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**LENGTH:** 19225 words**COMMENT:** Tolling the Statute of Limitations for Battered Women After *Giovine v. Giovine*: Creating Equitable Exceptions for Victims of Domestic Abuse**NAME:** David E. Poplar**LEXISNEXIS SUMMARY:**

... On appeal from this ruling, the plaintiff alleged that her husband's conduct, which consisted of mental and physical abuse, caused her severe emotional and physical injury, and contended that the continuing damage she suffered constituted battered woman's syndrome (BWS). ... The Appellate Division of the New Jersey Superior Court is currently the highest court in the country to allow civil recovery for battered woman syndrome. ... The continuous tort doctrine is also examined, along with its application to domestic violence cases. ... Additionally, states have expanded the ways in which a victim can receive civil compensation for domestic abuse under the torts of assault, battery and intentional infliction of emotional distress. ... As in *Curtis v. Firth*, many victims of domestic abuse who have sought recovery in tort have introduced evidence of battered woman syndrome. ... Even though BWS is used to explain why the victim stays with her abuser and does not seek help, courts have been loath to consider BWS when applying the statute of limitations. ... A. *Giovine* and Domestic Abuse: Continuous Tort Doctrine ... Since it would be unrealistic to view each prescription as a separate and actionable injury, the court held that the cumulative effect of the treatment was a continuous tort. ... The difference between the *Giovine* BWS tort and intentional infliction of emotional distress lies in more than just the recognition of battered woman's syndrome as the object of recovery. ...

**TEXT:**

[\*161]

## I. Introduction

On July 1, 1994, Christina Giovine brought an action against her husband for dissolution of marriage and damages for his intentional tortious conduct during their twenty-four year marriage. <sup>n1</sup> She alleged a "continuous and unbroken wrong" beginning less than one year after their marriage and continuing throughout twenty-one years of the marriage. <sup>n2</sup> These claims were dismissed by the trial court based upon the statute of limitations. <sup>n3</sup>

On appeal from this ruling, the plaintiff alleged that her husband's conduct, which consisted of mental and physical abuse, caused her severe emotional and physical injury, <sup>n4</sup> and contended that the continuing damage she suffered constituted battered woman's syndrome (BWS). <sup>n5</sup> The Appellate Division of the New Jersey Superior Court ruled that this claim could form a "continuous tort" <sup>n6</sup> sufficient to toll the statute of limitations, provided she could show that she was suffering from the syndrome. <sup>n7</sup> The court required her to establish through medical, psychiatric or psychological expert testimony that her condition caused her to have an "inability to take any action to improve or alter the situation unilaterally." <sup>n8</sup> If she could establish this, her claims against her husband would not be barred by the statute of limitations, thus [\*162] enabling her to seek recovery for the many years of alleged domestic abuse that contributed to

her medical condition. <sup>n9</sup>

By invoking the continuous tort doctrine, the Appellate Division of the New Jersey Supreme Court held that battered woman's syndrome can be used to extend the statute of limitations in tort. This decision makes it possible for victims of domestic abuse to receive compensation for physical and mental cruelty suffered throughout an entire marriage, even though the abusive acts occurred more than two years prior to the commencement of the victim's cause of action. <sup>n10</sup> This is significant because the statute of limitations has traditionally posed the greatest obstacle to recovery for battered spouses who sue their abusers. <sup>n11</sup>

Battered woman's syndrome (BWS), a sub-category of post traumatic stress disorder, <sup>n12</sup> is the psychological condition resulting from a pattern of domestic abuse. <sup>n13</sup> BWS evidence was first used as a component of a defense in criminal trials and it is now used in many areas of civil litigation. The syndrome, which results from a long-term pattern of abuse, is characterized by low self esteem, passivity and creation of a learned helplessness. <sup>n14</sup> It explains why a woman remains in an abusive relationship over a period of time. <sup>n15</sup> It also helps explain why a woman in an abusive relationship may be unable to take any affirmative action, such as bringing civil or criminal charges against her abuser to remedy the situation. <sup>n16</sup>

