370 Mass. 619, 351 N.E.2d 526; Beaudette v. Frana, 1969, 285 Minn. 366, 173 N.W.2d 416.

19. These decisions reflect a process of slow erosion beginning in the teenaged years of the century and continuing until the landslide of 1970–80. See, e.g., Klein v. Klein, 1962, 58 Cal.2d 692, 26 Cal.Rptr. 102, 376 P.2d 70; Crowell v. Crowell, 1920, 180 N.C. 516, 105 S.E. 206, rehearing denied 181 N.C. 66, 106 S.E. 149.

20. Rogers v. Yellowstone Park Co., 1974, 97 Idaho 14, 539 P.2d 566; Brooks v. Robinson, 1972, 259 Ind. 16, 284 N.E.2d 794; Shook v. Crabb, Iowa 1979, 281 N.W.2d 616; Lewis v. Lewis, 1976, 370 Mass. 619, 351 N.E.2d 526, 92 A.L.R.3d 890; Hosko v. Hosko, 1971, 385 Mich. 39, 187 N.W.2d 236; Imig v. March, 1979, 203 Neb. 537, 279 N.W.2d 382; Merenoff v. Merenoff, 1978, 76 N.J. 535, 388 A.2d 951; Maestas v. Overton, 1975, 87 N.M. 213, 531 P.2d 947; State Farm Mutual Automobile Insurance Co. v. Westlake, 1974, 35 N.Y.2d 587, 364 N.Y.S.2d 482, 324 N.E.2d 137 (considered dictum); Rupert v. Stienne, 1974, 90 Nev. 397, 528 P.2d 1013; Richard v. Richard, 1973, 131 Vt. 98, 300 A.2d 637; Surratt v. Thompson, 1971, 212 Va. 191, 183 S.E.2d 200; Freehe v. Freehe, 1972, 81 Wn.2d 183, 500 P.2d 771; Coffindaffer v. Coffindaffer, 1978, ___ W.Va. ___, 244 S.E.2d 338.

21. The problem is to prevent recovery from going to the "community" when one of the community is a tortfeasor. See Rogers v. Yellowstone Park Co., 1974, 97 Idaho 14, 539 P.2d 566; Maestas v. Overton, 1975, 87 N.M. 213, 531 P.2d 947.

22. Fernandez v. Romo, 1982, 132 Ariz. 447, 646 P.2d 878; MacDonald v. MacDonald, Me.1980, 412 A.2d 71. Hack v. Hack, Pa.1981, 433 A.2d 859.

23. Abrogation of the immunity has often come first in automobile injury cases and at times courts have suggested that the immunity might be otherwise retained. But the implication has been difficult to carry out in practice, and courts suggesting such limits have had occasion since to state a more general principle of abrogation. Compare Lewis v. Lewis, 1976, 370 Mass. 619, 351 N.E.2d 526, 92 A.L.R.3d 890 with Brown v. Brown, 1980, 381 Mass. 231, 409 N.E.2d 717; Immer v. Risko, 1970, 56 N.J. 482, 267 A.2d 481 with Merenoff v. Merenoff, 1978, 76 N.J. 535, 388 A.2d 951.

24. Lewis v. Lewis, 1976, 370 Mass. 619, 351 N.E.2d 526; Beaudette v. Frana, 1969, 285 Minn. 366, 173 N.W.2d 416 ("intimate sharing * * * injurious contact [must be] plainly excessive or a gross abuse of a normal privilege. * * *").

25. Alfree v. Alfree, Del.1979, 410 A.2d 161, appeal dismissed 446 U.S. 931, 100 S.Ct. 2145, 64 L.Ed.2d 783 (but recommending legislative attention); Raisen v. Raisen, Fla.1979, 379 So.2d 352, certiorari denied 449 U.S. 886, 101 S.Ct. 240, 66 L.Ed.2d 111; Bonkowsky v. Bonkowsky, 1982, 69 Ohio St.2d 152, 431 N.E.2d 998.

26. Moulton v. Moulton, Me.1973, 309 A.2d 224; Childress v. Childress, Tenn.1978, 569 S.W.2d 816 (possibly excluding torts impliedly released by marriage, such as seduction).

vorce,[27] though this is not a favored exception with many courts.[28] Likewise, a few have held that upon the death of one spouse a wrongful death action may be maintained against the other, since the reasons for the immunity no longer exist.[29] Still another exception sometimes recognized is that intentional torts by a spouse are actionable even where negligent torts are not.[30] These exceptions have at least on occasion turned out to be stepping stones toward a complete abolition of the immunity, since once the exception is recognized it does not, on analysis, seem to furnish a logical stopping place.[31] From all this it may be expected that the trend towards spousal liability for torts will continue.

In the case of spousal actions there is room for neither disciplinary authority nor parental discretion, but most courts have recognized that, even with the general abolition of immunity, some areas of the marital relationship will remain untouched by tort law. Not every act that is tortious between strangers will be so regarded when it is committed between spouses because there are many "mutual concessions implied in the marital relationship." [91] Thus consent, both that understood from past conduct or the spouses' way of doing things and that understood from social habits generally, will be an important defense as to some intentional torts. But it should go without saying, however, that a "gross abuse of normal privilege" [92] will receive no protection, and the victim of an outright rape or beating [93] or of systematic infliction of mental distress [94] has not "consented" merely because the spouse's earlier bad conduct has not been reported, and indeed the cases on such unpleasant facts have not even raised the issue of consent. Nevertheless courts appear to feel that there may be some relatively trivial, or at least highly transitory, harms that may be excluded from the protection of tort law.[95] Good candidates for this class of cases would probably be the purely technical battery and the normal hurts of intimate living. Beyond this courts so far have said little except that the abolition of immunity will not result in automatic liability and that the courts will be sure to respect the "subtle ebb and flow of married life." [96] On this basis it may be expected that courts will leave some matters to be adjusted by the parties themselves rather than by the courts, especially in areas of strong marital privacy interests and where agreement, consent or planning by the parties is possible.[97] Although there are few decisions, it is probably also a good guess at this point that in the absence of intended harm [98] little protection will be given in the case of purely economic or other intangible loss where the plaintiff-spouse suffers no accompanying physical injury.[99]

91. Lewis v. Lewis, 1976, 370 Mass. 619, 351 N.E.2d 526, 532.

92. Beaudette v. Frana, 1969, 285 Minn. 366, 173 N.W.2d 416.

93. Lusby v. Lusby, 1978, 283 Md. 334, 390 A.2d 77.

94. Davis v. Bostick, 1978, 282 Or. 667, 580 P.2d 544. In Vance v. Vance, 1979, 286 Md. 490, 408 A.2d 728, a putative husband was held liable for emotional distress resulting to the would-be wife when, upon petition for divorce, he revealed they had never been validly married.

95. Merenoff v. Merenoff, 1978, 76 N.J. 535, 388 A.2d 951.

96. Merenoff v. Merenoff, 1978, 76 N.J. 535, 388 A.2d 951.

SECOND RESTATEMENT OF TORTS

§ 936. Factors in Determining Appropriateness of Injunction

(1) The appropriateness of the remedy of injunction against a tort depends upon a comparative appraisal of all of the factors in the case, including the following primary factors:

(a) the nature of the interest to be protected,

(b) the relative adequacy to the plaintiff of injunction and of other remedies,

(c) any unreasonable delay by the plaintiff in bringing suit,

(d) any related misconduct on the part of the plaintiff,

(e) the relative hardship likely to result to defendant if an injunction is granted and to plaintiff if it is denied,

(f) the interests of third persons and of the public, and

(g) the practicability of framing and enforcing the order or judgment.

