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Joinder of Tort Claims in Divorce Actions

by
Barbara Glesner Fines†

Laws governing relations between spouses have undergone profound changes in the past twenty years: changes that continue to revolutionize the standards and procedures for dissolutions of marriage. Substantively, the most dramatic changes in divorce law have come from the advent of no-fault divorce,[1] the decline in spousal maintenance awards,[2] and the abolition of inter-spousal tort immunity.[3] Procedurally, ongoing changes include movements to integrate family courts as a separate judicial system and to incorporate alternative dispute resolution into that system.[4]

These transformations have been based in part on changes in how society views divorce and, equally, on the way the legal system views the family. As a result, more couples can divorce quickly, inexpensively, and with a minimum of rancor. Despite these dramatic changes, however, a number of divorces still occur the old fashioned way — with an extended, adversarial fight over fault and financial distribution. One question facing the legal system in this climate is the extent to which divorce should be the last battle — bloody, wide-ranging, but final — or simply the first step in an ongoing war. An important issue in resolving this question is the extent to which a spouse may or must join in a divorce action any tort claims he or she may have against the other spouse.

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1 *See infra* notes 15-25 and accompanying text.

2 Marsha Garrison, *The Economics of Divorce: Changing Rules, Changing Results, in* DIVORCE REFORM AT THE CROSSROADS 83-6 (Stephen D. Sugarman & Herma Hill Kay eds., 1990).

3 *See infra* notes 10-14 and accompanying text.

4 *See infra* notes 97-99 and accompanying text.

Under general principles of claim preclusion (res judicata) a tort claim against one's spouse should be joined with a divorce proceeding because both actions arise out of the same "transaction." Proponents of this application of claim preclusion consider tort claims to be merely a marital asset. Tort claimants are viewed as rational litigational players who use their claims as economic game pieces. Thus, these proponents argue that a strict application of claim preclusion will provide economic incentives to achieve the most efficient outcome.[5]

This article proceeds under a contrasting set of assumptions. Rather than viewing interspousal torts claimants as economic game players, this article notes that the vast majority of tort claimants are abused spouses and assumes that these claimants are making their litigation choices during divorce as emotional, even irrational, actors. This assumption requires different responses when deciding whether tort claims must or may be joined with divorce actions.

This article addresses that policy question by surveying the current state of the law regarding the effects of claim preclusion (res judicata) in a divorce proceeding. Some history of the role of fault in judicial resolution of spousal disputes is examined. The three major approaches to joinder of tort claims are identified and critiqued. While the best approach for any one jurisdiction will depend in part on the structure of the family courts and its substantive and procedural laws governing dissolution actions, this article posits that, on a policy basis, family court judges should have the discretion to allow, but not the authority to require,[6] joinder of tort claims in divorce proceedings. This approach responds to the needs of the litigants in the vast majority of tort cases who, as abused spouses, may be emotionally unable or unwilling to bring tort actions during the tumultuous and dangerous time of divorce. For those litigants who do wish to resolve

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[5] *See, e.g.*, Andrew Schepard, *Divorce, Interspousal Torts, and Res Judicata*, 24 FAM. L.Q. 127 (1990).

[6] Throughout the article, I refer to "requiring" joinder. This is, of course, not entirely accurate since no jurisdiction has suggested the courts could force litigants to raise rather than waive tort claims. The term is simply shorthand for the application of claim preclusion to divorce judgments such that subsequent tort claims would be barred.

all issues at once, however, this approach allows for that efficiency.

I. Fault and Interspousal Litigation

Deciding whether tort claims must or may be joined with divorce actions requires a basic choice as to the role of courts in resolving issues of fault between spouses. Jurisdictions vary in their approaches.[7] On one end of the spectrum are aggressively no-fault jurisdictions: maintaining some interspousal tort immunities and eliminating fault as a grounds for divorce.[8] At the other end of the spectrum are those states that have abolished immunity entirely and also allow fault as a basis for divorce in a broad range of circumstances.[9] Many states, however, take a middle ground in one or both areas of law: partially abolishing immunity or including some exceptions to no-fault divorce actions. How any one jurisdiction resolves the issue of joinder of tort claims in divorce actions depends significantly on that state law's place on this spectrum.

1. *Abolition of Interspousal Tort Immunity.*

The issue of joinder of tort claims with divorce actions would not arise at all were it not for the abolishment of interspousal tort immunity. Beginning in the mid-nineteenth century, with the passage of the Married Women's Property Acts, courts have faced spouses seeking to bring tort suits against one another.[10] Like most of the states facing the issue at that time, the United States Supreme Court in *Thompson v. Thompson*[11] upheld interspousal immunity. The rationale for the immunity paralleled that used in more recent years to justify no-fault divorce: the need for

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7 A comprehensive survey of these approaches is beyond the scope of this article. The examples provided are merely illustrative rather than exhaustive. For state approaches to no-fault, see Doris Jonas Freed & Timothy B. Walker, *Family Law in the Fifty States: An Overview*, 23 FAM. L.Q. 495, 514-16 (1990) [hereinafter *Freed & Walker*]. For a survey of immunity law, see Wayne F. Foster, Annotation, *Modern Status of Interspousal Tort Immunity in Personal Injury and Wrongful Death Actions*, 92 A.L.R.3d 901 (1979).

8 *See, e.g.*, Ward v. Ward, 583 A.2d 577, 579 n.1 (Vt. 1990).

9 *See, e.g.*, Hutchings v. Hutchings, 1993 Conn. Super LEXIS 498.

10 *See, e.g.*, Longendyke v. Longendyke, 44 Barb. 366, 367-70 (N.Y. 1863).

11 218 U.S. 611 (1910).

strict interpretation of legislative changes, the concern for increasing marital discord, the fear of exposing private family matters to public view, and the possibility of frivolous and repetitive litigation between spouses.[12]

By the 1970s, a number of states had begun eroding interspousal tort immunity by creating categorical exceptions, such as intentional torts, or torts occurring before the marriage or immediately before or during divorce proceedings. Ironically, these exceptions were justified by the same concerns as those expressed in earlier opinions affirming the immunity.[13] Courts interpreted legislative intent as favoring broadened rights to bring civil complaints to the court. Rather than promoting marital disharmony, these courts found that interspousal claims would arise only in those instances where marital harmony had already eroded significantly. Alternative remedies of divorce were considered ineffective and the further alternative of instigating a criminal complaint against a spouse would expose the family difficulties to the world even more than would tort claims. Finally, these courts favoring abolition of the immunity found the threat of frivolous interspousal litigation to be insignificant. Today, nearly all states have abolished immunity either partially or entirely.[14]

2. *Introduction of No-fault Divorce.*

In determining whether tort claims should be joined in divorce actions, states must also consider the role of fault in their dissolution statutes. Since no-fault divorce was first introduced in California in 1970,[15] every state has enacted some form of no-fault divorce.[16] The premises advanced initially for no-fault divorce were primarily negative. That is, in most cases, fault-based

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12 HOMER H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 370-72 (2d ed. 1988).

