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INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS IN DIVORCE: NEW YORK'S RELUCTANCE TO ENTER THE FRAY

GWEN SEAQUIST AND EILEEN KELLY

INTRODUCTION

When emotional distress is a factor in a marriage, it is not surprising that eventually the marriage may break down and lead to a divorce. In some cases, the divorcing spouse experiences some form of emotional or physical abuse. If the allegations are serious enough, the abused party may wish to seek restitution for the pain and suffering experienced in the marriage in the form of a tort lawsuit. This paper explores the law in New York State regarding divorce action combined with intentional tort lawsuits for either assault or intentional infliction of emotional distress. Despite the frequent occurrence of violence in the marital context, a cause of action for intentional torts, coupled with a cause of action for the dissolution of a marriage, is not a well-settled proceeding in New York. This is so despite the fact that during the past thirty years there has been a gradual abolition of the doctrine of interspousal immunity. While in some states, spouses may sue one another for the intentional tort of emotional distress committed during the marriage, this has never been done successfully in New York. Such a proceeding, if allowed at all, is usually one separate from the divorce proceeding.

Historically, when plaintiffs have attempted to combine divorce with intentional tort causes of action, the courts have struggled with the following three issues. First, at what point does conduct, which is a normal part of the "ebb and flow of married life,"

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1 This is, in fact, the second most common tort alleged in divorce proceedings, surpassed only by assault and battery. See, for example, Robert G. Spector, Marital Torts: Actions for Tortious Conduct Occurring During the Marriage, 5 AM. J. FAM. L. 71 (1991).

2 See, for example, Karp and Karp, Marital Torts: Beyond the Normal Ebb and Flow, 9 AM. J. FAM. L. 89, 95-96 (1995); Krohse, "No Longer Following the
become so outrageous enough to warrant an award of damages? Second, when is it appropriate for tort actions, which regulate blame and award damages, to be joined with divorce proceedings, which, by definition, are equitable in nature? Third, if the court allows tort and divorce actions to be joined should it then mandate joinder or should parties be given the option to combine both proceedings? And if they fail to join the proceedings, are they then estopped from ever bringing the other lawsuit? For purposes of this article, the history of the legal relationship between that of husband and wife is perhaps best studied beginning with the concept of interspousal immunity.

THE DOCTRINE OF INTERSPOUSAL IMMUNITY

The doctrine of interspousal immunity was originally based on an ancient religious belief that upon marriage, a husband and wife united to become "one flesh." English common law incorporated this concept into a theory of "illegal identity," where the wife's existence merged into that of her husband. As a result, women could not sue, enter into contracts, or own property without the joinder of their husband. In turn, the husband became liable for any and all torts committed by his wife. Like much of the English common law, the concept of interspousal immunity was incorporated into the laws of the United States. The doctrine of interspousal immunity remained untouched until the mid-1800's when a group of legislative Acts severely weakened the "legal

Rule of Thumb—What to Do with Domestic Torts and Divorce Claims," U. ILL. L. REV. 923, 931 (1997); Karp, Spousal Infliction of Emotional Distress . . . Beyond the Normal Ebb and Flow of Married Life, 12 J. AM. ACAD. MATRIM. LAW 309, 316. ("Its limits, however, are still vaguely defined. The tort involves more than the subtle ebb and flow of married life. It involves intended harm of an outrageous nature—not just conduct which is merely insulting, annoying, or even threatening.")

entity"\(^4\) concept. These Acts, known as "The Married Women's Property Acts," granted women the right to sue, own property, and enter into contracts. Some states liberally construed these Acts and allowed recovery against a spouse for specific torts. In most states, however, the doctrine of interspousal immunity continued under various public policy rationales. It was believed that the immunity helped to preserve marital harmony and prevent frivolous suits. Thus, the reasoning found in the 1877 decision of *Abbot v. Abbot*\(^5\) is typical when it states, "It is better to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive."\(^6\) Over the past twenty years, these rationales have been completely discredited. With the increased public awareness of violence against women, many courts have come to the realization that family unity should not be achieved at the expense of the mental and physical wellbeing of family members. Often, when intentional torts are being committed, there is no marital harmony left to be preserved. In addition, allowing such suits may actually serve as a deterrent to a violent family member who is disposed to inflict injury on his or her spouse and children.\(^7\) Time has also shown that the wave of frivolous litigation, which was supposed to occur when interspousal immunity was abolished, is unfounded.