The Appellate Division of the New Jersey Superior Court is currently the highest court in the country to allow civil recovery for battered woman syndrome. <sup>n17</sup> While many courts have been [\*163] reluctant to expand the statute of limitations, an increasing number of courts have been willing to create equitable exceptions in a variety of situations. The clearest example lies in the case of adult survivors of child sexual abuse who are unable to file their claims within the limitations period because they suffer from repressed memory syndrome. <sup>n18</sup> As the seriousness of the problem of domestic abuse receives more media attention and societal recognition, more courts will be persuaded to follow the example set by New Jersey.

This Comment discusses how BWS can be used to toll the statute of limitations in tort. Part II gives a brief history of spousal abuse and the state of the law prior to *Giovine*, discussing the traditional civil remedies used to compensate battered women and the problems faced by these plaintiffs. <sup>n19</sup> Part III provides an overview of battered woman's syndrome and the admissibility of BWS evidence at trial, tracing its application in both criminal and civil cases. The statute of limitations and equitable exceptions to the statute are examined in part IV. The continuous tort doctrine is also examined, along with its application to domestic violence cases. Another equitable exception, the discovery rule, is discussed as it has been used in repressed memory syndrome cases. A comparison is then made between battered woman's syndrome and repressed memory syndrome as both are used to toll the statute of limitations. Potential criticisms of the *Giovine* decision and its ramifications are then addressed. Finally, part V concludes that *Giovine* sets an important precedent that should be followed nationwide. [\*164]

## II. Background: History of Domestic Violence and the State of the Law Before *Giovine*

### A. Interspousal Tort Immunity

Domestic violence has traditionally been viewed as a private family matter between husband and wife, and the legal system has typically been reluctant to intrude into this sphere. <sup>n20</sup> Historically, a marriage was said to create one legal entity - the husband. <sup>n21</sup> Under English Common Law, a woman's legal identity was suspended during marriage, and her husband acquired all of her causes of action, along with her property interests. <sup>n22</sup> This prevented any tort action from being maintained between husband and wife. <sup>n23</sup> By 1875, however, every state had enacted Married Woman's Acts which granted women greater legal rights to own and protect their property interests. <sup>n24</sup> The majority of courts limited these acts to property interests while granting broad immunity for all other torts. <sup>n25</sup> This became known as the common law doctrine of interspousal immunity. <sup>n26</sup> Courts explained that the creation of this immunity was necessary to maintain the "peace and [\*165] harmony of the home" <sup>n27</sup> and to prevent "trivial actions for petty annoyances." <sup>n28</sup>

The doctrine reached a climax in 1910 with *Thompson v. Thompson*. <sup>n29</sup> In *Thompson*, the United States Supreme

Court narrowly interpreted a Married Woman's Act and prevented a wife from recovering against her husband in tort for assault and battery. <sup>n30</sup> This decision marked a turning point for the broad societal acceptance of interspousal tort immunity. Led by Justice Harlan's dissent in *Thompson*, <sup>n31</sup> the growing acceptance of women's legal status and the contemporary criticism of judicial legislation, many courts began to interpret Married Woman's Acts more liberally to encompass interspousal tort actions. <sup>n32</sup>

Albeit slowly, most courts have begun to recognize the seriousness and pervasiveness of domestic abuse. The prior justifications for immunity have been rejected in light of the judicial and societal recognition of women's rights and the goals of tort law. <sup>n33</sup> Today, most jurisdictions have abolished interspousal tort immunity either in whole or in part. <sup>n34</sup>

### B. Legislation Addressing Domestic Violence

The first federal attempts to address domestic violence were not proposed until the late 1970s. <sup>n35</sup> These measures, which focused on researching the problem and funding shelters, were ultimately defeated. <sup>n36</sup> Opponents viewed the proposed legislation as an inappropriate federal encroachment into private family [\*166] matters. <sup>n37</sup> It was not until 1984 that the first comprehensive federal measure, the Family Violence Prevention and Services Act, <sup>n38</sup> was passed. This act provided \$ 65 million to states for funding shelters and for research into domestic violence. <sup>n39</sup>