13 *See generally* Carl Tobias, *Interspousal Tort Immunity in America,* 23 GA. L. REV. 359 (1989).

14 *See generally* Burns v. Burns, 518 So. 2d 1205, 1211-12 (Miss. 1988); Heino v. Harper, 759 P.2d 253, 254-55 (Ore. 1988)(citing cases). *See also* Beattie v. Beattie, 630 A.2d 1096 (Del. 1993)(abolishing doctrine in negligence cases); Waite v. Waite, 618 So. 2d 1360 (Fla. 1993).

15 Family Law Act, ch. 1608, 331-32, 1969 CAL. STAT. 3312 (1970).

16 Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath,* 56 U. CIN. L. REV. 1, 51-55 (1987).

divorces were based on fictional or contrived allegations and imposed unnecessary costs (both financial and emotional) on the parties.[17] However, no-fault divorce was also part of an overall trend in the law toward no-fault liability in a number of areas.[18] No-fault divorce reflected society's increasing view that divorce was an acceptable (in some instances, even positive) aspect of modern marriage[19] and that the government should not interfere in intimate life choices.[20] Approaches to no-fault divorce include states requiring mutual consent for divorce, and those providing irreconcilable differences or irretrievable breakdown as grounds for divorce.[21]

Despite the widespread acceptance of no-fault divorce, fault issues still may arise in dissolution actions. About half of the states simply added no-fault grounds to the traditional fault bases for dissolution.[22] In many jurisdictions where fault is eliminated as a grounds for divorce, it may be considered as a factor in property division or maintenance awards.[23] Even in states in which statutes eliminate fault considerations entirely from divorce actions, there are concerns that fault issues are addressed nonetheless and do influence the decisions.[24] The clear trend in all

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17 *See, e.g.*, Garcia v. Garcia, 233 P.2d 23 (Cal. Ct. App. 1951); Potter v. Potter, 133 So. 94 (Fla. 1931).

18 Twila L. Perry, *No-Fault Divorce and Liability Without Fault: Can Family Law Learn from Torts?*, 52 OHIO ST. L.J. 55, 61-62 (1991).

19 Carl Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1809 (1985).

20 These choices included marriage (*e.g.*, Zablocki v. Redhail, 434 U.S. 374 (1978) and Loving v. Virginia, 388 U.S. 1 (1967)) and child bearing (*see, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965)).

21 *See Freed & Walker, supra* note 7, at 514-16.

22 *Id.* The authors list 21 states as retaining fault grounds for divorce.

23 *Id.* at 532-33. According to the authors, 18 states have excluded marital fault entirely as a factor in these decisions, while the statutes of an additional 10 states are silent on the issue.

24 "Although divorce is supposed to be no-fault in Maine and most of the rest of the country, we can all name a case where the economic impact was clearly derived at by a judge who did make a determination of who was mostly to blame." Testimony of Rep. Dore before the Maine Judiciary Committee on March 29, 1989 on L.D. 656 (114th Legis. 1989) (quoted in Henriksen v. Cameron, 622 A.2d 1135, 1140 n.6 (Me. 1993).

jurisdictions however, has been to reduce the role of fault in divorce actions.[25]

3. *Combining No-fault Divorce With Fault-based Tort Claims.*

The history of the recent past has appeared to give fault a role in resolving marital disputes with one hand (by abolishing interspousal tort immunity), and take it away with the other (by instituting no-fault divorce). Before no-fault divorce reform, divorce actions alleged behaviors such as mental cruelty, physical cruelty, adultery, and abandonment.[26] If tort claims may or must be combined with divorce actions, these issues, which are largely outmoded as grounds for divorce, will be resurrected in the guise of tort claims for emotional distress, battery, breach of contract and the like.[27]

Whether to reintroduce fault issues into divorce actions in this way requires considering the interests of the public, the courts, and both the tortfeasor and injured spouses. One can identify a wide array of public interests in dissolution proceedings: from preserving marital harmony, to minimizing animosity in relationships despite divorce; from preserving the legal rights and autonomy of married individuals, to minimizing the state's intrusion into marriage. The relevant judicial interests are primarily in just and expedient resolution of disputes. Finally, the interests of both litigants in a fair determination of their dispute must be balanced. Each of the approaches to joinder of tort claims strikes a different balance among these competing interests.

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25 CLARK, *supra* note 12 at 255-56 (noting the trend toward "minimization, even the virtual elimination of fault in marital litigation").

26 CLARK, *supra* note 12, at 496-521.

27 Professor Clark noted the analogy to tort law inherent in the fault-based divorce system: "[t]he divorce decree . . . came to resemble a tort judgment, both being granted for the fault of the defendant causing harm to the plaintiff, and both being denied where the plaintiff either consented or was himself at fault." CLARK, *supra* note 12, at 409.

II. Approaches to Joinder of Torts in Dissolutions Actions

In deciding whether tort claims should be joined with dissolution actions, there are three basic approaches: to mandate joinder in all actions by a broad application of res judicata (claim preclusion)[28] principles; to prohibit joinder of tort claims entirely; or to allow but not require joinder. Of course, each of these approaches has several variations. Requiring joinder, for example, could be accomplished more indirectly through application of doctrines of estoppel or issue preclusion or through a case-by-case application of res judicata instead of through categorical rules. Likewise, prohibition of joinder might extend to only certain types of tort actions (personal injury torts, for example, but not economic or property torts). In assessing whether these variations are appropriate, however, one must first focus on the essential features of the three basic approaches and the interests sought to be advanced by each.

Claim preclusion doctrine "makes a final, valid judgment conclusive on the parties, and those in privity with them, as to all matters, fact and law, that were or should have been adjudicated in the proceeding."[29] If claim preclusion applies to divorce actions, a subsequent tort action would be barred even if it had never been raised or decided, if it should have been joined with the divorce action. As a matter of doctrinal choice, jurisdictions follow two major approaches in determining whether divorce judgments should preclude subsequent tort claims.