(2) The appropriateness of an interlocutory injunction against a tort is determined in the light of the factors listed in Subsection (1), as presented prior to final hearing, but depends primarily upon the following special factors:

(a) the extent of the threat of irreparable harm to the plaintiff if the interlocutory injunction is not granted,

(b) the consequences that the interlocutory relief may have upon the defendant,

(c) the probability that the plaintiff will succeed on the merits, and

(d) the public interest.

CHAPTER 209A

ABUSE PREVENTION

The section headings for Massachusetts General Laws Annotated have been editorially supplied.

Chapter 209A of the General Laws was added by St.1978, c. 447, § 2.

Law Review Commentaries

Commonwealth v. Cadwell: Deliberate premeditation, extreme atrocity and cruelty, and the battered child syndrome—a new look at criminal culpability in Massachusetts. (1979) 14 New England L.Rev. 812.

Library References

Comments.
Law relative to prevention of family abuse, vacating marital home, orders prohibiting restraint on personal liberty, see M.P.S. vol. 2A, Lombard, § 1913.5.

Forms.
Protection from abuse, support and living apart, see M.P.S. vol. 2A, Lombard, § 1914.

WESTLAW Electronic Research

WESTLAW supplements Massachusetts Laws Annotated and is useful for additional research. Enter a citation in INSTA-CITE for display of any parallel citations and case history. Enter a constitution, statute or rule citation in a case law database for cases of interest.

Example query for INSTA-CITE: IC 258 N.E.2d 22
Example query for Massachusetts Constitution:
M.G.L.A. Const. Constitution /s 1 First /5 30 XXX
Example query for statute: M.G.L.A. G.L. /5 231 +5 85Q

§ 1. Definitions

The following words as used in this chapter shall have the following meanings:—

"Abuse", the occurrence of one or more of the following acts between family or household members:

(a) attempting to cause or causing physical harm;

(b) placing another in fear of imminent serious physical harm;

(c) causing another to engage involuntarily in sexual relations by force, threat of force or duress.

"Court", the superior, probate and family, district or Boston municipal court departments of the trial court.

"Family or household member", household member, former household member, a spouse, former spouse or their minor children, blood relative or person who, though unrelated by blood or marriage, is the parent of the plaintiff's minor child.

"Law officer", any officer authorized to serve criminal process.

Added by St.1978, c. 447, § 2. Amended by St.1983, c. 678, § 2; St.1986, c. 310, § 15.

Historical Note

St.1978, c. 447, § 2, adding this chapter, consisting of this section and §§ 2 to 6, was approved July 17, 1978.

Section 6 of St.1978, c. 447, provides:

"The chief justice of the superior court and the chief judge of the probate court and the chief justice of the district courts shall jointly promulgate a form of petition for chapter two hundred and nine A of the General Laws, inserted by section one of this act [so in enrolled bill; probably should read "section two of this act"], which shall be simple and permit a person to file a petition himself."

St.1983, c. 678, § 2, approved Dec. 21, 1983, in the definition of "Court" substituted "and family, district or Boston municipal court departments of the trial court" for "or district courts".

St.1986, c. 310, § 15, an emergency act, approved July 22, 1986, by § 35 made effective upon passage, in the definition of "Family or household member" inserted "former household member," and substituted ", blood relative or person who, though unrelated by blood or marriage, is a parent of the plaintiff's minor child" for "or blood relative".

Section 36 of St.1986, c. 310, provides:

"The provisions of this act are severable and if any of its provisions shall be held unconstitutional, void or unenforceable by any court of competent jurisdiction the decision of such court shall not affect or impair any of the remaining provisions."

Cross References

Terms and conditions of personal recognizance to protect family, see c. 276, § 42A.

Library References

Husband and Wife ⇐283(3).
Infants ⇐15, 156.
C.J.S. Husband and Wife § 611.
C.J.S. Infants § 31 et seq.

WESTLAW Electronic Research

See WESTLAW guide following the Foreword of this volume.

§ 2. Venue

Proceedings under this chapter shall be filed, heard and determined in the superior court department or the Boston municipal court department or respective divisions of the probate and family or district court departments having venue over the plaintiff's residence. If the plaintiff has left a residence or household to avoid abuse, such plaintiff shall have the option of commencing an action in the court having venue over such prior residence or household, or in the court having venue over the present residence or household.

Added by St.1978, c. 447, § 2. Amended by St.1983, c. 678, § 3.

Historical Note

St.1983, c. 678, § 3, approved Dec. 21, 1983, rewrote this section, which prior thereto read:

"Proceedings under this chapter shall be filed, heard and determined in the district, superior court or the probate court of the county in which the plaintiff resides. If the plaintiff has left the residence or household to avoid abuse, he shall have the option to bring an action in the county of the previous residence or household or the new residence or household."

Library References

Venue ⇐8(2).
C.J.S. Venue § 17 et seq.

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§ 3. Remedies; period of relief

A person suffering from abuse from an adult or minor family or household member may file a complaint in the court requesting protection from such abuse, including, but not limited to, the following orders:—

(a) ordering the defendant to refrain from abusing the plaintiff whether the defendant is an adult or minor;

(b) ordering the defendant to vacate forthwith the household. Notwithstanding the provisions of section thirty-four B of chapter two hundred and eight, an order to vacate shall be for a fixed period of time, not to exceed one year, at the expiration of which time the court may extend any such order upon motion of the plaintiff for such additional times as it deems necessary to protect the plaintiff from abuse;

(c) awarding the plaintiff, in the case of husband and wife, temporary custody of a minor child;

(d) ordering the defendant to pay temporary support for the plaintiff or any child in the plaintiff's custody or both, when the defendant has a legal obligation to support such a person;

(e) ordering the defendant to pay to the person abused monetary compensation for losses suffered as a direct result of such abuse. Compensatory losses shall include, but not be limited to, loss of earnings or support, out-of-pocket losses for injuries sustained, medical and moving expenses and reasonable attorneys' fees;

(f) ordering the plaintiff's address to be impounded as provided in section eight.

No filing fee shall be charged for the filing of the complaint. The plaintiff shall not be charged for copies of orders entered by the court.

Any relief granted by the court shall be for a fixed period of time not to exceed one year, at the expiration of which time the court may extend any order, upon motion of the plaintiff, for such additional time as it deems necessary to protect the plaintiff from abuse. The court may modify its order at any subsequent time upon motion by either party.

No order under this chapter shall in any manner affect title to real property.

Any action commenced under the provisions of this chapter shall not preclude any other civil or criminal remedies. A party filing a complaint under this chapter shall be required to disclose any prior or pending actions for divorce under chapter two hundred and eight, separate support under two hundred and nine, or abuse prevention under this chapter.

If there is a prior or pending order from the probate and family court department of the trial court for divorce under chapter two hundred and eight, or separate support under chapter two hundred and nine, an order issued in the district court or Boston municipal court departments pursuant to this chapter shall be restricted to ordering the defendant to refrain from abusing the plaintiff whether the defendant is an adult or minor, or ordering the defendant to vacate forthwith the household.

If the parties to a proceeding under this chapter are parties in a subsequent proceeding for divorce under chapter two hundred and eight or for separate support under chapter two hundred and nine, any custody or support order or judgment issued in the divorce or separate support proceeding shall supersede any prior custody or support order under this chapter.

Added by St.1978, c. 447, § 2. Amended by St.1983, c. 678, § 4.