The Violence Against Women Act, <sup>n40</sup> part of the Violent Crime Control and Law Enforcement Act of 1994, <sup>n41</sup> is the most recent piece of federal legislation to address domestic abuse. The Act authorizes grants to state and local governments to institute and expand cooperative efforts between law enforcement, prosecutors and victim advocacy groups for the purpose of investigating and prosecuting domestic violence and child abuse; provide treatment and counseling to victims; and develop community education and prevention strategies directed at domestic violence and child abuse. <sup>n42</sup> The Act also creates a civil rights remedy for any violent crime motivated by gender, <sup>n43</sup> and provides for non- [\*167] profit organizations with expertise in domestic violence to train judges to deal more competently with domestic abuse and stalking cases. <sup>n44</sup>

Presently, each state has its own individual legislation to aid abuse victims and prevent domestic violence. <sup>n45</sup> Much of this legislation focuses on the issuance of restraining orders to prevent domestic abuse. <sup>n46</sup> Additionally, states have expanded the ways in which a victim can receive civil compensation for domestic abuse under the torts of assault, battery and intentional infliction of emotional distress. <sup>n47</sup> These remedies, however, have not gone very far in compensating victims for the effects of long-term spousal abuse.

### C. Traditional Civil Remedies

Every year in America, more women are abused by their husbands than get married. <sup>n48</sup> One study claimed that as many as one half of all couples experience at least one incidence of domestic violence. <sup>n49</sup> Social scientists estimate that as many as two million women are abused by their spouses each year. <sup>n50</sup> These are [\*168] alarming statistics, and they are even more startling considering the fact that the United States Department of Justice estimated that wife assault is underreported by a factor of at least ten to one. <sup>n51</sup>

Victims of domestic violence have utilized traditional civil remedies to seek compensation for the physical or psychological injuries caused by their abuse. When appropriate, plaintiffs can also be awarded punitive damages. The torts of assault, battery and intentional infliction of emotional distress have been the most effective means of compensating victims who have been subject to domestic abuse. <sup>n52</sup> A number of cases have awarded abuse victims large sums for such torts arising in the marital context.

For example, in *Curtis v. Firth*, <sup>n53</sup> the Supreme Court of Idaho affirmed a jury verdict for a plaintiff who sued her common-law husband for battery and intentional infliction of emotional distress. The plaintiff claimed she was subjected to a recurring pattern of "antagonism and violence" <sup>n54</sup> characterized by verbal and physical abuse during her ten-year intimate relationship with the defendant. <sup>n55</sup> The jury awarded her a total of \$ 1,050,000, which included \$

725,000 in punitive damages. <sup>n56</sup>

While Curtis remains one of the largest awards in this type of action, other courts have allowed recovery on similar claims. <sup>n57</sup> [\*169] The North Carolina Court of Appeals upheld an award of \$ 13,619.85 in compensatory and \$ 10,000 in punitive damages for "numerous assaults and batteries" inflicted upon a plaintiff by her husband during the last four months of their marriage. <sup>n58</sup> In a similar divorce action in Texas, the Court of Civil Appeals upheld a jury award of \$ 20,000 to a plaintiff for the "injuries and mental anguish" caused by her husband's abuse. <sup>n59</sup> Likewise, the Washington Court of Appeals reinstated a jury verdict for a plaintiff, awarding her \$ 59,130 for personal injuries and denying her husband's motion for a new trial. <sup>n60</sup>

While these awards would seem to present a hopeful picture for battered women seeking to sue their abusers, these decisions are relatively few and far between. There are still many obstacles for victims of domestic abuse to overcome in order to recover in tort. Social factors make it difficult for victims to take any affirmative action to change their situations. Even if they do attempt to hold their abusers accountable, they face many legal hurdles before they can even get to trial.