A growing number of jurisdictions follow the Restatement (Second) of Judgments and apply a transactional test to issues of claim preclusion.[30] That test requires joinder of "all rights of the plaintiff to remedies against the defendant with respect to all or

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28 The Supreme Court has noted the "varying and, at times, seemingly conflicting terminology" used in discussing the doctrine and its two branches. Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75, 77 n.1 (1984). This article will use the terms claim preclusion and issue preclusion in order to reduce this confusion.

29 Woods Exploration & Producing Co., Inc. v. Aluminum Co. of America, 438 F.2d 1286, 1312-13 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972) (quoting 1B Moore, FEDERAL PRACTICE para. 0.4051 at 624).

30 JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE 630-31 (2d. ed. 1993)(indicating that this approach represents the "modern trend").

any part of the transaction, or series of connected transactions, out of which the action arose."[31] The transactional test is generally considered to be a fairly liberal test, requiring joinder of a broad variety of claims with some common factual basis.[32] The other major approach to claim preclusion requires joinder only of those claims that involve the same primary rights.[33] Conceptually, the "same claim" test represents a narrower approach than the transaction test; however, in the application to joinder of tort claims in divorce actions, both tests may be applied so as to either require or prohibit joinder. The approach to claim preclusion does not dictate outcome in these cases; rather, differences in outcome depend on how broadly courts view the scope of marriage and on what policy effects they believe will flow from joinder rules.

A. *Jurisdictions Requiring Joinder of Tort Claims.*

A minority of jurisdictions give claim preclusion effect to divorce judgments, thus barring any subsequent action for an interspousal tort arising during the marriage.[34] There are two rationales for this approach. One is the basic principle of res judicata that combining transactionally related actions is more efficient and insures finality and repose. A second reason is fairness to the tortfeasor spouse. This rationale views raising tort claims after a divorce action as allowing an unjust redistribution of marital resources based on only one factor (tortious conduct), rather than the equitable, multi-factored distribution that occurs in dissolution proceedings.

Of the states that have adopted this approach, some have used broad language requiring joinder in all cases[35] and others have suggested a case-by-case application of res judicata or

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31 RESTATEMENT (SECOND) OF JUDGMENTS § 24(1) (1982).

32 FRIEDENTHAL, *supra* note 30, at 630-31.

33 *Id.* at 626-28. *See, e.g.*, Ex parte Harrington, 450 So. 2d 99 (Ala. 1984).

34 *See infra* notes 35-42.

35 Tevis v. Tevis, 400 A.2d 1189, 1196 (N.J. 1979) used very broad language applying the "single controversy" doctrine to dissolution actions and to tort claims between spouses, noting that intentional torts in particular ordinarily comprise elements of the divorce action. *Id.* at 1191.

waiver theory.[36] When courts have enunciated a very strict rule requiring joinder under all circumstances, they generally have based the rule on a very broad interpretation of what constitutes a "claim" or "transaction" for purposes of res judicata. For example, the Connecticut court has stated that "the parties and their marital relationship [are] the appropriate basic unit of litigation, not the different legal theories that can be placed on events that occurred during the marriage."[37] These courts place primary emphasis on the efficiency of combined actions. Thus, the Alabama court in an early joinder case, noted that "[w]ith the merger of law and equity, and given the liberal joinder allowed by the . . . 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."[38]

However, the experience of other jurisdictions following a strict rule of joinder indicates that exceptions to such broad language are inevitable. Courts have held that res judicata does not bar a subsequent action for torts committed during the pendency of the divorce[39] or for torts that were not discovered until after the divorce was final.[40] Likewise, actions for temporary restraining orders in domestic violence cases do not require joinder of tort claims.[41]

Some jurisdictions have resisted broad rules requiring joinder in all cases in favor of applying res judicata or waiver doctrines on a case-by-case basis. Under this approach, not all claims arising between spouses are automatically assumed to re-

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36 Weil v. Lammon, 503 So. 2d 830 (Ala. 1987); Partlow v. Kolupa, 504 N.Y.S.2d 870 (N.Y. App. Div. 1986); Kemp v. Kemp, 723 S.W.2d 138 (Tenn. App. Div. 1986).

37 Hutchings v. Hutchings, 1993 Conn. Super. LEXIS 498, at *10.

38 503 So. 2d at 832.

39 Brown v. Brown, 506 A.2d 29 (N.J. Super. Ct. App. Div. 1986) (creating exception to New Jersey rule requiring joinder of tort claims in divorce proceedings for those torts arising during the pendency of the divorce). *See also* Davis v. Davis, 442 A.2d 208 (N.J. Super. Ct. Ch. Div. 1981) (characterizing as dicta the language in *Tevis* that mandates joinder but suggesting that the dicta is probably consistent with New Jersey entire controversy doctrine).

40 J.Z.M. v. S.M.M., 545 A.2d 249 (N.J. Super. Ct. Law Div. 1988)(tort claim for transmission of herpes virus during marriage not barred where injured spouse did not discover infection until after divorce was final).

41 Lickfield v. Lickfield, 614 A.2d 1365 (N.J. Super. Ch. Div. 1992).

late to divorce actions. Rather, in an approach more akin to estoppel or issue preclusion,[42] these courts look at the allegations actually raised in the divorce action. When issues of fault are raised in the divorce proceeding, any tort actions arising from those issues must be joined.[43] For example, tort actions for fraud, deceit and misrepresentation actions would be barred by the consideration of these behaviors in the award of alimony. In the absence of fault allegations, however, there would be no absolute rule requiring joinder of tort claims to every divorce action.[44] In both Alabama and Tennessee, when an injured spouse was awarded, as part of a divorce decree, compensation specifically for certain injuries, the courts barred subsequent tort actions alleging these same injuries.[45] Moreover, even though fault issues were not raised formally in the pleadings, if these issues formed the basis of a negotiated divorce settlement, an injured spouse may have waived any subsequent tort action based on those issues.[46]

Whether applying a categorical rule or a more case-by-case analysis, courts requiring joinder of tort claims in divorce actions generally cite two rationales supporting their decisions: efficiency and fairness to the tortfeasor spouse. Joining tort claims in divorce actions is seen as promoting the general efficiency goals of

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42 Collateral estoppel or issue preclusion refers to the effect of a judgment in foreclosing relitigation of a matter that has been actually litigated and decided. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982).