Historical Note

St.1983, c. 678, § 4, approved Dec. 21, 1983, in the first paragraph substituted "complaint in the court requesting protection from such abuse, including, but not limited to, the following orders:" for "petition in the district, probate or superior court requesting any order which will protect him from abuse, including, but not limited to the following:", in cl. (b) added the second sentence, in cl. (c) substituted "husband and" for "husband or" and added "child", in cl. (d) deleted a comma following "custody" and inserted "a" preceding "person", in cl. (e), in the second sentence, inserted "medical and" and substituted "attorneys'" for "attorney", and added cl. (f); in the second paragraph, in the first sentence, substituted "the filing of the complaint" for "such a petition", and added the second sentence; in the fourth paragraph deleted "any" preceding "real property"; in the fifth paragraph, in the first sentence substituted "action commenced under the provisions of this chapter" for "proceedings under this chapter", and added the second sentence; and added the sixth and seventh paragraphs.

Library References

Husband and Wife ⇐283(3).
Infants ⇐15, 156, 179, 200, 221, 222.
C.J.S. Husband and Wife § 611.
C.J.S. Infants § 31 et seq.

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Notes of Decisions

1. Purpose of law
Indication of legislative purpose in Domestic Violence Act constituted clear legislative statement of public policy which Supreme Judicial Court would try to advance in its construction of rape statute (c. 265, § 22). Com. v. Chretien (1981) 417 N.E.2d 1203, 383 Mass. 123.

§ 4. Temporary orders; notice; hearing

Upon the filing of a complaint under this chapter, the court may enter such temporary orders as it deems necessary to protect a plaintiff from abuse, including relief as provided in section three. Such relief shall not be contingent upon the filing of a complaint for divorce or separate support.

If the plaintiff demonstrates a substantial likelihood of immediate danger of abuse, the court may enter such temporary orders without notice as it deems necessary to protect the plaintiff from abuse and shall immediately thereafter notify the defendant that the temporary orders have issued. Notice shall be made by the appropriate law enforcement agency as provided in section seven. The court shall give the defendant an opportunity to be heard on the question of continuing the temporary order no later than five days after such orders are entered. If the defendant does not appear at such subsequent hearing the temporary orders shall continue in effect without further order of the court.

Added by St.1978, c. 447, § 2. Amended by St.1983, c. 678, § 4; St.1984, c. 189, § 152.

Historical Note

St.1983, c. 678, § 4, approved Dec. 21, 1983, in the first paragraph in the first sentence, substituted "complaint" for "petition" and "three" for "eighteen and section thirty-four B of chapter two hundred and eight and section thirty-two of chapter two hundred and nine", and added the second sentence; and rewrote the second paragraph, which prior thereto read:

"If the plaintiff demonstrates a substantial likelihood of immediate danger of abuse, the court may enter such temporary order without notice as it deems necessary to protect the plaintiff. The court shall immediately thereafter notify the defendant and give him an opportunity to be heard as soon as possible but not schedule the hearing later than five days after such order is entered on the question of continuing such temporary order."

St.1984, c. 189, § 152, an emergency act, approved July 12, 1984, purported to substitute "schedule" for "scheduled" in the second sentence of the second paragraph as appearing in the text as added by St.1978, c. 447, § 2.

Cross References

Trespass, see c. 266, § 120.

Library References

Husband and Wife ⇐102.
Infants ⇐15, 154 to 159.
C.J.S. Husband and Wife § 219 et seq.
C.J.S. Infants §§ 31 et seq., 92 et seq.

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§ 5. Granting of relief when court closed; certification

When the court is closed for business, any justice of the superior, probate and family, district or Boston municipal court departments may grant relief to the plaintiff as provided under section four if the plaintiff demonstrates a substantial likelihood of immediate danger of abuse. If relief has been granted without the filing of a complaint pursuant to this section of this chapter, then the plaintiff shall appear in court on the next available business day to file said complaint. Notice to the plaintiff and defendant and an opportunity for the defendant to be heard shall be given as provided in said section four.

Any order issued under this section and any documentation in support thereof shall be certified on the next court day by the clerk-magistrate of the court issuing such order to the court having venue and jurisdiction over the matter. Such certification to the court shall have the effect of commencing proceedings under this chapter and invoking the other provisions of this chapter but shall not be deemed necessary for an emergency order issued under this section to take effect.

Added by St.1978, c. 447, § 2. Amended by St.1983, c. 678, § 4.

Historical Note

St.1983, c. 678, § 4, approved Dec. 21, 1983, rewrote this section which prior thereto read:

"When the court is unavailable after the close of business at the end of the week, a petition may be filed before any available district court justice who may grant relief to the plaintiff under section three upon cause shown in an ex parte proceeding. Immediate and present danger of abuse to the plaintiff shall constitute cause for purposes of this section.

"Any order issued under this section shall terminate as of the close of business on the next day the court is in session.

"Any order issued under this section and any documentation in support thereof shall be certified immediately by the clerk of the district court to the court. Such certification to the court shall have the effect of commencing proceedings under this chapter and invoking the other provisions of this chapter."

Library References

Judges ⇐27, 28.
C.J.S. Judges § 58.

WESTLAW Electronic Research

See WESTLAW guide following the Foreword of this volume.

§ 6. Powers of police

Whenever any law officer has reason to believe that a family or household member has been abused or is in danger of being abused, such officer shall use all reasonable means to prevent further abuse, including: (1) remaining on the scene as long as there is immediate danger to the physical safety of such person without the presence of a law officer, including but not limited to staying in the dwelling unit for a reasonable period of time; (2) assisting such person in obtaining medical treatment necessitated by an assault, which may include driving the victim to the emergency room of the nearest hospital, or arranging for appropriate transportation to a health care facility, any law to the contrary notwithstanding; (3) giving such person immediate and adequate notice of his or her rights; (4) arresting any person whom the officer has probable cause to believe has committed a felony; (5) arresting any person who has committed, in the officer's presence, a misdemeanor which involves abuse; (6) arresting any person whom the officer has probable cause to believe has committed a misdemeanor pursuant to section thirty-four C of chapter two hundred and eight or section seven of chapter two hundred and nine A.

The notice as required in clause (3) of section six shall consist of handing such person a copy of the following statement written in English and Spanish and reading the same to such person in English.

"You have the right to go to the superior, probate, and family, district or Boston municipal court if you reside within the appropriate jurisdiction, and file a complaint requesting any of the following applicable orders; (a) an order restraining your attacker from abusing you; (b) an order directing your attacker to leave your household; (c) an order awarding you custody of a minor child; (d) an order directing your attacker to pay support for you or any minor child in your custody if the attacker has a legal obligation to support them; and (e) an order directing your attacker to pay you for losses suffered as a result of the abuse, including medical and moving expenses, loss of earnings or support, attorneys fees and other out-of-pocket losses for injuries sustained."

"For an emergency on weekends, holidays or weeknights, you should contact the police, who will refer you to a justice of the superior, probate and family, district or Boston municipal court departments.

"You have the right to go to the appropriate district court or the Boston municipal court and seek a criminal complaint for threats, assault and battery, assault with a deadly weapon, assault with intent to kill or other related offenses.

"If you are in need of medical treatment, you have the right to request that the officer present drive you to the nearest hospital or otherwise assist you in obtaining medical treatment.

"If you believe that police protection is needed for your physical safety, you have the right to request that the officer present remain at the scene until you and your children can leave or until your safety is otherwise insured".

Added by St.1978, c. 447, § 2. Amended by St.1983, c. 678, § 4.

