

The "Rule of Thumb": Plaintiffs' domestic violence tort actions

The first in a series of articles describing how plaintiffs can obtain redress in domestic violence cases.

By Richard A. Friedling

Who loves well,
Punishes well.
— *French proverb*

The purpose of this three-part article is to present trial lawyers with an overview of how domestic violence victims can be "plaintiffs" and to explain how civil causes of action can be used to obtain redress for the various forms of domestic violence perpetrated against spouses, children and in an increasing number of cases, third parties.

Domestic violence: A brief history

The phrase, "rule of thumb," originated in England but was carried over into this country where, well into the last century, it was legal for a husband to beat his wife or children with a stick as long as the weapon was no thicker than the husband's thumb.

Domestic violence, whether denominated spousal abuse, domestic partner abuse, or domestic abuse – occurs when a family member, partner or ex-partner, co-inhabitant, unmarried intimate partner or, in an increasing number of jurisdictions, third parties perpetrate any of a number of offenses which may or may not also constitute criminal offenses depending on the jurisdiction. It is cross-cultural, heedless of economic status, and perpetrated by either gender – a cosmopolitan universe of criminal and civil offenses. It has as its nucleus, control of the victim.

Both civil and family law practitioners risk malpractice liability if they neglect to inform their clients of their civil rights in tort claims and to file appropriate actions in addition to family law cases, or consolidate such claims to improve property settlements.

In 2001, a Texas jury awarded a woman $5.56 million on a tort claim that she filed against her husband. The claim was based on an incident where her husband, after a night of drinking, brandished a gun and threatened to kill himself. As his wife tried to flee the room, her husband dragged her back and began hitting her with a bedpost he had just torn off. (*Brown v. Brown* (Texas Dist. Ct. Montgomery Cty., Oct. 19, 2001) No. 1-0200811.[ii]) After hearing the wife's voice on the 911 tape, the jury awarded Ms. Brown $3.46 million, including $3 million for mental anguish. A few days later, it added $2 million in punitive damages, reaching the total of $5.56 million.

Domestic Violence Abuse Intervention Project created in the early 1980s

The 1980s, in particular, changed the playing field for both family law and personal injury litigators. In 1981, the Domestic Abuse Intervention Project was the first multi-disciplinary program designed to address the issue of domestic violence. According to the Duluth Model, "women and children, and some men are vulnerable to violence because of their unequal social, economic, and political status in society." Incorrectly, however, the Duluth Model was based on a strict "patriarchal violence" model and presumes that all violence in the home and elsewhere has a male perpetrator and a female or juvenile victim. This model explicitly rejects any concept of mutuality or symmetry in abusive relationships.

Domestic violence is prevalent against men and women

Domestic violence against men is a social problem, both morally and statistically worthy of attention. Each year, 834,000 men are raped or physically assaulted by intimate partners. This is an average 3.5 times per year, for a total of 2.9 million assaults per year. The figure for women is 4.9 million per year. Thus, the rate for men is more than 50 percent as high as for women – a figure that should hardly be ignored. Men in intimate relationships with other men are more likely to be raped or assaulted than men in heterosexual relationships.[iii]

Explaining spousal abuse with the Walker Model: The Cycle of Violence

Dr. Lenore Walker presented the first model of a Cycle of Violence.[iv] This Model consisted of three basic phases:

• The first phase is the Tension-Building Phase, characterized by breakdowns in communication or no communication, rising tension and a fear of causing outbursts by the other party. During the tension-building phase, the abuser becomes more temperamental and critical of the victim. As the tension

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escalates, the victim feels as if she or he is "walking on eggshells," and often tries to placate the abuser to prevent the abuse.

• The second phase is the Acting-Out Phase. This phase may include outbursts of violent, abusive behaviors where the abuser attempts to dominate his or her partner using domestic violence. The abuser verbally or physically attacks the victim. This is much more intense than during the tension-building phase and the incidents may increase in intensity with each explosive phase.

• The third phase is the Honeymoon Phase. Here, the abuser may now show affection or make apologies, promising never to be violent again. Some abusers may walk away from the situation, while others shower their partner-victims with love and affection, combined with expressions of remorse and promises to change. During this phase, the abuser is charming and may offer gifts such as flowers, jewelry, perfume or candy and temporarily relinquish control over the victim's actions.

By 1983, women working in the Anti-violence Movement realized the Walker Tension Building/Exploding Model was flawed because abusers do not harm their intimate partners because of tension and stress. As humans, each of us feels stress and tension in our lives, yet not everyone chooses to abuse someone else. If it were a matter of tension, the abusive person would be unable to control his behavior and would batter whoever was causing the stress (i.e., the boss who yells at him or police officers who pull him over, etc.) Also, abusers would not be able to control where their punches landed. Many abusers "target punch" their partners, specifically targeting areas where the bruises and marks are less likely to be seen, such as the neck, back, upper torso and legs.