\(^5\) *Abbot v. Abbot*, 67 Me. 304, 306, (1877). The court found torts unnecessary in a marital context because, "The married woman has remedy enough. The criminal courts are open to her . . . [and] as a last resort, if need be, she can prosecute at her husband's expense a suit for divorce." In addition, it was thought that if the immunity were lifted, spouses would use fraud and collusion to defraud insurance companies.

\(^6\) Id.

\(^7\) Jennifer Wriggins, *Domestic Violence Torts*, 75 S. Cal. L. Rev. 121 (Nov. 2001).
NEW YORK'S REFUSAL TO ALLOW RECOVERY ON INTENTIONAL TORTS

With the main rationales destroyed, forty-five states have now fully abrogated interspousal tort immunity, opening the door for spouses to sue one another under numerous torts, including the tort of intentional infliction of emotional distress.\(^8\) New York removed the final barrier to a married woman's right to sue her husband for a personal tort, legislatively.\(^9\) Despite the availability of this remedy for victims of abuse, the strong change in public attitude toward protecting victims of abuse and the deterrent effect such suits could have, New York nevertheless refuses to allow recovery for intentional torts in a divorce proceeding.\(^10\)

Why are the New York courts, as a matter of public policy, opposed to allowing additional monetary relief to divorcing spouses engaged in extreme and outrageous behavior? The New York Court of Appeals addressed this issue only once, in its 1968 decision *Weicker v. Weicker*. At the trial court level, the plaintiff had alleged that her husband violated New York General Obligations Law, § 3-313. This law gives married women the right to sue her husband for wrongful and tortious acts.\(^11\) Based on the

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\(^{9}\) General Obligations Law, §3--313 *Also see:* Rozell v. Rozell, 281 N.Y. 106, 110, 22 N.E.2d 254, 255, 128 A.L.R. 1015; Coster v. Coster, 289 N.Y. 438, 442, 46 N.E.2d 509, 511, 146 A.L.R. 702; People v. Morton, 308 N.Y. 96, 98, 123 N.E.2d 790, 791. The New York statute provides that: "1. A married woman has a right of action for an injury to her person, property or character or for an injury arising out of the marital relation, as if unmarried. . . A married woman has a right of action against her husband for his wrongful or tortious acts resulting to her in any personal injury as defined in section thirty-seven-a of the general construction law..."


\(^{11}\) "The statute provides, in part: 'A married woman has a right of action against her husband for his wrongful or tortious acts resulting to her in any personal injury as defined in section thirty-seven-a of the general construction law, or resulting in injury to her property, as if they were unmarried...' Sec. 37-a of the General Construction Law defines 'personal injury' to include 'libel, slander and malicious prosecution; also an assault, battery, false imprisonment, or other
statute and public policy, the court held that "[t]he acts charged against the husband...are wrongful and tortious and that the injury resulting to the wife is an 'actionable injury'. It is difficult to reach any other conclusion after studying the long history leading up to the 1937 amendment."  

The Court of Appeals did not agree. While the Court acknowledged that New York law permits "recovery for the intentional infliction of emotional distress without proof of the breach of any duty," nevertheless, as a matter of policy, such a claim would not be allowed in the Weicker's divorce action. Why? "To sustain the claim for damages would result in a revival of evils not unlike those which prompted the Legislature in 1935 to outlaw actions for alienation of affections and criminal conversation."  

In other words, if spouses can recover for intentional torts in a divorce proceeding, there will be fraud and collusion between divorcing spouses and third parties that the abolition of the heart balm statutes in the 1930's was meant to remedy.  

As one court admonished, "Imagine what might occur if routine matrimonial actions, most with allegations of cruelty and abuse, were permitted to escalate into independent tort actions to recover for intentional infliction of emotional or mental distress."  

Ironically, in answering this question, there may exist numerous benefits in opening up the divorce proceeding to a full hearing. Certainly, there is no guarantee that the system will suffer abuse or that fraud and collusion would become a mainstay of such

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13 Id. at 855. 