### 1. Societal Obstacles.

- There are many societal pressures that can prevent battered women from bringing charges against their abusers. <sup>n61</sup> Many battered women hold traditional views about a woman's role in the marital relationship and feel that they are beaten because they have not been a "good wife." <sup>n62</sup> Often these women fear societal condemnation for accusing their husbands of abuse. <sup>n63</sup> They may even feel guilty or ashamed that their mar- [\*170] riages are failing and blame themselves for such failure. <sup>n64</sup> Furthermore, they may perceive the battering as "normal," especially if the victims were raised in a violent household. <sup>n65</sup>

Additionally, many battered women remain in an abusive relationship because they are economically dependent upon their spouses, <sup>n66</sup> rendering them financially unable to leave, or they remain because they fear for the well-being of their children. <sup>n67</sup> Moreover, many women fear that leaving will only encourage their husbands to commit more severe violence. <sup>n68</sup> Further compounding the situation is the denial that an abusive relationship even exists. <sup>n69</sup>

A battered woman's hesitation to seek help may, as well, come from experience. Even when a battered woman is able to call the police for help, this often proves ineffective. Some officers assign domestic disturbance calls low priority or hesitate to respond out of a fear for their own safety. <sup>n70</sup> Only recently have most states allowed officers to arrest an abusive spouse where the officer himself has not seen any physical acts of aggression, but where probable cause existed to believe such acts had occurred. <sup>n71</sup> [\*171]

### 2. Legal Obstacles.

- In addition to the numerous social factors, there are also legal obstacles that a battered woman must overcome before she can recover in tort. While generally eliminated, interspousal tort immunity is still retained in some states for all claims arising out of a marriage. <sup>n72</sup> In other states, the immunity still exists for specific torts, such as claims of battery and intentional infliction of emotional distress. <sup>n73</sup>

Res judicata can likewise prevent a battered woman from suing her husband outside of marriage. In many jurisdictions, any claim arising out of a marriage must be joined with the dissolution proceeding or the claim is extinguished. For example, New Jersey courts apply the "entire controversy doctrine" to marital torts. <sup>n74</sup> In *Tevis v. Tevis*, <sup>n75</sup> the New Jersey Supreme Court reasoned that

since the circumstances of the marital tort and its potential for money damages were relevant in the matrimonial proceedings, the claim should not have been held in abeyance; it should, under the "single controversy" doctrine, have been presented in conjunction with that action 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. <sup>n76</sup>

While this doctrine is based on general conceptions of efficiency and fairness, it can operate against a woman who has been traumatized during an abusive marriage and is psychologically unable to bring claims against her abuser at such an early stage. <sup>n77</sup> [\*172]

By far, statutes of limitations pose the greatest barrier to a woman who sues her batterer. <sup>n78</sup> Even where a claim is not completely barred at the time of pleading, recovery is limited to the tortious acts committed within the statutory time limit. Therefore, a woman who has been subjected to a thirty-year marriage of physical and mental abuse may sue only for the incidents that would traditionally constitute a tort, and only for the acts that happened within the statutory time limit from the date of filing suit. The statute of limitations for all other claims will have run as soon as the plaintiff had the right to bring an action against her batterer. <sup>n79</sup>

As in *Curtis v. Firth*, <sup>n80</sup> many victims of domestic abuse who have sought recovery in tort have introduced evidence of battered woman syndrome. In this context, the jury is instructed through expert testimony on the dynamics of battering relationships to explain the victim's actions, such as why she would remain in an abusive relationship without attempting to escape. While a plaintiff has been unable to receive compensation for the syndrome itself, it can be used to help a jury understand the extent of her distress. BWS evidence is also frequently used to give credibility to the victim's behavior, which may be perceived as inconsistent with being a victim by those on the jury who are unfamiliar with abusive relationships. <sup>n81</sup>