Historical Note

St.1983, c. 678, § 4, approved Dec. 21, 1983, rewrote this section, which prior thereto read:

"Whenever any law officer has reason to believe that a family or household member has been abused, that officer shall use all reasonable means to prevent further abuse, including: (1) remaining on the scene as long as there is a danger to the physical safety of such person without the presence of a law officer, including but not limited to staying in the dwelling unit; (2) assisting such person in obtaining medical treatment necessitated by an assault, including driving the victim to the emergency room of the nearest hospital; (3) giving such person immediate and adequate notice of his rights (4), arresting the person if the officer has probable cause to believe that a felony has been committed, or a misdemeanor has been committed in the officer's presence, or a misdemeanor has been committed pursuant to section thirty-four C of chapter two hundred and eight. Said notice shall consist of handing such person a copy of the following statement written in English and Spanish, and reading the same to such person:

"'You have the right to go to the district, probate or superior court and file a complaint requesting any of the following applicable orders for temporary relief: (a) an order restraining your attacker from abusing you; (b) an order directing your attacker to leave your household; (c) an order awarding you custody of a minor child; (d) an order directing your attacker to pay support for you or any minor child in your custody if the attacker has a legal obligation to support them; and (e) an order directing your attacker to pay you for losses suffered as a result of the abuse, including medical and moving expenses, loss of earnings or support, attorney fees and other out-of-pocket losses for injuries sustained.

"'You have the right to go to district court and file a criminal complaint for threats, assault and battery, assault with a deadly weapon, assault with intent to kill or other related crimes. You may go to district court for an emergency on weekends or holidays.

"'If you are in need of medical treatment, you have the right to demand that the officer present drive you to the nearest hospital or otherwise assist you.

"'If you believe that police protection is needed for your physical safety, you have the right to demand that the officer present remain at the scene until you and your children can leave or until your safety is otherwise insured.'"

Library References

Municipal Corporations ⟹188.
C.J.S. Municipal Corporations § 574.

Comments.
Abused persons, protection and prevention, domestic relations and other matters, see M.P.S. vol. 2A, Lombard, § 1813.

WESTLAW Electronic Research

See WESTLAW guide following the Foreword of this volume.

Notes of Decisions

1. In general

Although Fourth Amendment rights are paramount, police officer's actions, in moving from living room to bedroom in attempting to keep defendant within view while he was still acting towards wife in hostile and threatening manner, were justified by exigent circumstances exception to warrant requirement; officer had duty to use his best judgment to protect wife and as long as he acted reasonably, he should not be faulted for choosing one of several alternative ways of performing that duty. Com. v. Rexach (1985) 478 N.E.2d 744, 20 Mass.App. 919, review denied 482 N.E.2d 328.

§ 7. Court orders; service; enforcement; violations

Whenever the court orders the defendant to refrain from abusing the plaintiff or orders the defendant to vacate the household under section three or four, the register or clerk-magistrate shall transmit two certified copies of each such order and one copy of the complaint and summons forthwith to the appropriate law enforcement agency which shall serve one copy of each order upon the defendant, together with a copy of the complaint and summons. Unless otherwise ordered by the court, service shall be by delivering a copy in hand to the defendant. Law enforcement officers shall use every reasonable means to enforce such orders. Law enforcement agencies shall establish procedures adequate to insure that an officer on the scene of an alleged violation of such order may be informed of the existence and terms of such order. The court shall notify the appropriate law enforcement agency in writing whenever any such order is vacated and shall direct the agency to destroy all record of such vacated order and such agency shall comply with such directive.

Any violation of such order shall be punishable by a fine of not more than five thousand dollars or by imprisonment for not more than two and one-half years in a house of correction or both such fine and imprisonment. Each such order issued shall contain the following statement: VIOLATION OF THIS ORDER IS A CRIMINAL OFFENSE.

Any such violation may be enforced in the superior, the district or Boston municipal court departments. Criminal remedies provided herein are not exclusive and do not preclude any other available civil or criminal remedies. The superior, probate and family, district and Boston municipal court departments may each enforce by civil contempt procedure a violation of its own court order.

Added by St.1983, c. 678, § 5.

Historical Note

St.1983, c. 678, § 5, was approved Dec. 21, 1983.

Library References

Husband and Wife ⟹102.
Infants ⟹15.
C.J.S. Husband and Wife § 219 et seq.
C.J.S. Infants § 92 et seq.

WESTLAW Electronic Research

See WESTLAW guide following the Foreword of this volume.

§ 8. Address of plaintiff; exclusion from court documents; confidentiality of records

Upon the request of the plaintiff, the court shall impound the plaintiff's address by excluding same from the complaint and from all other court documents which are available for public inspection, and shall ensure that the address is kept confidential from the defendant and defendant's attorney.

The records of cases arising out of an action brought under the provisions of this chapter where the plaintiff or defendant is a minor shall be withheld from public inspection except by order of the court; provided, that such records shall be open, at all reasonable times, to the inspection of the minor, said minor's parent, guardian, attorney, and to the plaintiff and the plaintiff's attorney, or any of them.

Added by St.1983, c. 678, § 5.

Historical Note

St.1983, c. 678, § 5, was approved Dec. 21, 1983.

Library References

Pretrial Procedure ⟹3.
Records ⟹32.
C.J.S. Trial § 17(2).
C.J.S. Records § 36.

WESTLAW Electronic Research

See WESTLAW guide following the Foreword of this volume.

§ 9. Form of complaint; promulgation

The administrative justices of the superior court, probate and family court, district court, and the Boston municipal court departments shall jointly promulgate a form of complaint for use under this chapter which shall be in such form and language to permit a plaintiff to prepare and file such complaint *pro se*.

Added by St.1983, c. 678, § 5.

Historical Note

St.1983, c. 678, § 5, was approved Dec. 21, 1983.

Library References

Courts ⟹81.
C.J.S. Courts § 173 et seq.

WESTLAW Electronic Research

See WESTLAW guide following the Foreword of this volume.

Historical Note

1987 Legislation

St.1987, c. 522, § 16, approved Nov. 24, 1987, substituted "person, or if said person is incapacitated by reason of mental illness" for "husband or, if he is insane".

CHAPTER 209A. ABUSE PREVENTION

§ 1. Definitions

Cross References

Police reports of incidents, offenses, alleged offenses, arrests involving domestic abuse, see c. 22, § 94 and c. 41, § 98G.

§ 6. Powers of police

Whenever any law officer has reason to believe that a family or household member has been abused or is in danger of being abused, such officer shall use all reasonable means to prevent further abuse, including: (1) remaining on the scene as long as there is immediate danger to the physical safety of such person without the presence of a law officer, including but not limited to staying in the dwelling unit for a reasonable period of time; (2) assisting such person in obtaining medical treatment necessitated by an assault, which may include driving the victim to the emergency room of the nearest hospital, or arranging for appropriate transportation to a health care facility, any law to the contrary notwithstanding; (3) giving such person immediate and adequate notice of his or her rights; (4) arresting any person whom the officer has probable cause to believe has committed a felony; (5) arresting any person who has committed, in the officer's presence, a misdemeanor which involves abuse; (6) arresting any person whom the officer has probable cause to believe has committed a misdemeanor pursuant to section thirty-four C of chapter two hundred and eight or section seven of chapter two hundred and nine A; (7) arresting any person whom the officer has probable cause to believe has committed an assault and battery in violation of section thirteen A of chapter two hundred and sixty-five which involves abuse.

[See main volume for text of second paragraph]

Amended by St.1987, c. 761.

Historical Note

1987 Legislation

St.1987, c. 761, added cl. (7) in the first paragraph.

St.1987, c. 761, was approved Jan. 14, 1988. Emergency declaration by the Governor was signed on Jan. 26, 1988.

§ 7. Court orders; service; enforcement; violations

[See main volume for text of first to third paragraphs]

The provisions of section eight of chapter one hundred and thirty-six shall not apply to any order, complaint or summons issued pursuant to this section.

Amended by St.1987, c. 213.

Historical Note

1987 Legislation

St.1987, c. 213, approved July 9, 1987, added the fourth paragraph.