14 Weicker, 22 N.Y.2d at 11. 

15 "In 1935, New York adopted what has become known as a heart balm statute, [Civil rights Law §§ 80-a-84] which abolished all causes of action ... [based upon] alleged alienation of affections, criminal conversation, seduction and breach of contract to marry ..." Gaden v. Gaden, 29 N.Y.2d 80, 84, 323 N.Y.S.2d 955, 272 N.E.2d 471 (1971). The tort of seduction along with other causes of action for alienation of affection invited "grave abuses ... and in many cases ... resulted in the perpetration of frauds ..." Id at 85. 

procedures. Even if there is a flood of litigation, what better place to redress such harm than in court? As one court noted, "It is the business of the court to remedy wrongs that deserve it, even at the expense of a 'flood of litigation' and it is a pitiful confession of incompetence on the part of any court of justice to deny relief on such grounds."

While the New York courts do not seem so persuaded, they have given "judicial lip service" to the notion that a claim for emotional distress is possible under the right circumstances. Those circumstances include behavior rising to a level deemed "'outrageous' beyond peradventure." Apparently, no behavior to date has met such a standard in New York, a factor hard to take seriously in light of the statistics in the State for spousal abuse. Yet, litigants have certainly attempted to put forth the theory. In Reich v. Reich, the wife joined her divorce action with a claim for intentional infliction of emotional distress as well as an action under the Federal Violence Against Women Act. She claimed that spousal abuse had left her mentally disabled. The court dismissed her claim for intentional infliction of emotional distress noting that such a claim in a divorce context is allowed only when the alleged conduct is "'outrageous' beyond peradventure." Similarly, an oral promise allowing the plaintiff lifetime use of the

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18 Id.
19 The courts apparently condone a certain amount of diharmony in a marital relationship, but it crosses the line when it rises to the level of tortious behavior. "In our view, the circumstances do not constitute a mere matrimonial dispute...(citations omitted) Indeed, the conduct of this defendant seems to fit nicely within the rule stated in the Restatement (Second) of Torts (§46[1] [1965] that: One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress. The deliberate and malicious campaign of harassment vindictively conducted by defendant was, in our view, 'outrageous' beyond peradventure." Murphy v. Murphy, 109 A.D.2d 965, 966, 486 N.Y.S.2d 457, 459(App. Div. 1985).
23 Id. at 672.
home, when broken, was not outrageous enough to sustain a claim for intentional infliction of emotional distress.24

New York courts have also contended that to date no behavior has been "outrageous enough" to warrant a finding of emotional distress.25 This is so in spite of the multitude of cases in New York in which parties are suing for divorce. A reading of the descriptions is a chronicle of abuse.26 In those states where the plaintiff prevailed on an emotional abuse theory, they have had to prove extreme abuse such as rape, assault, or threats of assault. Falsely telling a spouse that he had contracted AIDS and requesting his wife to take their son home to Canada so he would not have to see his father die was actionable.27 An affair, by itself, however, does not constitute the tort.28 Nor do fraud and adultery combined rise to the level of emotional distress.29 Nor does a claim that a spouse engaged in an extramarital affair that resulted

24 Wiener v. Wiener, 444 NYS.2d 130 (2nd Dept. 1981) "Absent physical contact or direct physical injury, however, the acts complained of do not amount to a cognizable cause of action in tort unless they constituted conduct 'beyond all reasonable bounds of decency.'" Id. at 131.
25 "[I]n determining when the tort of outrage should be recognized in the marital setting, the threshold of outrageousness should be set high enough--or the circumstances in which the tort is recognized should be described precisely enough so that the social good from recognizing the tort will not be outweighed by unseemly and invasive litigation of meritless claims." Hakkila, 812 P.2d at 1323-1326.
26 See for example, N.Y. DOM. REL. LAW § 170 (McKinney).
28 Poston v. Poston, 436 S.E.2d 854 (N.C. Ct. App. 1993). The husband contended that his wife's affair caused him "extreme mental anguish, distress, anxiety, physical damage, emotional damage, and financial losses and damage." Id. at 856. The court rejected this argument because the evidence of an affair alone is not the type of conduct that "exceeds all bounds usually tolerated by decent society" or the type of conduct that "causes mental distress of a very serious kind." (quoting Prosser, The Law of Torts, s 12 (4th ed. 1971)). "We find that appellant's allegation of adultery does not evidence the extreme and outrageous conduct which is essential to this cause of action." Id.
29 Whittington v. Whittington, 766 S.W.2d 73 (Ky. Ct. App. 1989). (the wife sued the husband in the divorce proceeding for the tort of outrageous conduct, but the complaint was dismissed for failure to state a cause of action because the husband's fraud and adultery did not rise to the necessary level of outrageousness.)
in the fear of contracting a sexually transmitted disease.\textsuperscript{30} Neither is preventing visitation, even against court orders, outrageous enough to warrant emotional distress.\textsuperscript{31}