43 Weil v. Lammon, 503 So. 2d 830 (Ala. 1987); Partlow v. Kolupa, 504 N.Y.S.2d 870 (N.Y. App. Div. 1986)(conversion action barred by consideration of issues in property division award); Kemp v. Kemp, 723 S.W.2d 138 (Tenn. Ct. App. 1986)(award of medical expenses and lost wages for physical injuries as part of divorce decree barred subsequent tort actions for assault and battery).

44 *See, e.g.*, Pearce v. Pearce, 1987 U.S. Dist. LEXIS 7951 (Ala. 1987) in which a wife's § 1983 federal civil rights claim against husband for false arrest was barred by prior divorce action in which the same behaviors formed a substantial part of the divorce litigation. The court, interpreting prior Alabama cases noted: "It may be possible that the law of Alabama does not preclude the litigation of all matters or issues which could have been presented in a divorce proceeding whether presented therein or not, but the law of Alabama clearly precludes the subsequent litigation of any matters or issues which actually were treated in a divorce proceeding, whether or not artfully pled and necessary to the outcome." *Id. See also* Coleman v. Coleman, 566 So. 2d 482 (Ala. 1990).

45 Weil v. Lammon, 503 So. 2d at 830; Kemp v. Kemp, 723 S.W.2d at 138.

46 566 So. 2d at 482.

modern procedure: that is, to "avoid the prolongation and fractionalization of litigation."[47] This efficiency is realized in conserving judicial resources as well as minimizing the overall costs of litigation between spouses.[48] However, perceived economic advantages of combining actions are based on a number of assumptions.

One assumption is that, in a significant majority of divorce actions, there is overlap of evidence between the divorce action and the tort action. In those jurisdictions in which fault may not be considered in dissolution proceedings, this assumption is wrong. Thus in states following the Uniform Dissolution of Marriage Act,[49] "[c]onsiderations of fault or misconduct would be appropriate only in the context of child custody proceedings and, even then, only when directly bearing on the issue of the best interests of the child the custody of whom is at issue."[50]

Some efficiency may be gained from combining actions to the extent that judges need not duplicate the work of familiarizing themselves with the basic marital facts. However, in no-fault jurisdictions only a generalized, minimum history of the marriage is necessary. Repeating this process results in only a small savings of judicial resources.

In jurisdictions in which fault may be considered, joinder is arguably more efficient. Yet, even here, efficiency would be furthered best if the evidence supporting considerations of fault in the divorce decree would be the same and would be presented in similar form as the evidence of fault in the tort action. The differences in the nature of these actions often preclude that parallelism. Even similar evidence may be presented or reviewed differently if the purposes of awards in tort and divorce actions are so divergent as to require substantially different perspectives

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47 Tevis v. Tevis, 400 A.2d 1189 (N.J. 1979).

48 Hutchings v. Hutchings, 1993 Conn. Super. LEXIS 498, at *13-*15.

49 UNIF. MARRIAGE & DIVORCE ACT § 308(a), 9A U.L.A. 347-48 (1987).

50 Simmons v. Simmons, 773 P.2d 602, 604 (Colo. Ct. App. 1988). *Cf.* McNevin v. McNevin, 447 N.E.2d 611, 618, n.7 (Ind. Ct. App. 1983)(dicta) (allowing personal injury torts to be joined with divorce action would undermine no fault system, since legislature did not include spousal abuse in criteria to be considered in fashioning divorce judgments).

on the evidence supporting these awards.[51] As several courts have noted:

> The purpose of a tort action is to redress a legal wrong in damages; that of a divorce action is to sever the marital relationship between the parties, and where appropriate, to fix the parties' respective rights and obligations with regard to alimony and support, and to divide the marital estate.[52]

Thus, the assumption of efficiency may be faulty even in jurisdictions in which fault is a factor in fashioning divorce decrees, since often fault is not the sole or even most significant factor.[53]

The issue of mandatory joinder is often confused with the issue of whether a tort claim should be allowed at all.[54] Often, in the instances in which mandatory joinder makes the most sense, there are equally good reasons for simply not allowing a tort action at all. For example, the elements of the tort of negligent infliction of emotional distress would likely present substantial overlap with many divorces. However, rather than require joinder of this tort, some jurisdictions have refused to abolish interspousal immunity as to this cause of action. As the Florida court noted, requiring or allowing negligent infliction of emotional distress actions to be joined with divorce actions would:

> turn every, or almost every, dissolution case into two cases — one to secure a dissolution from the chancellor, and another, to secure damages from a jury or trial judge, for the "wrongs" done by a tortious spouse. It is not parading the horrible so to put the question, nor to state that no Court could permit such a result.[55]

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51 *See, e.g.*, Heacock v. Heacock, 520 N.E.2d 151, 153 (Mass. 1988)(tort goals of compensation for damages differ significantly from purposes of alimony — provide economic support to a dependent spouse — or property division — reflect contributions to the marriage). *See also* Koepke v. Koepke, 556 N.E.2d 1198, 1199 (Ohio Ct. App. 1989).

52 Henriksen v. Cameron, 622 A.2d 1135, 1141 (Me. 1993) *citing* Heacock v. Heacock, 520 N.E.2d 151, 153 (Mass. 1988).

53 *See, e.g.*, Ex parte Harrington, 450 So. 2d 99 (Ala. 1984)(tort action for assault and battery did not have to be joined with divorce proceeding where divorce involved a wide range of fault and non-fault issues, of which the specific tortious behavior was only a part).

54 *See, e.g.*, Twyman v. Twyman, 855 S.W.2d 619 (Tex. 1993).

55 Mims v. Mims, 305 So. 2d 787, 789-90 (Fla. Dist. Ct. App. 1974). *But cf.*, Ruprecht v. Ruprecht, 599 A.2d 604, 606 (N.J. Super. Ct. Ch. Div. 1991): "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, sup-

The instance in which considerations of fault in property division or alimony would most likely overlap tort issues would be when the tortious behavior relates to economic or property torts in the marriage, such as fraud or conversion.[56] For torts such as this, absent other countervailing policies, required joinder may provide the fairest and most efficient solution.