The Walker Tension Building/Explosion Model could also be used to blame the victim for the abuse. If the victim had kept the kids quiet or the house clean, the abuser would not be stressed. Now it becomes the victim's responsibility to keep the abuse from happening. Due to our socialization process, it is common for women in our society to feel responsible for making a relationship "work" and the Tension Building/Explosion Model of the Cycle of Violence only fed into those stereotypes.

The Cycle of Violence

After 1983, a different "wheel" emerged. Domestic violence may seem unpredictable, simply an outburst related just to the moment and to the circumstances in the lives of the people involved. However, that is not accurate. Domestic violence follows a typical pattern, no matter when it occurs or who is involved. The pattern, or cycle, repeats. With each repetition, the level of violence may increase. At every stage in the cycle, the abuser is fully in control of him or herself and is working to further control and isolate the victim. Understanding the cycle of violence and the abuser's thinking helps survivors recognize they truly are not to blame for the violence they have suffered and that the abuser is the one responsible.

There are six distinct stages that make up the cycle of violence: the set-up; the abuse; the abuser's feelings of "guilt" and his or her fear of reprisal; the abuser's rationalization; the abuser's shift to non-abusive and charming behavior; and the abuser's fantasies and plans for the next time he will abuse. As discussed earlier, abuse can be emotional, physical, sexual, psychological, economic and social.

Steps in the Cycle of Violence

• ***Guilt***

A non-abusive person experiences guilt very differently than an abusive person does. A non-abusive person may feel guilt about how they have impacted the life of the person they harmed, something called victim-directed guilt. On the other hand, an abuser experiences self-directed guilt. The abuser does not feel guilty or sorry for hurting his or her victim. Although the abuser may apologize for his or her behavior, the apology is designed to prevent the abuser from facing the consequences or being held accountable. For the abuser, the goal of the guilt stage is to reassure him or her that he or she will not be caught or face consequences.

• ***Rationalization***

Rationalization occurs when the abuser makes excuses and blames the victim for the abusive behavior. Common excuses propounded by abusers usually revolve around the abuser being intoxicated or abused as a child. Common statements offered by the abuser usually focus on the victim's behavior. For example, "If you had the house cleaned, I wouldn't have had to hit you," or, "If you had cooked dinner on time, I wouldn't have had to hit you." The goal of the rationalization stage from the abuser's point of view is to abdicate responsibility for the abusive behavior.

• ***"Normal" behavior***

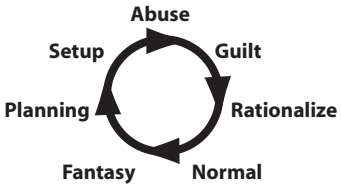
During this stage, the abuser may use different tactics to achieve his or her goal to regain power over the victim. The abuser may act as though nothing happened and that everything is normal. This makes victims feel crazy because they do not understand how the abuser could pretend nothing happened. The goal of this stage is to keep the victim in the relationship and present the relationship as normal.

• ***Fantasy and planning***

This is the stage where the abuse is planned. In the initial stages before engaging in any abusive behavior, the abuser fantasizes or creates a mental picture of the next time he or she will abuse the victim. During the fantasy and planning stage, the abuser is the actor, producer, director and the star and experiences his or her power from activating the fantasy. The planning phase details more specifically what the abuser will need to have and to do in order to abuse his or her partner. Abusers may spend minutes, hours or even days fantasizing about what the victim has done "wrong" and how the abuser is going to make the victim "pay." The

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most common scenario is for the abuser to fantasize that the victim is having an affair. Although most victims of abuse do not have the time, energy or interest in having an affair, it is still the most common accusation since a victim can never "prove" to the abuser's satisfaction that the victim is not having an affair.

• ***Set-up***

This stage is when the abuser puts his plan into action. He sets the victim up.

• ***An example of the Full Cycle of Violence***

Here is an example of the cycle of violence through all its phases:

A man abuses his partner. After he hits her, he experiences self-directed guilt. He says, "I'm sorry for hurting you." What he does not say is, "because I might get caught." He then rationalizes his behavior by saying that his partner is having an affair with someone. He tells her, "If you weren't such a worthless whore, I wouldn't have to hit you." He then acts contrite, reassuring her that he will not hurt her again. He then fantasizes and reflects on past abuse and how he will hurt her again. He plans on telling her to go to the store to get some groceries. What he withholds from her is that she has a certain amount of time to do the shopping. When she is held up in traffic and is a few minutes late, he feels completely justified in assaulting her because, "You're having an affair with the store clerk." He has just set her up.