Ironically, the only New York litigant who came close to prevailing on a claim of emotional distress occurred in a "live-in" rather than a marriage situation. In \textit{Murphy v. Murphy},\textsuperscript{32} the plaintiff brought an action against the defendant whom she had been living with for the past fourteen years, for intentional infliction of emotional distress. The jury had awarded her $90,000 in damages after listening to testimony, which alleged that the defendant had killed the plaintiff's Canadian goose, smashed windows, assaulted her, and destroyed her personal property. The plaintiff claimed these actions took place after their relationship had ended, even though she had remained living in the defendant's house. The court ruled that "the behavior of the defendant . . . occurred after whatever relationship in fact existed between the parties had terminated."\textsuperscript{33} Thus, the court managed to end-run the existing precedent\textsuperscript{34} and upheld the award of damages.

As a general rule the New York cohabiting individuals will not prevail in a lawsuit combining intentional torts with the dissolution of a "non-marital relationship." For example, in \textit{Baron v. Jeffer},\textsuperscript{35} the parties were not married, but had been living together as husband and wife. Plaintiff sought to recover damages for intentional infliction of emotional distress against her ex-boyfriend alleging, among other things, assault. Referring to \textit{Weicker}, the court held "that it would be contrary to public policy to recognize the existence of this type of tort in the context of disputes, as here, arising out of the differences which occur

\textsuperscript{31} Doe v. Doe, 519 N.Y.S.2d 595 (Sup. Ct.1987).
\textsuperscript{33} Murphy, , 486 N.Y.S2d at 457.
\textsuperscript{34} Id at 459.
\textsuperscript{34} See, e.g., Ruprecht v. Ruprecht, 599 A.2d. 604 (N.J. Super. Ct.1991). (Wife's eleven-year affair occurring during the parties' marriage was not outrageous enough to support a tort action.)
between persons, who although not married, have been living together as husband and wife."\(^\text{36}\)

Today, \textit{Weicker} exemplifies matrimonial disputes that are not actionable, while \textit{Murphy} sets the standard for outrageous conduct, although not in a matrimonial context. At present, however, the finding in \textit{Weicker} and \textit{Baron} that intentional emotional distress in a divorce proceeding is not winnable between spouses, has not been overruled, leaving the merits of future claims tenuous.

**Texas Adopts Intentional Torts**

Why have other states come full circle on this issue while New York has not? The purpose of this section is to examine the odyssey taken by the Texas courts, which initially denied emotional distress claims in divorce proceedings, yet recently reversed themselves and the state's public policy toward abused spouses. Numerous other states are also moving in the same direction\(^\text{37}\). If other jurisdictions have concluded that allowing the tort protects spouses in the marital context, then the question remains: Why hasn't New York?

Texas first recognized emotional distress as a compensable injury in 1890.\(^\text{38}\) Initially, Texas limited recovery to injuries where the emotional distress was manifested by physical

\(^{36}\) \textit{Id.} at 816. \textit{See also:} Jose F. v. Pat, 154 Misc.2d 883 (N.Y. Sup. Ct. 1992). A case in which a man cohabiting with a woman alleged fraud and intentional infliction of emotional distress. In Artache v. Goldin, 133 A.D.2d 596 (N.Y. App. Div. 1987), the Second Department declared, "It would be contrary to public policy to recognize the existence of this type of tort in the context of disputes, as here, arising out of the differences which occur between persons who, although not married, have been living together as husband and wife for an extended period of time."