REPORT OF THE GENDER BIAS STUDY OF THE SUPREME JUDICIAL COURT, COMMONWEALTH OF MASSACHUSETTS

Pp. 80, 83–85, 81–83, 95–98 (1989).

Domestic Violence

The domestic violence working group of the [Gender Bias Study] Committee evaluated the implementation of Massachusetts General Laws Chapter 209A, the Massachusetts abuse prevention statute (c. 209A), and the efficacy of criminal prosecutions for assault and battery in cases involving domestic violence. ...

The Abuse Prevention Act was enacted by the Massachusetts legislature in 1978 in response to a growing awareness of the extent of violence between family and household members. The act created a civil remedy that allows victims of domestic violence to obtain orders of protection restraining the abuser (who is a family or household member) from abusing the plaintiff, requiring the defendant to vacate the household, awarding the plaintiff temporary custody of a minor child, and requiring the defendant to pay temporary support for the plaintiff and any minor children (c. 209A, § 3[a]–[d]). Because district courts are prohibited from awarding visitation or custody to a defendant, married or otherwise, in a proceeding pursuant to c. 209A, defendants must resort to the probate and family courts on these issues. Courts may also order the defendant to pay monetary damages to the abused person (c. 209A, § 3[e]–[f]). Section 8 of the statute provides that a court shall impound the plaintiff's address upon the request of the plaintiff.

This statute is similar to legislation enacted in other states during the past decade. A victim of domestic violence is, therefore, able to obtain relief without filing for divorce or separation, if married, and to obtain relief if she is not married to her abuser.

The statute contemplates a two-step process for obtaining orders of protection. A plaintiff who demonstrates "a substantial likelihood of immediate danger of abuse" may be awarded an *ex parte* temporary order, meaning that the defendant is not given prior notice. The defendant has an opportunity to be heard on the issue of continuing the order no later than five days after the temporary order is entered (c. 209A, § 4). The statute contains a provision for the granting of emergency orders when the court is closed for business (c. 209A, § 5).

In addition to making court intervention available to victims of domestic violence, the statute confers power on the police to take certain actions in responding to incidents of domestic violence. The statute provides that, "any law officer who has reason to believe that a family or household member has been abused or is in danger of being abused ... shall use all reasonable means to prevent further abuse." Pursuant to section 6 of c. 209A, police officers investigating domestic violence incidents are required to respond in the following ways where appropriate to the particular situation:

1) remaining on the scene to protect the victim;
2) assisting the victim in obtaining necessary medical treatment, including providing transportation to an appropriate health care facility;
3) providing the victim with adequate notice regarding her rights by giving her a copy of a statutory notice in Spanish and English;
4) arresting any person who the officer has cause to believe committed a felony;
5) arresting any person who has committed a misdemeanor involving abuse in the presence of the officer;
6) arresting any person where there is probable cause to believe the person has violated an order to vacate issued under the divorce statute, M.G.L. c. 208, § 34(b)–(c);
7) arresting any person where there is probable cause to believe the person has committed an assault and battery in violation of M.G.L. c. 265, § 13 (added to the statute, St.1987, c. 761).

Violation of an order of protection is a criminal offense punishable by a fine of not more than $5,000, or by imprisonment in a house of correction for up to two and one-half years, or both (c. 209A, § 7). When an order is issued under sections 3 or 4, the statute requires that two copies of the order be transmitted to the appropriate law enforcement agency, which is required to serve one copy on the defendant. Section 7 requires that law enforcement agencies retain the second copy of each protective order and establish procedures to ensure that an officer on the scene of an alleged violation be informed of the existence and terms of the order.

The statute also provides that the criminal remedies provided in c. 209A are not exclusive and do not preclude other civil or criminal remedies. For example, a batterer may be charged with assault and battery under the criminal law. Judges in a criminal matter, with a defendant's consent, may place any person on probation before trial or after a finding or verdict of guilty, and they may impose, as a condition of probation, participation by the defendant in a specified program of counseling or rehabilitation (M.G.L. c. 276, §§ 87 and 87A). In addition, section 7 provides that the superior, probate, district, and Boston municipal court departments can enforce orders of protection by civil contempt procedures.

Filing a petition for an order of protection under c. 209A is intended to be available to victims who are acting pro se, that is, without representation by an attorney. Proceedings can be initiated in the superior, district, probate, and Boston municipal courts having venue over the plaintiff's residence or prior residence if the plaintiff has left a residence to avoid abuse.

It is generally agreed that the statute, with some modifications, provided the courts and law enforcement agencies with some of the tools necessary for an effective response to domestic violence. Women's advocates pointed out, however, that there was a disparity between the protection afforded to victims by c. 209A and the reality as the statute was actually applied. In early 1987, the public became acutely aware of the nature and scope of the problems with the application of the statute. Intense public scrutiny was generated by a case where a woman was murdered by her husband after having obtained a protective order from a district court judge. In the context of granting the order, the judge berated the woman and her husband for taking up court time with the domestic dispute. A judge assigned to the same court made statements to the press indicating that he lacked sympathy for victims of domestic violence and that he doubted the credibility of women who filed c. 209A petitions.

In addition to highlighting problems with the courts' administration of c. 209A, these two cases focused attention on weaknesses in the abuse prevention statute and on problems with the response of law enforcement agencies in the domestic violence context. In an attempt to strengthen the abuse prevention statute, an amendment (c. 761 of the Acts of 1987) was added that allows a police officer to arrest a person whom the officer has probable cause to believe has committed an assault and battery. This statutory modification made it possible for police to arrest persons for misdemeanors not committed in an officer's presence. . . .

The Committee found that:

1. Where there is a petition for an order of protection under c. 209A, orders are almost always issued. Most requests that addresses be impounded, however, are not granted.
2. While proceedings under c. 209A are intended to be pro se, litigants not represented by counsel or assisted by trained advocates are not always able to take full advantage of the opportunities available

under the statute to obtain child support, custody, or other benefits. The problem is exacerbated when one party, usually the male respondent, is represented by counsel and the female petitioner is not. Where available, victim/witness assistance provided by groups such as battered women's shelters and the victim/witness assistance programs is very effective and essential to a victim's pursuit of civil and criminal relief to its conclusion.

3. While the statute is designed to make it convenient for petitioners to file petitions under c. 209A at nearby courthouses, jurisdictional limitations of the district and probate courts cause difficulties in the administration of proceedings under the statute. Specifically, c. 209A cases present problems in the administration of support orders which the district courts, particularly, are ill-equipped to handle. In addition, the district courts cannot order visitation for a defendant in a c. 209A proceeding, and parties who desire such orders must seek relief in the probate courts.
4. Judges and jurors expect more corroboration of physical injuries in domestic violence cases than in other serious crimes.
5. Although the conduct of judges, court personnel, and attorneys toward victims of domestic violence has improved, some victims still report inappropriate treatment such as receiving inaccurate and unclear advice from court personnel and instances of improper questioning of plaintiffs in proceedings under c. 209A.
6. Petitioners in proceedings under c. 209A are still confronted with treatment reflecting racial and ethnic bias, as well as bias against homosexuals.
7. Petitioners in proceedings under c. 209A can be thwarted in their efforts to obtain relief where court schedules make it difficult for petitioners to present their cases and where facilities are not adequate to allow for secure waiting by petitioners.
8. Coordination between the courts and law enforcement agencies in serving documents relating to c. 209A proceedings and enforcing orders for protection needs to be improved.
9. Courts appear reluctant to impose penalties provided in c. 209A for violations of orders for protection issued pursuant to the statute.
10. Most prosecutors' offices have not articulated formal case dismissal policies with regard to domestic violence cases.
11. In criminal cases involving domestic violence, the Committee found that bail procedures are not effective in protecting victims from harassment and coercion by defendants, but that arrest and detention of abusers can reduce the recurrence of violence.
12. Sentences in domestic violence cases are generally lower than in cases of other serious crimes.
13. While mutual orders are rarely issued in most parts of the Commonwealth, use of such orders is to be avoided, as the practice

serves to confuse the status of the parties if enforcement issues arise.