However, the fact that these economic torts often overlap with divorce actions, does not justify broad rules of joinder for all torts, since most claims for interspousal tort are for personal, rather than economic, injury. The vast majority of interspousal torts are for assault and battery.[57] Moreover, of the growing number of claims for interspousal intentional infliction of emotional distress, most of these involve "physical abuse cases which result in severe emotional injury."[58]

Requiring joinder of these tort actions for physical or psychological abuse in the marriage will result in significant efficiency only if one assumes that the type and quantum of evidence of fault would be substantially the same and that an award of damages for these harms would equate with the property division and maintenance award decrees. However, these assumptions seem unlikely to be valid in most cases. Evidence of fault result-

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port, and equitable distribution should deny one spouse from suing the other in a divorce proceeding for emotional distress without physical injury."

56 *See, e.g.*, Partlow v. Kolupa, 504 N.Y.S.2d 870 (N.Y. App. 1986)(conversion action barred by consideration of issues in property division award). *See generally Freed & Walker, supra* note 7 at 532-33 (listing 18 states in which economic misconduct is specifically provided as a consideration in property division or maintenance awards).

57 Robert G. Spector, *All in the Family — Tort Litigation Comes of Age*, 28 FAM. L.Q. 363, 364 (1994)("represent[ing] over three-quarters of the total tort suits that have been brought for injuries that occurred while the parties were married."). Professor Spector does not identify how he derived this figure; however, this is consistent with my own count of the cases, based on the cases reported in Steven J. Gaynor, Annotation, *Joinder of Tort Actions Between Spouses With Proceeding For Dissolution of Marriage*, 4 A.L.R.5th 972 (1993).

58 Leonard Karp & Cheryl L. Karp, *Beyond the Normal Ebb and Flow . . . Infliction of Emotional Distress in Domestic Violence Cases*, 28 FAM. L.Q. 389, 398 (1994)("represent over 75 percent of the total tort suits filed."). Again, the authors do not identify the source of their figures; however, my own count of the reported cases identified through a LEXIS search corresponds with that noted. (Searching terms! spous! or inter-spous! w/10 tort!)

ing in personal injury in a divorce action, for example, would be taken evaluated with a broad range of other factors leading to the breakdown of the marriage. Issues of "duty" or "proximate causation" in tort actions, however, would require a more focussed and detailed examination of fault. Likewise, while property or maintenance awards may be adjusted for economic losses, equivalent to tort damages of medical expenses and lost earnings, they would be unlikely to compensate for psychic losses such as pain and suffering that are the major components of personal injury damages awards.

Even if one does assume substantial overlaps between tort and divorce actions that would provide efficiency in joinder, one must further assume that there are not countervailing inefficiencies. However, there may be significant costs in combining actions. Even with the merger of law and equity, divorce proceedings retain significant vestiges of their equitable and ecclesiastical roots. Discovery practice and the right to join third parties are significantly limited in the divorce procedures of most jurisdictions.[59] Tort judgments extinguish the court's jurisdiction and the damages awards are enforced by the parties; whereas divorce jurisdiction remains open for the court to enforce its orders through its contempt powers.

Perhaps the most significant procedural difference, however, is that tort litigants in most states have a right to a jury trial for their claims while divorce claims are tried before a judge only. Thus, in these jurisdictions, joinder accomplishes minimal efficiencies when tort actions must be separated to preserve the jury right.[60] In fact, the inefficiencies to the parties resulting from having the divorce action delayed until a jury resolves tort issues would likely be substantial as would the psychological costs of prolonging the uncertainty as to the status of the marriage.[61] While a court of equity could make interim determinations re-

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59 *See, e.g.*, Henriksen v. Cameron, 622 A.2d 1135, 1142 n.8 (Me. 1993); Stuart v. Stuart, 421 N.W.2d 505, 508 (Wis. 1988).

60 Lord v. Shaw, 665 P.2d 1288 (Utah 1983).

61 Such a result would obtain in any jurisdiction which applies the rule of Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 510-11 (1959)(to preserve the federal constitutional right to a jury, trial of legal issues must precede judicial determination of equitable claims in all but the most imperative circumstances). *See, e.g.*, Maharam v. Maharam, 575 N.Y.S.2d 846 (N.Y. App. Div. 1991) ("[w]hile the issues are to be tried jointly, the jury shall first render a verdict

garding support and custody, these are unlikely to be adequate substitutes for a final dissolution. Even in jurisdictions applying the equitable clean up doctrine, in which the judge may decide legal issues, this doctrine would apply only when the tort action is such a small but connected part of the divorce action as to be considered "ancillary and incidental" to the divorce.[62]

Other inefficiencies from the combination may result from the dissimilar roles that attorneys play in divorce actions and tort actions. In tort actions, an attorney's role is to provide zealous representation of the client in an overwhelmingly adversarial context.[63] Conversely, many courts and commentators posit that the nature of an attorney's role in divorce actions includes counseling the client regarding reconciliation[64] and proceeding in a conciliatory manner so as to promote "amicable settlement of disputes."[65] That the law of almost all states prohibits contingent fee arrangements in divorce actions is but one example of this view of the distinct role of attorneys in these cases.[66] This difference also illuminates the practical inefficiencies of combining actions. Even if a plaintiff were able to find an attorney willing to undertake both the divorce and tort actions,[67] separate fee agreements for the two aspects of the case would have to be fashioned if the tort claim were, as is common, to be funded through a con-

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upon plaintiff's tort claims, and the court shall thereafter determine the plaintiff's equitable distribution and support claims."). *Id.* at 847.

62 Davis v. Davis, 442 A.2d 208, 209 (N.J. Super. Ct. Ch. Div. 1981).

63 *See, e.g.*, MODEL CODE OF PROFESSIONAL RESPONSIBILITY, Canon 7 (1980).