Even with the assistance of BWS evidence, these civil remedies have not gone far enough to redress the problems of domestic [\*173] abuse. As the Law Division of the New Jersey Superior Court noted in *Cusseaux v. Pickett*, <sup>n82</sup>

as is the case with the domestic violence statute where existing criminal statutes were inadequate, so too are the civil laws of assault and battery insufficient to redress the harms suffered as a result of domestic violence. Domestic violence is a plague on our social structure and a frontal assault on the institution of the family. The battered-woman's syndrome is but one of the pernicious symptoms of that plague. <sup>n83</sup>

*Cusseaux*, the trial level predecessor to *Giovine v. Giovine*, <sup>n84</sup> held that battered woman's syndrome was an independent cause of action. <sup>n85</sup> In reaching its decision, the court focused on the nature of the syndrome and its psychological impact on the victim. <sup>n86</sup> To understand the significance of *Cusseaux* and *Giovine*, and why BWS can be used to surmount the statute of limitations in tort, a more in-depth examination of battered woman syndrome is necessary.

### III. Battered Woman Syndrome

#### A. The Syndrome

Battered Woman Syndrome is a subcategory of Post Traumatic Stress Disorder. <sup>n87</sup> It is used to describe "a series of common characteristics that appear in women who are abused physically and psychologically over an extended period of time by the dominant male figure in their lives." <sup>n88</sup> The syndrome is characterized by a pattern of behavior known

as the "cycle of violence." <sup>n89</sup> In order for a woman to be diagnosed as suffering from BWS, she must have gone through this cycle at least twice. <sup>n90</sup> [\*174]

The cycle of violence consists of three phases that can vary in both time and intensity. <sup>n91</sup> The first phase is known as the "tension-building stage." <sup>n92</sup> This period is characterized by repeated minor battering incidents, both physical and psychological, against the woman. <sup>n93</sup> As the tension builds, she becomes passive and tries to appease her partner, attempting to prevent him from exploding into violent behavior. <sup>n94</sup> The anticipation of this violent behavior causes severe psychological stress, often manifesting itself in physical symptoms. <sup>n95</sup>

The second phase consists of the "acute battering incident." <sup>n96</sup> This occurs when the tensions built up during the first phase are released. <sup>n97</sup> The abuser's rage takes over and neither partner is able to control the violent behavior. <sup>n98</sup> By the time composure is regained, the woman has usually been severely beaten. <sup>n99</sup>

The third phase is illustrated by "kindness and contrite loving behavior." <sup>n100</sup> Here, the abuser realizes that he has lost control and begs for forgiveness for his actions. <sup>n101</sup> He promises he will never use physical violence again, and vows to change his behavior. <sup>n102</sup> This change, however, is only temporary, and soon phase three becomes phase one and the cycle begins anew. <sup>n103</sup>

Understanding BWS and the cycle of violence can help to explain why women remain with their abusers. The myth that women will leave after the first instance of abuse, or conversely, that women enjoy being beaten if they stay, has often improperly impeached the credibility of women who remain in the relationship. <sup>n104</sup> The third phase of the cycle reinforces a woman's belief that her abuser can change his ways and she becomes convinced that they can achieve a normal loving relationship. <sup>n105</sup> She wants to believe him and his behavior during this phase reinforces her hope. <sup>n106</sup> Unfortunately, this usually turns out to be a false hope. The woman's ultimate realization that she cannot control her partner's behavior instills a feeling of helplessness and futility. <sup>n107</sup>

The theory of "learned helplessness" describes how a perceived feeling of helplessness can become reality. <sup>n108</sup> It explains why a battered woman feels that she cannot help herself and why she does not seek help from others. The constant physical and mental abuse "diminishes the woman's motivation to respond." <sup>n109</sup> The victim becomes passive and feels that nothing she does can influence her partner or her situation. <sup>n110</sup> She further believes that any attempt to leave will be futile. <sup>n111</sup> Consequently, she develops a belief in the strength and omnipotence of her abuser, <sup>n112</sup> a belief that is reinforced with each violent act. This leads to low-self esteem and deep depression. <sup>n113</sup> As a result, the victim falls into [\*176] a "state of psychological paralysis and becomes unable to take any action at all to improve or alter the situation." <sup>n114</sup>

Such inaction on the part of the battered woman has led to many misconceptions about why battered women remain in an abusive relationship. Therefore, introducing evidence of BWS is helpful to combat these popular myths, as both juries and judges may not understand the dynamic of a battering relationship. <sup>n115</sup> Like all expert testimony evidence, this must first satisfy the applicable rules for admissibility.