14. Although many experts have concluded that it is not appropriate to use mediation in domestic violence cases, most probate courts routinely use what is called "court-ordered mediation" to arrive at the disposition of such cases. ...

According to statistics compiled by the Department of Public Health, every twenty-two days a woman in Massachusetts is murdered by a husband, estranged spouse, or boyfriend. Thirty percent of all homicides committed in Massachusetts between 1981 and 1984 involved female victims whose assailants were husbands or boyfriends. Thousands of other Massachusetts women are victims of less horrific violence each year. This is consistent with national figures which show that battery is a major cause of injury to women in America.

Women are disproportionately the victims of domestic violence. The overwhelming majority of petitioners for protection orders under the Massachusetts Abuse Prevention Act, c. 209A, are women. In a study of court records of domestic violence cases filed in three Massachusetts counties, the Committee found that 91% of the petitioners were women. Thus, any reluctance on the part of the courts or law enforcement agencies to apply the provisions of c. 209A or the criminal law in situations involving domestic violence has an adverse impact largely on the female victims of domestic violence.

The enactment of c. 209A was an important step in removing family violence from behind a curtain of privacy where it had long been relegated. Prior to c. 209A, various societal forces combined to ensure that family violence was not taken seriously by the legal system. Worse, the view predominated that matters relating to family violence were not subjects properly addressed by courts and were best left to the private sphere. The enactment of the statute marked an explicit recognition by the legal system that victims and potential victims of domestic violence are entitled to government protection.

In the initial stages of our research, the Committee heard a long list of problems with the handling of cases of domestic violence, both from before and after the passage of c. 209A. For instance, testimony revealed that courts often become frustrated dealing with victims of domestic violence who are ambivalent or reluctant about going forward with criminal prosecutions of male batterers who are their husbands or boyfriends. Yet resources available to provide victim/witness assistance to victims have not been sufficient to ensure that victims receive the emotional and institutional support necessary to go forward with these cases. The same social and legal factors that formerly prevented courts from dealing with domestic violence in the civil context also operated to limit the response of law enforcement agencies, prosecutors' offices, and the courts when domestic violence cases appeared in criminal court. More recently, there are reports that law enforcement officers have been reluctant to arrest, and courts have been reluctant to punish, batterers who violate protective orders obtained under c. 209A. All of these concerns guided the Committee in our study of the court's handling of cases of domestic violence.

Such reported problems with the application of civil and criminal statutes underscore the importance of understanding the psychology of the perpetrators and the victims of domestic abuse, and the role that helping professionals and the legal system may play in perpetuating this abuse. Testimony received by the Committee presented a profile of men who abuse that reveals a discrepancy between the public image and the private behavior of the abuser. Often, men who abuse are well-liked and highly regarded in their communities and by their professional or work peers. They appear to be rational, well-adjusted, and even sensitive, and to have positive social relationships. In fact, these men use physical and psychological abuse as a means of privately controlling and dominating relationships with their partners, on whom they actually often have a pathological dependence. The typical abuser's reaction to the legal system is that the system and everyone associated with it are biased against him and that it is unfair to be publicly embarrassed and put out of his home. Abusers tend to minimize their abusive behavior, tend to consider their actions as not abusive, and think that private actions are not properly the subject of scrutiny. Alternatively, abusers may concede violence, but divert attention to a partner's problems as a way of justifying the violence. In the narcissism characteristic of abusers, these men are rarely able to see the partner's perspective on the relationship, often shifting responsibility for the abuse to the victim. To the extent society joins in this view by blaming the victim, domestic abuse is perpetuated.

As in the case of abusers, ignorance about the psychology of female victims of domestic violence interferes with the ability of the legal system to respond in an effective way. Victims of domestic abuse are frequently criticized for remaining in abusive relationships and are held responsible for the abuse to which they are subjected. This blaming of the victim may compromise a victim's willingness to seek, and ability to receive, relief. This tendency is exacerbated by the psychological state of most battered women, referred to as the "battered woman's syndrome." These women suffer from low self-esteem, helplessness, economic and emotional dependence on the relationship with the abuser, isolation, and a lack of social support. Battered women tend not to exaggerate the extent of violence or abuse, but instead tend to minimize and deny the severity and extent of the abuse.

As a result of these characteristics, victims often appear ambivalent about the relief they seek from the legal system. For instance, they may be unwilling to pursue criminal prosecutions of batterers to conclusion and may be ambivalent about taking permanent steps to end the abusive relationship. These women are criticized for repeatedly seeking protective orders and subsequently reconciling with the abuser. "While the desire for protection and an end to the violence may be strong, many women who are married to abusive spouses are not prepared to proceed with a dissolution action ... Moreover, many victims are not married to abusers and therefore a dissolution proceeding is not even an option ... Finally, many women are distrustful of the criminal process. While they desire an end to the violence, many times they do not want to see their partners sentenced to jail". In ordering protection, jailing, victim/witness assistance, and other relief, the legal system must understand, and be responsive to, these concerns. ...

Though well-drafted and comprehensive statutes can provide some of the tools necessary to prevent and punish acts of domestic violence, the people actually implementing the law must also be sensitive to the issues involved in domestic violence. Judges, court personnel, attorneys, and others must recognize the special needs of domestic violence victims when assisting them in obtaining the protection and support they need and deserve. It is only with an understanding of the phenomenon of domestic violence that decisions regarding support, custody, visitation, bail, detention, sentencing, and mutual orders can be made responsibly.

We emphasize that domestic violence is, and should properly be, the object of attention of criminal law enforcement activity. Just as the criminal law punishes violence occurring among strangers, the criminal law should punish violence committed among people who are related or share a household.

Finally, though education of the players in the court is a clear remedy for many of the problems we have identified, the courts must recognize that only a comprehensive approach will be successful in the elimination of domestic violence. Members of the judicial system must cooperate with peers in other disciplines such as medicine, nursing, psychology, social work, and the ministry to solve the problem on a long-term basis. The necessary responses to the complex societal forces that result in domestic violence will not be provided by the courts and legal system alone.

Christina Giovine v. Peter J. Giovine

Superior Court of New Jersey, Appellate Division, 1995.
284 N.J.Super. 3, 663 A.2d 109.

STEVEN Z. KLEINER, J.A.D.

On July 1, 1994, plaintiff Christina Giovine filed an eleven count complaint against defendant Peter J. Giovine denominated: "Complaint for divorce, domestic torts, equitable claims and jury trial demand." Plaintiff's complaint alleged habitual drunkenness, ... and extreme cruelty, ... as alternative grounds for the dissolution of the marriage. In counts three through six, plaintiff asserted claims for compensatory and punitive damages based upon an assault and battery which allegedly occurred in March 1972 ...; intentional infliction of emotional injury/distress commencing in March 1972 ...; "continuous wrong" between March 1972 and May 1993, resulting in "severe emotional and physical damage" ...; and negligence....

Interspousal tort immunity no longer exists to bar the suit of one spouse against another for injuries sustained by one spouse due to the tortious conduct of the other. Merenoff v. Merenoff, 76 N.J. 535, 557, 388 A.2d 951 (1978).