64 Kenneth Kressel, et. al., *A Provisional Typology of Lawyer Attitudes Towards Divorce Practice: Gladiators, Advocates, Counselors and Journeymen, in* READINGS IN FAMILY LAW 122-23 (Frederica K. Lombard, ed., 1990)(identifying family law attorneys as falling into two classes: counselors, who are "oriented to psychological and interpersonal issues and disinclined towards the use of adversarial tactics" and advocates.) *See also* HOMER H. CLARK, DOMESTIC RELATIONS: CASES AND PROBLEMS 1113 (3rd ed. 1980)

65 Simmons v. Simmons, 773 P.2d 602, 604 (Colo. Ct. App. 1988), *cert. denied* May 15, 1989.

66 MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5 (1983).

67 *See, e.g.*, Paul Bohannan, *The Six Stations of Divorce*, in READINGS IN FAMILY LAW 130 (Frederica K. Lombard, Ed., 1990)(identifying a "rigid and fairly overt hierarchy" of practice fields into which attorneys divide themselves, and noting that divorce attorneys are at the bottom of that hierarchy.)

tingent fee arrangement.[68] If these differences in attorney roles reflect overall differences between divorce and tort actions, the efficiencies gained by combining actions will be more than offset by the costs of increased bitterness and hostility.[69]

Some courts have rejected this emphasis on retaining simplicity and conciliation in divorce proceedings as unrealistic. They take the position that divorce is a "wrenching all-consuming emotional experience."[70] Given this view that divorces in which tort claims would be present are inherently difficult and hostile, these jurisdictions conclude that the additional complexity and hostility caused by joining a tort claim is more than offset by the efficiencies of combining the actions and by the value of finality.

Finality is a basic value in res judicata doctrine. Thus, a second argument for requiring joinder of tort claims in divorce actions is that joinder will provide repose. This finality is important not only to the tortfeasor spouse but also to an injured spouse, their children, and to the legal system as a whole.[71] Particularly when children are involved, the overall personal and societal losses caused by divorce are lessened by a swift resolution of disputes so that the parties can begin to establish their new relationship as divorced parents.

The difficulty with this argument is that, while the legal dispute may comprise the whole of two individuals' interactions in most tort cases, in an ongoing relationship a legal divorce does not necessarily mean psychological repose for the parties, or even an end to legal disputes. Ongoing disputes over child custody and visitation rights or payment of maintenance awards are not uncommon; indeed, it is the assumption that such decrees require supervision that allows courts of equity to retain jurisdiction over their decrees.[72] Couples must divorce physically, emotionally, and socially, and the rates at which these various "divorces" occur do not necessarily coincide with the timing of a

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68 *Twyman*, 855 S.W.2d at 625, n.18.

69 Nash v. Overholser, 757 P.2d 1180, 1181 (Idaho 1988).

70 Hutchings v. Hutchings, 1993 Conn. Super. LEXIS 498, at *12.

71 Andrew Schepard, *Divorce, Interspousal Torts, and Res Judicata*, 24 FAM. L.Q. 127, 134 (1990).

72 DAN B. DOBBS, LAW OF REMEDIES 124 (2d ed. 1993).

legal divorce.[73] "Too often courthouse resolutions resolve only the legal conflicts, leaving unaddressed the underlying personal relationship and psychological disputes."[74] As a result, no legal doctrine will guarantee psychological repose.[75] To the extent any doctrines can provide legal repose, statutes of limitations and rules allowing sanctions for frivolous litigation are better tools for providing finality than is requiring joinder of tort claims.

A third argument in favor of required joinder is fairness to the tortfeasor spouse. This argument goes beyond repose and assumes that saving a tort action for after a divorce is an attempt to reopen a property-division settlement or judgment unfairly.[76] Justice Bistline of the Idaho Supreme Court expressed this concern:

> [If courts required joinder], the defendant would at the least have had fair warning as to what the plaintiff had in store for him. It seems that there was a certain amount of sandbagging, i.e., a pleasant divorce after an unpleasant marriage, but, lo! shortly thereafter followed the tort action which obviously had been part of the game plan.[77]

This position assumes that bringing a subsequent tort claim is a planned strategy in order to maximize economic return or to use superior economic resources to obtain favorable results through continual relitigation of issues.[78]

In the instances in which tort actions are brought by abused spouses, however, the reasons for delaying the action until after divorce may be based far more on psychological factors than economic strategizing. An abused spouse may fear — rightfully —

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73 Bohannan, *supra* note 67 at 4-10.

74 Ann L. Milne, *Family Law From a Family System Perspective — The Binary Equation*, 21 PAC. L.J. 933, 934 (1990).

75 *See, e.g.* Friedlander v. Kwartin, 1991 WL 155520 at *1 (Conn. Super. Ct. 1991):

> [I]t will be twenty years next month since these parties were divorced, and almost twenty-three years since the commencement of the dissolution action. . . . According to Mr. Friedlander, . . . twenty-eight separate lawsuits have been generated by the divorce of Henry and Claire Friedlander in 1971. Plaintiff . . . [has] been in court on approximately 375 motions and [has] expended nearly 6000 hours of his own time on these various cases.

76 Chiles v. Chiles, 779 S.W.2d 127 (Tex. Ct. App. 1989).

77 Nash v. Overholser, 757 P.2d at 1185 (Bistline, J. concurring).

78 Robert W. Page, *Family Courts: An Effective Judicial Approach to the Resolution of Family Disputes*, 44 JUV. & FAM. CT. J. 1, 17-18 (1993).

retaliation if she adds fuel to the fire of dissolution by raising claims of physical or emotional damage.[79] Moreover, at the stage of divorce, many abused spouses may not yet recognize that they have indeed been wrongfully harmed by their spouses. Psychological studies have demonstrated that abused spouses often feel as though they deserve their abuse or do not recognize much of the harm done to them as abusive.[80] For these individuals — who constitute the majority of interspousal tort plaintiffs[81] — concerns for economic game-playing are not an accurate basis for requiring joinder.

To the extent joinder does prevent unfair surprise, other less drastic rules could achieve this same result. The behavior of the plaintiff in *Cater v. Cater*[82] provides an excellent example of how notice and fair decision making can be accomplished when tort and divorce actions are kept separate. In that case, the plaintiff kept her tort claim scrupulously separate from the divorce action.[83] She gave notice to the chancery court that she would prosecute her tort action in circuit court; she specifically noted that damages evidence introduced in the divorce action was for fault purposes only; and she was granted an award of medical

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79 Studies of violence between couples indicate that the most dangerous time for an abused wife is when she attempts to leave her husband. *See* Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 65-71 (1991) (defining the problem of "separation assault".). Presumably, the delay and increased animosity resulting from a joined tort claim would only further escalate violence. Lori L. Yamauchi, *Note: Gussin v. Gussin: Appellate Courts Powerless to Mandate Uniform Starting Points in Divorce Proceedings*, 15 HAWAII L. REV. 423, 450 (1993).

80 Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801 (1993).

> Batterers are able to psychologically control their victims using a combination of isolating tactics and disinformation tactics. Victims are isolated from social networks and support systems. Psychological control over the victims can increase to the point where the abuser literally determines reality for his victim. This often prevents discovery of the violence while allowing the abuser to avoid being held accountable for his behavior.