Torts created by domestic violence

Domestic torts created by this cycle include, but are not limited to:

• Common-law assault and battery, or "direct" spousal abuse;
• Intentional/Negligent infliction of emotional distress;
• Transmission of sexually transmitted diseases;
• Physical and emotional battery of children;
• Sexual exploitation of either children or spouse;
• Interference with parental rights;
• Acts by third parties.

Common Law did not allow for domestic violence torts

The common law rule was that inter-spousal tort actions for personal injuries were not allowed.[v] The legal identity of husband and wife precluded lawsuits between spouses, even where a husband raped or physically abused his wife. The rationale was that the public policy of preserving the marital relationship trumped individual redress for inter-spousal grievances.

The common law rule prohibiting inter-spousal tort actions began eroding in the 1800s with the passage of various Married Woman's Acts. These Acts allowed one spouse to sue the other over property rights. Most jurisdictions – but still, not all – permit a spouse or partner to obtain remedy for inter-spousal or inter-partner torts through domestic violence orders, criminal prosecution or tort litigation.

Personal injury torts for domestic violence: What plaintiffs' lawyers can do

• ***Assault and Battery by a marital partner/spouse***

Seeking monetary damages through a traditional civil tort claim against one's spouse or partner for physical abuse is an effective remedy. This is especially true in jurisdictions where courts do not consider fault in equitably dividing marital property, as long as there are resources against which a judgment may be exercised. Due to that caveat, many attorneys will not take on such cases standing alone (alone, that is, from divorce cases) as the defendant is, if not judgment proof, at least nearly so, and insurance policies in most states exclude paying out for intentional torts (see Part II of this series.) "Consideration should be given to whether a negotiated settlement for more property or higher alimony or spousal maintenance within the context of the divorce case is not more desirable than a separate, independent case in civil court for personal injury damages."[vi]

The same elements of common-law assault and battery form the gravamen of these offenses in the domestic violence context, especially in California where courts do not consider fault in equitably dividing marital property.

To successfully pursue such a claim, you need (A) a harmful or offensive, unpermitted contact that either (B) results from an act intended to or which with foreseeability would cause the plaintiff (or a third person, especially the parties' child) to suffer such contact; or (C) Apprehension that such contact is imminent and possible.[vii]

California's seminal case addressing this topic is *Self v. Self*, which established the right of a spouse to sue her husband for physical abuse.[viii]

• ***Intentional/Negligent infliction of emotional distress***

The Restatement of Torts 2d characterizes this tort as conduct that is "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."[ix] States vary as to the availability of this cause of action between spouses or partners. Negligent infliction of emotional distress requires, in most jurisdictions, an accompanying physical consequence of injury or illness, unless there is an independent basis for tort recovery such as assault and battery or transmission of a sexual disease. Kentucky law, for example, requires physical contact to receive a recovery for mental suffering.[x] More jurisdictions are allowing recovery for this tort, however, if the mental disturbance, even without physical injury or illness, is severe and the distress caused by the negligence was foreseeable.[xi]

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• ***Marital/Partner rape as battery***

Rape, as we have now been educated, is not a sexual act. It is a degrading, violent act intended, if even subliminally, by the perpetrator to violate the integrity and autonomy of the victim by brutalizing the victim's most intimate being.

At common law, there was an irrevocable implied consent by married women to sexual intercourse with their husbands. Therefore, a husband could never be tried criminally for raping his wife except in jurisdictions that had statutes expressly providing otherwise. By the 1990s, approximately 60 percent of the states had removed that marital exemption from their criminal rape statutes. Regardless of the existence of that offense in a given jurisdiction, both family and civil practitioners should be prepared to file appropriate actions for assault and battery.

• ***Transmission of sexually transmitted diseases***

Sexually transmitted diseases include syphilis, gonorrhea, Chlamydia trachomatis, genital herpes and HIV-AIDS. Consensual sex does not include the consent to be infected with a sexually transmitted disease where the defendant knew, or arguably should have known, that he or she carried the disease and transmitted to a partner. To pursue this cause of action, counsel should analyze whether such transmission constitutes a battery.

Courts continue to wrestle with the question as to whether sexual tort liability issues stemming from private relationships should be cognizable in civil courts. Questions that still trouble courts, in degrees as varying as the number of state jurisdictions, include:

• Should the transmission of diseases through sexual relations between two consenting adults, whether or not married, be a matter cognizable in either civil or family court?

. . .and the corollary inquiry:

• Are sexually transmitted diseases best left to the privacy of the bedroom and free of governmental intrusion?

• Should courts explore sexual tort liability issues stemming from private sexual relations and resulting from conduct that is perceived to be immoral, if not illicit, by a significant percentage of the general public?

• Should the legal action for transmitting a sexual disease be a civil or criminal matter (or both)?