\(^{38}\) Price v. Price, 732 S.W.2d 316, 318 (Tex. 1987).
Beginning in 1967, the Texas courts altogether removed the requirement of physical manifestations holding that one could recover even if the injuries were limited to mental abuse. Regardless of these holdings, coupling emotional distress with a divorce proceeding was not recognized. In language strikingly similar to New York's, the court reasoned that, "...permitting such separate damages in divorce actions would result in evils similar to those avoided by the legislature's abrogation of fault as a ground for divorce."

Just four years later, however, the Texas Supreme Court reversed Chiles in the 1993 decision Twyman v. Twyman, and announced, "...we expressly adopt the tort of intentional infliction of emotional distress, and hold that such a claim can be brought in a divorce proceeding." The court reviewed its own judicial history and found two factors significant. First, the Texas legislature had long before abolished the doctrine of interspousal immunity, thereby opening the doors to lawsuits between spouses. Second, Texas recognized the tort of emotional distress, whether

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39 Both the New York and the Texas courts have adopted the Restatement's definition of emotional distress. A significant aspect of the Restatement is its recognition of both intentional as well as negligent infliction of emotional distress claims.

40 Chiles v. Chiles, 779 S.W.2d 127 (Tex. App. 1989). The court acknowledged that proof of physical injury is no longer required to recover for negligent infliction of emotional distress. St. Elizabeth Hospital v. Garrard, 730 S.W.2d 649 (Tex. 1987). One month after it issued the opinion in St. Elizabeth Hospital, the Texas Supreme Court handed down its opinion in Price, 732 S.W.2d 316. In the Price case, the court re-examined the doctrine of interspousal immunity, which mandates that one spouse cannot sue another for negligent conduct, and unequivocally abolished the doctrine "as to any cause of action." Id. at 319.

41 "There were no pleadings, evidence or issues related to physical injury. The reluctance of Texas courts to adopt the tort of intentional infliction of emotional distress, coupled with the retreat in Texas and in other jurisdictions from the recognition of negligent infliction of emotional distress without physical symptoms, leads us to the conclusion that the tort should not be recognized in a divorce action." Chiles, 779 S.W. 2d at 131.

42 Id.

43 855 S.W.2d at 619.

44 Id. at 620.
coupled with negligence or intentional actions for personal injuries, as a viable cause of action. In short, if spouses could sue one another, and if emotional distress could be proved with or without physical injuries, then spouses could sue one another for emotional distress without physical injuries as a by-product of a divorce action. With regard to the fear that the courts were opening a 'flood of litigation', the court reasoned that once Texas abolished the doctrine of interspousal immunity, it made no sense that spouses would find a safe harbor in their marriage to abuse one another. Even prior to the Twyman decision, the Texas courts began edging toward a reversal of their own decisions. Unlike New York, Texas stated as a matter of policy, "it is the duty of this court to continually monitor the legal doctrines of this state to insure the public is free from unwarranted restrictions on the right to seek redress for wrongs committed against them." Since Twyman, numerous plaintiffs have recovered significant sums of money for intentional torts occurring during the marital state. The law has its detractors, however. Despite the availability of the claim of action, some writers claim that too few plaintiffs have prevailed on the merits. Nevertheless, the protection and remedy exists, in spite of a less than perfect outcome, if plaintiffs can meet the standards of abuse set forth in the Restatement. Considering the floodgate theory has been so far disproved in Texas, it is especially difficult to understand how

45 Id. at 624, citing: Price, 732 S.W.2d at319.
46 St. Elizabeth Hosp., 730 S.W.2d at 653-654.
47 Yet, Texas still does not recognize negligent infliction of emotional distress. On the same day as the Twyman decision, the Texas Supreme Court handed down Boyles v. Kerr, 855 S.W.2d 593 (Tex Sup. Ct. 1993), which eliminated negligent infliction of emotional distress as a cognizable cause of action in Texas.
48 "Moreover, court opinions discuss the infrequency with which relief has been granted for intentional infliction of emotional distress claims. Yet, with their decisions in Boyles and Twyman, the Texas Supreme Court intimated that it was offering to victims of sexual exploitation and harassment an improved remedial path with its "new" cause of action." Mae C. Quinn, The Garden Path of Boyles v. Kerr and Twyman v. Twyman: An Outrageous Response to Victims of Sexual Misconduct, 4 TEX. J. WOMEN & L. 247, 252 (Summer 1995).
New York courts continue to deny a forum for the redress of any wrong that could encourage domestic tranquility. 49