Id. at 872 n.427.

81 *See supra* notes 57-58.

82 846 S.W.2d 173 (Ark. 1993).

83 846 S.W.2d at 175.

expenses as part of the property dissolution, made contingent on her not pursuing these damages in the civil case.[84]

Formally requiring the procedures followed voluntarily by Mrs. Cater would be one direct method for eliminating unfair surprise. Additionally, tortfeasor spouses could effectively prevent subsequent tort claims by negotiating release of claims clauses in settlement agreements.[85] Language in divorce settlements providing a waiver of any tort claims can effectively bar these claims if it is clear and freely negotiated.[86] Finally, the doctrines of estoppel in pais[87] or waiver[88] provide more narrowly tailored legal tools to prevent unfair surprise than a broad-based application of claim preclusion.[89]

B. *Jurisdictions That Prohibit Joinder.*

Given the difficulties with the justifications for required joinder, one might conclude that the best approach would be to prohibit joinder in all cases. Some jurisdictions have taken this approach.[90] However, prohibiting joinder raises a number of additional concerns.

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84 *Id.*

85 "Such broad general releases seem to be standard operating procedure in sophisticated matrimonial settlement agreements . . . ." Andrew Schepard, *Divorce, Interspousal Torts, and Res Judicata,* 24 FAM. L.Q. 127, 154 n.126 (1990). (referring to New York practice).

86 *See, e.g.*, Coleman v. Coleman, 566 So. 2d 482 (Ala. 1990); Overberg v. Lusby, 727 F. Supp. 1091 (E.D. Ky.), *aff'd* 921 F.2d 90 (6th Cir. 1990).

87 The elements of estoppel require:

> [F]irst, an admission, statement, or act inconsistent with the claim afterward asserted and sued on; [S]econd, action by the other party on the faith of such admission, statement, or act; and, [T]hird, injury to such other party, resulting from allowing the first party to contradict or repudiate such admission, statement, or act.

Waugh v. Williams, 119 S.W.2d 223 (Mo. 1938).

88 Waiver is the intentional relinquishment of a known right. BLACK'S LAW DICTIONARY (5th ed. 1979).

89 *See, e.g.*, McNevin v. McNevin, 444 N.E.2d 320 (Ind. Ct. App. 1983)(Separation agreement in which tort claim was not disclosed in list of "assets" created equitable estoppel against wife's later action.)

90 Heacock v. Heacock, 520 N.E.2d 151 (Mass. 1988); Simmons v. Simmons, 773 P.2d 602 (Colo. Ct. App. 1988); Ward v. Ward, 583 A.2d 577 (Vt. 1990). *See also*, Koepke v. Koepke, 556 N.E.2d 1198 (Ohio Ct. App. 1989); Lord v. Shaw, 665 P.2d 1288 (Utah 1983)(dicta); McNevin v. McNevin, 444

One argument for prohibiting joinder of torts in divorce actions is that such a division will allow for less hostile and less complicated divorce actions. This justification is similar to that used to support interspousal tort immunity. Many courts have rejected this argument as based on the assumption that allowing tort claims to be added to a divorce will substantially increase hostility in the underlying relationship. However, as one court noted:

> A family in which willful or intentional torts have caused injury and mental anguish to occur is not likely to be more disrupted by allowing a spouse to redress a grievance in the courts of equity. The usual occurrence is that when such physical attacks occur, the marriage is already in deep trouble. It is most difficult to perceive how allowing a suit for injury could disrupt the marriage even more.[91]

While requiring a plaintiff to join a tort claim to a divorce may likely increase the adversarial nature of the divorce,[92] it does not necessarily follow that prohibiting tort claims will decrease hostility in the action or the relationship. Indeed, the parties in any individual case are probably in the best position to know the effects of a tort claim on the emotional tenor of the proceedings. To the extent the legal system is concerned with hostility in divorce actions, it would be far better served to reform its overall approach to divorce procedure than to attempt to influence the interactions of the parties by restricting the types of actions to be brought.

In many jurisdictions prohibiting joinder, the courts base their decisions on jurisdictional rules.[93] Courts in some states note that the legislature has devised no-fault divorce statutes and that allowing joinder of tort claims would undermine legislative intent. Other jurisdictions base prohibiting joinder on the state's law of interspousal tort immunity, in which such immunity is abrogated only as to divorced individuals.[94] In his dissenting opin-

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N.E.2d 320 (Ind. Ct. App. 1983)(dicta); Wood v. Wood, 716 S.W.2d 491 (Mo. Ct. App. 1986)(dicta).

91 Stephenson v. Kolb, CV 83-AR-1895-S, published as Appendix A in Pearce v. Pearce, 1987 U.S. Dist. LEXIS 7951, p *27 (Ala. 1987).

92 Rather it seems that spouses may be more likely to simply waive the tort entirely in these cases. *See* text *infra* note 105.

93 *See, e.g.*, Aubert v. Aubert, 529 A.2d 909 (N.H. 1987); Noble v. Noble, 761 P.2d 1369 (Utah 1988).

94 *See, e.g.*, Myhre v. Erler, 575 So. 2d 519 (La. Ct. App. 1991).

ion in *Henriksen v. Cameron*,[95] Judge Glassman of the Maine Supreme Court noted his objections to allowing tort claims to be joined in divorce actions. He viewed the decision to allow a cause of action for intentional infliction of emotional distress as a legislative function. Noting the superior ability of legislatures to gather facts and public comment, he concluded that courts are not the proper body to make "what is essentially a political judgment." In these jurisdictions, then, the decision to prohibit joinder of tort claims is not based on policies of joinder but on views of institutional competence and judicial propriety.

As a policy matter, however, whether joinder should be prohibited entirely depends largely on the structure of divorce law in particular jurisdictions. In a jurisdiction in which fault is rarely, if ever, considered in dissolution actions, prohibiting joinder could maintain that aggressively no-fault position, streamlining dissolution actions. However, most jurisdictions do not maintain a pristine no-fault system.[96]

Thus, the decision to prohibit joinder must largely reflect a jurisdiction's determination of the direction in which it wants its divorce actions to proceed. For example, many jurisdictions have undertaken efforts to reduce the hostility and adversarial nature of divorce through unified family court structures and the increased use of alternative dispute resolution.[97] These courts would consolidate all family disputes — from juvenile civil or criminal actions to dissolution actions — into one court with a specially trained judge, heavily utilizing social services resources to provide consistent, comprehensive assistance to families in crisis.[98] These unified family courts generally require mediation of family disputes and counseling for family members. While conceptually interspousal tort claims appear to fit within the extensive jurisdiction of these courts, it may be difficult, if not impossible, to fit the inherently legal and adversarial nature of

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95 622 A.2d 1135 (Me. 1993).