• Should the transmission of a sexual disease to a spouse play a part in a domestic relations' case?[xii]

This latter question varies primarily on whether the venue is in a "no fault" or "equitable division" jurisdiction, and whether, therefore, the perpetration of these torts can be compensable by an offset in a domestic court settlement. Plaintiffs' consent to sexual intercourse is universally distinguished form the plaintiff's consent to the transmission of a sexual disease.[xiii]

If tort law is truly, as William Prosser has termed it, a "battleground of social theory,"[xiv] balancing social theory against individual rights of redress and access to judicial fora in which to vindicate those rights, then civil and family law litigators alike must recognize the rights which particular fact patterns present and competently inform their clients of any causes of action.

Left for Part II of this series is a discussion of negligence in the context of sexually transmitted diseases; limitations to such actions; and defenses including contributory or comparative negligence, and how these defenses may be overcome.

• ***Physical and emotional battery of children***

"Battered Child Syndrome" was first coined by Dr. C. Henry Kempe in 1961 at a multi-disciplinary conference he organized and which was aimed at establishing that chilling phrase denoted a legitimate pediatric phenomenon and deserved greater clinical and legal attention. The difficulty is in obtaining reliable histories in each such case, as there are great overlaps between "normal" childhood injuries and those inflicted, whether intentionally or negligently, by those entrusted with their care or by strangers.

• ***False arrest and imprisonment***

The tort of false imprisonment embodies the common law's respect for the right of freedom from restraint of movement,[xv] and is cognizable between spouses in those jurisdictions. California has eliminated inter-spousal immunity, requiring, as at common law, that the restraint be total, even if only for a brief period.

• ***Defamation***

At common law, the torts of libel and slander involved an invasion of the personal interest in reputation and good name in the community. Common law causes of action required that the defendant communicate or publish something to a third party that may negatively affect the victim's good name.[xvi] Over decades, the tort has been expanded to include statements that arouse pity or sympathy as well. For example, statements imputing insanity, poverty, or that a person has been sexually assaulted, can be the basis for an actionable tort between spouses.[xvii]

Conclusion

The purpose of Part I of this article is to point out that plaintiff's lawyers and family law attorneys often overlook advising their clients of the various causes of action arising from acts of domestic violence. Later parts will focus in more detail on additional causes of actions plaintiff's attorney can allege as well as the liability for failing to pursue such causes of action.

Endnotes:

[i] Borrowed from "Domestic Violence," *Wikipedia* 2009 at http://en.wikipedia.org/wiki/Domestic_violence, last accessed October 14, 2009.

[ii] See "In Divorce Case, Wife Files Tort Claim and Wins $5.56 Million," *The Matrimonial Strategist*, Nov. 2001.

[iii] Tjaden, Patricia and Thoennes, Nancy "Extent, Nature, and Consequences of Intimate Partner Violence" (Research report) National Institute of Justice and the Centers for Disease Control and Prevention July 2000.

[iv] Walker, L. E. (1979). *The Battered Woman*. New York: Harper & Row.

[v] See, for example, *Ferguson v. Davis* (195448 Del 299) 102 A2d 707; *Sullivan v. Sessions* (Fla 1955) 80 So2d 707.

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[vi] Karp, Leonard and Karp, Cheryl, *Domestic Torts: Family Violence, Conflict and Sexual Abuse,* "Battered Husbands" (1989) Clark, Boardman, Callaghan (1989) p. 38.
[vii] Restatement (Second) of Torts (1965) §13
[viii] 58 Cal.2d 683, 876 [P2d 65].
[ix] Restatement (Second) of Torts (1965) §46(1)
[x] *Browning v. Browning* (Ky Ct App 1979) 584 SW2d 406
[xi] See, for example, *Molien v. Kaiser Found*. Hosp. (1980) 27 Cal.3d 916 [167 Cal.Rptr. 832]; *Ledger v. Tippitt* (1985) 164 Cal.App.3d 625 [210 Cal.Rptr. 814] [upholding an action for negligent infliction of emotional distress where defendant killed plaintiff's fiancé standing a few feet away, on the basis of the foreseeability that the deceased was a loved one and plaintiff would suffer extreme emotional distress when decedent died.]
[xii] Karp, Leonard and Karp, Cheryl, *Domestic Torts: Family Violence, Conflict and Sexual Abuse,* "Transmitting Sexual Diseases," (1989) Clark, Boardman, Callaghan (1989) p. 89.
[xiii] *State v. Lankford* (1917) 29 Del (6 Boyce) 594, 102 A 63.
[xiv] W. Prosser, Handbook of the Law of Torts S §3, agt 14-15 (4th ed 1971).
[xv] W. Prosser & P. Keeton, *Handbook on the Law of Torts* §11, at 47 (5th ed 1984)
[xvi] *Id.,* at §111, at 773 (5th ed 1984)
[xvii] See, for example, *Papy v. Frischkorn* (Fla Dist Ct App 1970) 234 So 2d 718

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