> [T]he abolition of the doctrine pertained to tortious conduct generally encompassing not only conventional negligence but also intentional acts, as well as other forms of excessive behavior such as gross negligence, recklessness, wantonness, and the like. The only kind of marital conduct excepted from the abolition was that involving marital or nuptial privileges, consensual acts and simple, common domestic negligence, to be defined and developed on a case-by-case approach. [Tevis v. Tevis, 79 N.J. 422, 426–27, 400 A.2d 1189 (1979)(citation omitted).]

If the circumstances surrounding a domestic tort and claim for monetary damages are relevant to a divorce proceeding, the domestic tort must be joined with the divorce proceeding under the "single controversy doctrine" in order to avoid protracted, repetitious and fractionalized litigation. Id. at 434, 400 A.2d 1189.

On appeal, plaintiff contends that the motion judge erred in refusing to follow the decision in Cusseaux v. Pickett, 279 N.J.Super. 335, 652 A.2d 789 (Law Div.1994), which concluded that "battered-woman's syndrome is the result of a continuing pattern of abuse and violent behavior that causes continuing damage." Id. at 345, 652 A.2d 789. As such, "it must be treated in the same way as a continuing tort." Ibid. Battered woman's syndrome would therefore be an exception to N.J.S.A. 2A:14–2, that "[e]very action at law for an injury to the person caused by the wrongful act, neglect or default of any person within this state shall be commenced within 2 years next after the cause of any such action shall have occurred." Ibid. The decision in *Cusseaux* substantially relied upon State v. Kelly, 97 N.J. 178, 478 A.2d 364 (1984).

In *Kelly*, the Supreme Court, relying in part on the research of Lenore E. Walker, THE BATTERED WOMAN (1979), noted that battered woman's syndrome is a recognized medical condition. By definition, a battered woman is one who is repeatedly physically or emotionally abused by a man in an attempt to force her to do his bidding without regard for her rights. ...According to experts, in order to be a battered woman, the woman and her abuser must go through the "battering cycle" at least twice. ...

The battering cycle consists of three stages. ... Stage one, the "tension-building stage," involves some minor physical and verbal abuse while the woman tries to prevent an escalation of the abuse by assuaging the abuser with her passivity. ...Stage two, the "acute battering incident," is characterized by more severe battering due to either a triggering event in the abuser's life or the woman's inability to control the anger and fear she experienced during stage one. ...During stage three, the abuser pleads for forgiveness and promises that he will not abuse again. ...This period of relative calm and normalcy eventually ends when the cycle begins anew. ...

"The cyclical nature of battering behavior helps explain why more women simply do not leave their abusers." Ibid. The caring and attentive behavior of the abuser during stage three fuels the victim's hope that her partner has reformed and keeps her tied to the relationship. ...In addition, some women who grew up in violent families do not leave abusive relationships because they perceive their situations as normal. ... Other cannot face the reality of their situations. ... Some victims "become so demoralized and degraded by the fact that they cannot predict or control the violence that they sink into a state of psychological paralysis and become unable to take any action at all to improve or alter the situation." Ibid. Victims are often afraid to seek help out of shame, fear that no one will believe them, or fear of retaliation by their abusers. ..."They literally become trapped by their own fear." Ibid. ...

Cusseaux established a four-part test to state a cause of action for battered woman's syndrome:

> 1) involvement in a marital or 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 aforesaid abuse has caused recurring physical or psychological injury over the course of the relationship; and 4) a past or present inability to take any action to improve or alter the situation unilaterally. [Id. at 344, 652 A.2d 789 (footnotes omitted).]

We agree with the premise espoused in *Cusseaux* and conclude that a wife diagnosed with battered woman's syndrome should be permitted to sue her spouse in tort for the physical and emotional injuries sustained by continuous acts of battering during the course of the marriage, provided there is medical, psychiatric, or psychological expert testimony establishing that the wife was caused to have an "inability to take any action to improve or alter the situation unilaterally." Ibid. In the absence of expert proof, the wife cannot be deemed to be suffering from battered woman's syndrome, and each act of abuse during the marriage would constitute a separate and distinct cause of action in tort, subject to the statute of limitations, N.J.S.A. 2A:14–2. Laughlin v. Breaux, 515 So.2d 480, 482–83 (La.Ct.App.1987).

Our disagreement with *Cusseaux* is predicated upon semantics. *Cusseaux* classifies battered woman's syndrome as a continuous tort. The concept of "continuous tort" has been recognized in this state. Morey v. Essex County, 94 N.J.L. 427, 430, 110 A. 905 (E. & A. 1920) (unremitting trespass is a continuous tort); Russo Farms, Inc. v. Vineland Bd. of Educ., 280 N.J.Super. 320, 327–28, 655 A.2d 447 (App.Div. 1995) (claim of inverse condemnation continued to accrue as long as defendant' conduct caused plaintiff's property to be subject to continual flooding due to negligent construction of an adjoining building); Aykan v. Goldzweig, 238 N.J.Super. 389, 392, 569 A.2d 905 (Law Div. 1989) (continuous negligent representation by an attorney is a continuous tort which tolls the statute of limitations until the representation is terminated or the client discovered or should have discovered the injury). This concept was also discussed, although not applied, in Tortorello v. Reinfeld, 6 N.J. 58, 66, 77 A.2d 240 (1950), in reference to a claim that a continuing course of negligent treatment by a physician should be considered a continuous tort, and not an isolated incident of negligent treatment.

We do not adopt the conclusion in *Cusseaux* that battered woman's syndrome is itself a continuous tort. Battered woman's syndrome is more correctly the medical condition resulting from continued acts of physical or psychological misconduct. Because the resulting psychological state, composed of varied ~~by~~ but identifiable characteristics, is the product of at least two separate and discrete physical or psychological acts occurring at different times, to overcome the statute of limitations, it is imperative that the tortious conduct giving rise to the medical condition be considered a continuous tort. . . .

. . . [I]n Kyle v. Green Acres at Verona, Inc., supra, 44 N.J. at 112, 207 A.2d 513, the Supreme Court directed:

> A trial court shall itself without a jury hear and determine (1) whether insanity developed on or subsequent to the date of the alleged act of defendant and within the period of limitation and if so, whether that insanity resulted from the defendant's acts; and (2) whether plaintiff's suit was started within a reasonable time after restoration of sanity. . . .

That same mandate will be applicable in the trial of this matter. It will be incumbent upon plaintiff to establish pretrial, by medical, psychiatric or psychological evidence, that she suffers from battered woman's syndrome, which caused an inability to take any action to improve or alter the circumstances in her marriage unilaterally, so as to warrant a conclusion by the trial judge that the statute of limitations should be tolled. . . .

STEPHEN SKILLMAN, J.A.D., concurring and dissenting.

I see no need for the creation of a new tort cause of action for "battered woman's syndrome." In addition, I would conclude that plaintiff failed to present any evidence that could justify postponing the accrual of her other tort causes of action. . . .

"It is inadvisable to create new causes of action in tort in advance of any necessity for doing so in order to achieve a just result." Neelthak Dev. Corp. v. Township of Gloucester, 272 N.J.Super. 319, 325, 639 A.2d 1141 (App.Div.1994). Consequently, this court should consider whether existing tort causes of action provide an adequate remedy for conduct that may result in battered woman's syndrome before undertaking to create a new cause of action.