96 *See supra* notes 8-9.

97 James H. Andrews, *Putting Family Matters Under One Roof*, CHRISTIAN SCI. MONITOR, Sept. 12, 1994, at 13. *See generally*, SANFORD N. KATZ & JEFFREY A. KUHN, RECOMMENDATIONS FOR A MODEL FAMILY COURT: A REPORT FROM THE NATIONAL FAMILY COURT SYMPOSIUM (1991); Page, *supra* note 78 (noting that 24 jurisdictions have established or are examining unified family courts systems).

98 Page, *supra* note 78, at 9.

tort actions into the equitable and conciliatory approach contemplated by these family court structures.[99] Thus, to the extent these integrated family court/alternative dispute resolution structures become an important part of the judicial system of any jurisdiction, allowing or requiring joinder of tort claims may be incompatible with these reforms.

Apart from jurisdictions attempting to differentiate divorce actions from the procedures and doctrines of civil actions, then, prohibiting joinder of tort actions has little policy justification.

C. *Jurisdictions Allowing but not Requiring Joinder.*

Many jurisdictions allow — even encourage — but do not require joinder of tort actions in divorce proceedings.[100] This approach seeks to secure the efficiencies of joinder and preserve injured spouses' property rights in their tort claims, while avoiding the difficulties of mandatory joinder.

This approach argues that efficiencies of joinder are better accomplished when joinder is permissive rather than mandatory. Joinder of relatively minor tort claims may be especially efficient, while tort claims that would overwhelm the divorce action may be better separated. The assumption underlying voluntary joinder is that the parties are in the best position to ascertain whether joinder of claims is efficient in their dispute. Plaintiffs who wish to consolidate actions in order to save attorneys fees and the time and expense of two lawsuits may do so. Defendants who are concerned with the complexity and delay of joinder may move to sever the cases.[101]

Some problems with mandatory joinder simply do not arise when joinder is voluntary. For example, the voluntary addition of a tort claims to a divorce action waives the right to a jury trial

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99 Thus, for example, Missouri's family court law requires transfer to civil court of any case in which tort claims arise unless the tort defendant waives his or her right to a jury trial in the tort claim. MO. REV. STAT. § 487.090(3) (Cum. Supp. 1993).

100 Abbott v. Williams, 888 F.2d 1550 (11th Cir. 1989)(applying Alabama law); Nelson v. Jones, 787 P.2d 1031 (Alaska 1990); Liles v. Liles, 711 S.W.2d 447 (Ark. 1986); Massey v. Massey, 807 S.W.2d 391 (Tex. Ct. App. 1991); Nash v. Overholser, 757 P.2d 1180 (Ida. 1988); Stuart v. Stuart, 421 N.W.2d 505 (Wis. 1988).

101 Mogford v. Mogford, 616 S.W.2d 936 (Tex. Ct. App. 1981).

whereas mandatory joinder rules would retain this right.[102] In jurisdictions applying the equitable clean up doctrine, the court has the discretion to determine whether it may decide the joined tort claim without benefit of a jury.[103] Preserving the right to a jury trial in these tort actions is especially important. Tort claims raised in the context of a marriage require application of difficult community standards. When is maltreatment of a spouse beyond the normal give and take of marriage? When does conduct within marriage rise to the level of "outrageous"? These are precisely the types of decisions requiring the sensitivities and experience of a jury of one's peers. Thus, allowing parties the choice as to whether and when to assert their claims, taking into account their right to a jury trial, seems to best balance this concern.

A fundamental value of civil litigation in the United States is plaintiff control of his or her claim.[104] Courts allowing joinder emphasize that an injured spouse has a property interest in the tort claim as well as a right to a jury trial on that claim. In order to best preserve those rights, these courts place the decision whether to join the tort action with the divorce in the hands of that spouse.

Preservation of these property rights is not merely an abstract nicety. Since most interspousal tort actions involve spousal abuse, the general rule should be fashioned to best protect these individuals from further abuse. As the Wisconsin Court of Appeals noted:

> If an abused spouse cannot commence a tort action subsequent to a divorce, the spouse will be forced to elect between three equally unacceptable alternatives: (1) Commence a tort 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. To enforce such an election would require an abused spouse to surrender

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102 Stuart v. Stuart, 421 N.W.2d 505 (Wis. 1988).

103 Liles v. Liles, 711 S.W.2d 447 (Ark. 1986).

104 Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) (standard civil litigation is "party initiated and party controlled.").

> both the constitutional right to a jury trial and valuable property rights to preserve his or her well-being. This the law will not do.[105]

The policy of providing a choice for plaintiffs best protects abused spouses from this Hobson's choice while allowing the efficiencies of consolidated claims.

Conclusion

The difficulties in choosing whether to give preclusive effect to divorce judgments are in large part due to a lack of empirical data. Even if a jurisdiction has firmly committed to policy choices favoring efficiency in judicial resolution of divorces, for example, choosing an appropriate rule to further that efficiency policy requires assumptions about litigant motives and behaviors. Are plaintiffs who bring tort actions attempting to "divide and conquer" their spouse through economic game playing to gain the largest possible piece of the marital pie? Or are plaintiffs merely seeking compensation, or perhaps moral or psychological vindication, for a pattern of outrageous abuse by their former spouses? A jurisdiction's choice regarding its joinder rules certainly must consider the structural factors that argue for or against a particular approach; however, the choice will be equally influenced by the assumptions regarding the nature of plaintiffs in these cases. To the extent empirical evidence exists, we know only that most interspousal tort claims are brought by women seeking recompense for physical and psychological abuse suffered during their marriages. Given this fact, absent significant structural factors in any jurisdiction's court system, the voluntary joinder approach appears to best serve justice to these individuals. Concerns of efficiency and fairness to defendants would be better met through rules specifically tailored to these ends.

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105 Stuart v. Stuart, 410 N.W.2d 632, 637-38 (Wis. Ct. App. 1987); *accord* Nash v. Overholser, 757 P.2d at 1182.