PERMISSIVE AND MANDATORY JOINDER

Another reason why some states keep divorce and tort actions separate involves issues of permissive and mandatory joinder. Some states allow an action for intentional infliction of emotional distress for incidents that occurred during the marriage, but do not allow the claims to take place in the divorce proceeding. 50 If, however, the state requires that the two claims are joined (if the joinder is mandatory) then does the failure to raise the tort in the divorce preclude a subsequent action? Stated another way, if joinder is mandatory, then does res judicata apply to the subsequent action? 51

The problems with joinder were described as follows: If the former wife is forced to bring her claim for damages either simultaneously with, or prior to, her complaint for divorce, she will be forced to elect between three equally unacceptable alternatives: (1) Commence a tort

49 "Analysts worried, if suits claiming negligent or even intentional infliction of emotional distress were permitted, a tidal wave could be expected. The doomsayers were wrong. The Chiles verdict was overturned in 1989 by an appellate court in Huston. The Texas Supreme Court refused to review the case and the deluge... never materialized. Rorie Sherman, When Divorce is Not Enough, NAT'L L. J., September 23, 1991, at 1.

50 "According to the ABA's 'Marital and Parental Torts,' six other states have either expressly or by implication sanctioned such joinders: Alabama, Georgia, Nevada, New Yor, Texas and Tennessee. But other states have Prohibited or discouraged the joinder of a tort claim in a divorce action: Arizona, Colorado, Indiana, Iowa, Massachusetts, New Hampshire, Utah and Wisconsin." Id.

51 The basic principle of the application of the res judicata doctrine is described as follows: "When a valid and final personal judgment is rendered in favor of the plaintiff: (1) [t]he plaintiff cannot thereafter maintain an action on the original claim or any part thereof..." Restatement (Second), Judgments Sect. 18 (1982); "Original claim" has been defined by the Restatement in Sect. 24(1): "[t]he claim [that is] extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose." Restatement (Second), Judgments Sect. 24(1)).
action during the marriage and possibly endure additional abuse; (2) join a tort claim in a divorce action and waive the right to a jury trial on the tort claim; or (3) commence an action to terminate the marriage, forego the tort claim, and surrender the right to recover damages arising from spousal abuse.\footnote{Stuart v. Stuart, 143 Wis.2d 347, 352, 421 N.W.2d 505, 508. (1988).}

As a result, many states that mandate joinder have "carved out an exception" to the rule of \emph{res judicata}, allowing a subsequent lawsuit in spite of the fact that some of the same issues will be raised in both proceedings.\footnote{"Divorce and tort actions lack an identity of causes of action or claims. Applying the res judicata doctrine to bar the tort action fails to achieve the doctrine's objectives and would be fundamentally unfair. Therefore, we conclude that a doctrine of res judicata cannot act as a bar to [a post-divorce] tort action." Nash v. Overholser, 757 P.2d 1180, 1181-1182 (Idaho 1988).}