Any person who is a victim of violence, or the threat of violence, may recover money damages for assault and/or battery. A person may be liable for battery if "he acts intending to cause a harmful or offensive contact . . . or an imminent apprehension of such contact" and a "harmful" or "offensive" contact "directly or indirectly results." 1 Restatement (Second) of Torts Sections 13, 18 (1965). A person who acts with the same intent may be liable for assault even if no contact actually results if the victim is placed in "imminent apprehension" of a harmful or offensive contact. Id. at Section 21. Consequently, any woman who is the victim of an act of battering, or a threat of battering, can bring a tort action against her assailant for each of those acts. Moreover, a battered woman would be entitled to recover not only for any economic losses resulting from those acts, such as medical expenses and lost wages, but also for pain and suffering and disability, see Schroeder v. Perkel, 87 N.J. 53, 66, 432 A.2d 834 (1981), which would include the psychological sequelae of any act of battering. Wilson v. Parisi, 268 N.J.Super. 213, 219–20, 633 A.2d 113 (App.Div.1993).

The trial court's opinion in Cusseaux v. Pickett, 279 N.J.Super. 335, 343, 652 A.2d 789 (Law Div.1994), upon which the majority relies, simply asserts, without any supporting explanation, that "the civil laws of assault and battery [are] insufficient to redress the harms suffered as a result of domestic violence." Although the majority's opinion likewise fails to explain why the law of assault and battery fails to provide adequate means of redress for the victims of domestic violence, it suggests that the creation of an independent tort of battered woman's syndrome would allow recovery in tort for "all acts of cruelty which occurred during the course of [the] marriage," (majority op. at 22, 663 A.2d at 119), even if those acts do not involve any battering. Under this view, plaintiff could seek money damages for the alleged emotional distress and psychological harm resulting from the alleged occasions when defendant came home late at night in an intoxicated condition and verbally abused her.

However, the creation of a cause of action that allowed recovery for incidents of verbal abuse would extend marital tort liability to conduct that would not give rise to legal liability in other contexts. Mere verbal abuse or insult is not generally a basis for the imposition of tort liability. 2 Fowler V. Harper, et al., THE LAW OF TORTS Section 9.2 (1986); Prosser on Torts Section 12 at 59–60 (5th ed. 1984). As observed in a comment to the Restatement of Torts, "some safety valve must be left through which irascible tempers may blow off relatively harmless steam." 1 Restatement (Second) of Torts Section 46 commend d (1965); cf. Ward v. Zelikovsky, 136 N.J. 516, 529, 643 A.2d 972 (1994) (quoting Rodney A. Smolla, Law of Defamation Section 6.12[9], at 6–54) ("[N]ame calling, epithets, and abusive language, no matter how vulgar or offensive, are not actionable" under the law of defamation). Moreover, even assuming that verbal abuse could be sufficiently outrageous and harmful to the target to give rise to a cause of action for intentional infliction of emotional distress, see Price v. State Farm Mut. Auto. Ins. Co., 878 F.Supp. 1567 (S.D.Ga. 1995); Jean C. Love, *Discriminatory Speech and the Tort of Intentional Infliction of Emotional Distress*, 47 WASH & LEE L.REV. 123 (1990), our courts have established rigorous prerequisites for proving this cause of action: Generally speaking, to establish a claim for intentional infliction of emotional distress, the plaintiff must establish intentional and outrageous conduct by the defendant, proximate cause, and distress that is severe. Initially, the plaintiff must prove that the defendant acted intentionally or recklessly. . . .

Second, the defendant's conduct must be extreme and outrageous. The conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Third, the defendant's actions must have been the proximate cause of the plaintiff's emotional distress. Fourth, the emotional distress suffered by the plaintiff must be "so severe that no reasonable man could be expected to endure it." By circumscribing the cause of action with an elevated threshold for liability and damages, courts have authorized legitimate claims while eliminating those that should not be compensable. [Buckley v. Trenton Saving Fund Soc'y, 111 N.J. 355, 366–67, 544 A.2d 857 (1988) (citations omitted).]

The kind of verbal abuse that defendant allegedly directed at plaintiff, although certainly offensive, was not "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded a atrocious, and utterly intolerable in a civilized community." Id. at 366, 544 A.2d 857; see Price v. State Farm Mut. Auto. Ins. Co., supra; cf. Ruprecht v. Ruprecht, 252 N.J.Super. 230, 238, 599 A.2d 604 (Ch.Div.1991) (holding that wife's eleven year secret adulterous affair with her employer failed "to reach the level of outrageousness necessary for liability under this tort."). In fact, serious verbal abuse, often reciprocal in nature, is a common feature of deteriorating marriages. Consequently, the verbal abuse that plaintiff ascribes to defendant could not provide the basis for a claim of intentional infliction of emotional distress.

It is clear to me that we should not create a cause of action that would result in potential tort liability between domestic partners in a broader range of circumstances than apply in other contexts. Although close family relationships, such as those between a husband and wife or a parent and child, serve as primary sources of love, affection and support, the emotional significance of such relationships and the constant contact that occurs among family members who live together also produce various forms of tension, discord and verbal abuse. Verbal abuse between spouses is likely to be most frequent, and most nasty, when a marital relationship is deteriorating. As we noted in Peranio v. Peranio, 280 N.J.Super. 47, 56, 654 A.2d 495 (App.Div.1995):

> [T]he dissolution of a marriage is rarely a happy event. All parties suffer and even the most rational are hard pressed to avoid any emotional encounters.

In my view, such emotional encounters within a marriage should not form a basis for the imposition of tort liability unless one of the parties engages in conduct that could support a claim for assault, battery or intentional infliction of emotional distress. See Merenoff v. Merenoff, 76 N.J. 535, 555, 388 A.2d 951 (1978) ("There is a range of activity arising in the course of a marriage relationship beyond the reach of the law of torts."). In fact, the creation of an overly expansive concept of tort liability in the marital setting would conflict with current statutory provisions that have reduced the significance of fault in matrimonial litigation, see Kazin v. Kazin, 81 N.J. 85, 92, 405 A.2d 360 (1979), and would unnecessarily complicate such litigation. Therefore, I would reject plaintiff's effort to gain recognition of a new tort action for battered woman's syndrome.

... The majority opinion suggests that a primary objective of creating a new tort cause of action for battered woman's syndrome is to avoid the normal application of the statute of limitations to bar marital tort claims. If that is the underlying reason for the creation of this new tort, it is a classic case of the tail being allowed to wag the dog. If defendant's alleged marital misconduct could be properly characterized as "continuous" or if plaintiff's mental state could be shown to constitute "insanity," the running of the statute of limitations could be tolled regardless of whether plaintiff's cause of action were labeled assault and battery, intentional infliction of emotional distress, or the amorphous new tort of battered woman's syndrome. See Jones v. Jones, 242 N.J.Super. 195, 576 A.2d 316 (App.Div.), certif. denied, 122 N.J. 418, 585 A.2d 412 (1990); Twyman v. Twyman, 790 S.W.2d 819, 820–21 (Tex.Ct.App.1990), rev'd on other grounds, 855 S.W.2d 619 (Tex. 1993). To state the point another way, it seems to me that the elements that a plaintiff must prove to establish a cause of action should be analyzed separately from the question of whether the plaintiff has made the kind of showing required to toll the statute of limitations. ...

Giovine

NOTE ON THE DISSENT IN GIOVINE V. GIOVINE

On page 103 of the materials, Judge Skillman, dissenting, says that the majority's opinion "suggests that the creation of an independent tort of battered woman's syndrome would allow recovery in tort for 'all acts of cruelty which occurred during the course of [the] marriage,' (663 A.2d at 119) even if those acts do not involve any battering."

The passage alluded to was omitted by the editors who cut the majority opinion. It is as follows:

> It is therefore clear that plaintiff must be permitted to present proofs of all acts of cruelty which occurred during the course of her marriage to defendant. Those prior acts may be offered to prove plaintiff's cause of action for divorce predicated on the grounds of extreme cruelty, or they may be offered as relevant evidence in conjunction with plaintiff's claim for damages attributable to battered woman's syndrome, intentional infliction of emotional distress and negligence.