Similarly, when the state allows a \emph{permissive} joinder, many of the same questions remain about the impact of \emph{res judicata}. If the issue is not joined, does that preclude a subsequent lawsuit? In effect, does permissive joinder really mean claim preclusion, thus making it mandatory? The cases do not address these issues squarely. If the state adheres to a no-fault divorce doctrine, an exception to \emph{res judicata} may exist. By definition, because fault cannot be considered in the divorce, it must be litigated in a subsequent proceeding.\footnote{Where the wife filed a civil action three months after the divorce decree for assault, battery, and intentional infliction of emotional distress for incidents that occurred during the marriage, the trial court dismissed on the grounds of \emph{res judicata}, equitable estoppel and waiver. Stuart v. Stuart, 410 N.W.2d. 632, 634. (Wis Ct. App. 1987). On appeal, the court reversed, stating that "for \emph{res judicata} to act as a bar to a subsequent action, there must be not only an identity of the parties but also an identity of the causes of action or claims in the two actions." Id. at 635. "In the Stuarts' divorce proceedings, the issues litigated were the termination of the marriage and the equitable division of the marital estate. Under Wisconsin's no-fault divorce code, the court without regard to the fault of the parties makes these determinations. Consequently, in making the financial allocation between the parties, the court could not consider one spouse's tortious conduct or, based upon that conduct, award the injured spouse punitive damages or compensatory
Likewise, if the court in the divorce did not address the issues in the tort claim, then there is nothing to collaterally estop, leading many courts to the conclusion that the issues should be litigated in a separate proceeding. So, when a wife believed that her husband was involved in a conspiracy to kill her, the lawsuit for intentional infliction of emotional distress was not barred by *res judicata.* Other courts considering this issue conclude that the tort claim is not barred by *res judicata* when the fact was not litigated in the divorce action. Some courts have called this a "unique and limited exception to the doctrine of *res judicata.*" If damages are not addressed in the divorce, that is also a reason for a separate suit. "The purpose of a divorce action is to dissolve the marital relationship and effect the legal separation of..." *Id.* Since the same issues were not litigated, *res judicata* did not prohibit the subsequent suit.

55 Vance v. Chandler, 597 N.E.2d 233, 237-38 (Ill. App. Ct. 1992). "While the facts underlying the instant tort issues were apparently raised in the dissolution proceedings between plaintiff and Morton, we find from the record that those issues were neither litigated nor determined in the divorce proceeding. Accordingly, we find plaintiff's amended complaint is not barred by collateral estoppel." *Id.*

56 For example, in Abbott v. Williams, 888 F.2d 1550 (11th Cir. 1989) (interpreting Alabama law), the court stated "Alabama precedent does not establish a bright-line rule that a divorce judgment automatically precludes one former spouse from suing the other in tort based upon conduct which occurred during the marriage. Rather, it suggests that each such case be examined on its own facts and circumstances: a case is within the 'field of operation' ... if a settlement agreement, merged into a final divorce judgment, did not cover the tort claim, or if all elements of the tort claim were not fully litigated and decided in the divorce action, even though the divorce action has proceeded to final judgment." *Id.* at 1554. On the other hand, this same jurisdiction has decided that if the facts were litigated in the divorce action, then *res judicata* does bar a subsequent tort action. Weil v. Lammon, 503 So.2d 830, (Ala. 1987) "[G]iven the liberal joinder allowed by the Alabama Rules of Civil Procedure, there is no reason why all known claims between spouses in a divorce action should not be settled in that litigation." *Id.* at 832.

57 *Nash v. Overholser,* 757 P.2d. 1180 (In *Nash*, almost a year after entrance of the divorce decree, the wife filed a separate lawsuit for assaults that occurred during the marriage. The court upheld her right to litigate the tort claims because the "tort allegations were neither pleaded nor addressed during the divorce proceedings and, in fact, Mrs. Nash's complaint alleged irreconcilable difference, not physical or mental cruelty, as the grounds for divorce." *Id.* at 1181.)
man and wife, while a tort action is brought to recover compensation for injuries suffered as a result of a civil wrong. It is settled that damages for personal injuries cannot be requested in a divorce proceeding.58 Under this doctrine, the tort action should, under the 'single controversy' doctrine, have been "presented in conjunction with [the divorce] as part of the overall dispute between the parties in order to lay at rest all their legal differences in one proceeding and avoid the prolongation and fractionalization of litigation."59

As a result, when the issues sought to be addressed in the tort action are joined in the divorce, and settled by agreement of the parties, then the court will invoke collateral estoppel to prevent any subsequent lawsuits. For example, when the parties in the


59 Hutchings v. Hutchings, 1993 WL 57741, 10 (Conn. Super. Ct.). Just as there are numerous arguments supporting the separation of the causes of action, there are many arguments in favor of joinder. These include:

1. The preservation of judicial resources, by combining claims.
2. Matters regarding children do not have to be protracted because all matters can be addressed by motion.
3. It is better to decide the tort matter first, establishing any financial liabilities of the parties, and then let the judge make her divorce decision and distribution taking into account the jury's verdict and award of damages in the tort action.
4. "The factual overlap between the grounds and remedies in the divorce and tort actions alone makes the spouses marriage and the victim spouses tort claim a "convenient trial unit," and thus outweigh non-joinder.
5. The procedural inefficiency that results when the tort and divorce actions are not combined was illustrated in Simons v. Simons" Id.Or, as summarized in another case, "This court is not satisfied that a flood of litigation with fraudulent claims or the resurrecting of fault, or the possibility of confusing the issues of custody, support, and equitable distribution should deny one spouse from suing the other in a divorce proceeding for emotional distress without physical injury. There is neither valid policy interest nor logical reason to allow [it]. It is this court's opinion that an independent cause of action between spouses for emotional distress without physical injury should exist in a divorce case."

Ruprecht v. Ruprecht, 599 A.2d 604,605,606 (N.J . Super. Ct. 1991). (The adulterous actions of the defendant were ultimately deemed by the court not outrageous enough to set forth a case for intentional distress).
divorce entered into a settlement and the husband agreed to pay compensation to the wife for injuries received during the marriage as a result of the assaults by him, she was collaterally estopped from bringing a subsequent lawsuit.\textsuperscript{60}

When the same matters are litigated in the divorce proceeding that would have been litigated in the tort action, this will preclude a subsequent lawsuit. For example, where the court considered the wife's allegations of assault and battery in the divorce and awarded damages, and she, six months later, filed a second lawsuit for assault and battery, the court dismissed.\textsuperscript{61}

What of the problem that such joinder confuses equity issues with money damages? The court stated that, "A plaintiff in his or her petition may join as independent claims any or as many claims... either legal or equitable or both as he [or she] may have against the opposing party."\textsuperscript{62} The court set forth the following reasons: "Courts... avoid[ing]... a multiplicity of suits... [and encouraging] resolution in one suit of all matters existing between

\textsuperscript{60} "It is clear that the parties reached a settlement on this matter. Furthermore, the wife asked court to delay the final judgment so that she could remain covered by her husband's health insurance policy in the event that she required future surgery, and the court acquiesced in that request. Having taken the position that Mrs. Smith did in the divorce action, she is now estopped from relitigating matters that were settled in that action." Smith v. Smith, 530 So.2d 1389, 1391. (Ala.1988).

\textsuperscript{61} Kemp v. Kemp, 723 S.W.2d 138 (Tenn. Ct. App. 1986) "The cause of action under which the plaintiff recovered medical expenses and lost wages in the divorce litigation technically was not the same—she sued for divorce—but, in effect, she prevailed on a tort claim. In any event, the wife is collaterally estopped from relitigating the same factual issues in a 'different' cause of action, even if res judicata is not appropriate." Id. at 140.

Numerous other cases dealing with assorted causes of action also reach the same results. See e.g., Partlow v. Kolupa, 122 A.D.2d 509, 504 N.Y.S.2d 870 (1986), aff'd mem. 69 N.Y.2d 927, 509 N.E.2d 327, 516 N.Y.S.2d 632 (1987) (subsequent conversion action filed by wife barred by divorce judgment); Davis v. Dieujuste, 496 So.2d 806 (Fla.1986) (property rights). "These courts reason, in essence, that an action for divorce and a tort claim both evolve from a common factual nucleus and raise interrelated economic issues that should be resolved in a single proceeding. They view the parties and their marital relationship as the appropriate basic unit of litigation, not the different legal theories that can be placed on events that occurred during the marriage." Hutchings, 1993 WL 57741, at 3.

the parties.\textsuperscript{63} Regarding the issue of double recovery, the court stated, "This argument ignores the unique and separate roles played by the judge and jury in this divorce case. While the jury may place a value on certain property . . . the division of property in a divorce action is exclusively within the province of the trial judge, not the jury."\textsuperscript{64}

CONCLUSION

New York Courts should revisit the issue of allowing litigants in a divorce proceeding to sue in the same action for intentional torts arising out of the marital context. The policy issues preventing joinder of both actions is founded on antiquated fear of fraud and collusion, rather than the best interests of the parties and protection of the injured spouse. Legislation allowing joinder could serve to deter the behavior of abusive spouses by making them fiscally responsible for their actions, thereby adding to the arsenal of laws seeking to protect victims of domestic abuse.

\textsuperscript{63} Id.