#### B. Admissibility of BWS Evidence at Trial

Evidence of BWS is introduced at trial through expert witness testimony. <sup>n116</sup> Generally, the standard for admissibility for expert testimony is determined under the *Dyas* <sup>n117</sup> test or the Federal Rules of Evidence. <sup>n118</sup> *Dyas* contained a three-prong test: (1) whether the subject matter of the expert's testimony is beyond the understanding of the average layman; (2) whether the expert is qualified to give an opinion that will aid the trier of fact; and (3) the state of the art or scientific knowledge permits the expert to give a reasonable opinion. <sup>n119</sup> To meet the third prong, also [\*177] known as the *Frye* <sup>n120</sup> or "general acceptance" test, <sup>n121</sup> the evidence sought to be admitted must be shown to have general acceptance within the relevant scientific community. <sup>n122</sup>

In contrast, Federal Rule of Evidence 702 eliminates the *Frye* test from the requirement for admissibility. Instead,

it permits expert testimony on a subject if the testimony will assist the trier of fact to understand the evidence. <sup>n123</sup> In 1993, The United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals* <sup>n124</sup> declared that the Frye test was superseded by Federal Rule 702. <sup>n125</sup> Many state courts, including New Jersey, have also replaced the Frye test with the more liberal standard articulated in Rule 702. <sup>n126</sup>

*State v. Kelly* <sup>n127</sup> was the first case to hold that BWS evidence could pass the more rigorous Frye test. In *Kelly*, the defendant was an abused wife who murdered her husband. <sup>n128</sup> BWS evidence was introduced to bolster her claim of self-defense by explaining her constant fear and why she remained in an abusive marriage. <sup>n129</sup> This evidence was introduced to show the reasonableness of her perception of immediate danger. <sup>n130</sup> Although not [\*178] making a conclusive ruling, the New Jersey Supreme Court stated that BWS had a sufficient scientific basis to produce reliable results. <sup>n131</sup> The majority of states that have dealt with this issue have since followed New Jersey's lead and have declared BWS to be admissible scientific evidence of a psychological or medical condition. <sup>n132</sup>

While not a defense in itself, BWS evidence is used to show the reasonableness of a woman's actions. <sup>n133</sup> This evidence cannot be introduced to show that a defendant was not responsible for her actions, but instead that it was reasonable for her to believe that she was in imminent danger. <sup>n134</sup> In a case factually analogous to [\*179] *Kelly*, Chief Justice Nix of the Pennsylvania Supreme Court stated in a concurring opinion that

traditional concepts of self-defense do not include this particular cycle of behavior [of the battering relationship], but instead focuses [sic] on the immediacy of the perceived harm rather than the systematic and cumulative damage inflicted on the abused individual. Tailoring self-defense claims to recognize the "battered woman syndrome" would thus be an effective means of finally providing legal protection for a woman forced to defend herself from further attack. <sup>n135</sup>

Battered woman's syndrome evidence has been extremely useful in supporting a claim of self-defense when a woman kills her batterer in retaliation. By introducing evidence of BWS to corroborate a self-defense claim, evidence of the batterer's history of violent conduct will be admitted. This evidence is further helpful to the defense, not only because it goes to show the defendant's knowledge of the prior violent character of her abuser, but also because it helps to buttress the assertion that he was actually the aggressor. <sup>n136</sup> [\*180]

Criminal prosecutors have also made extensive use of BWS evidence. It has been frequently used in rape trials to enhance the victim's credibility. For example, in *State v. Frost*, <sup>n137</sup> the defendant tried to show that the victim consented to sex because she voluntarily remained with the defendant for the rest of the day following the rape and did not immediately seek help. <sup>n138</sup> The state offered expert testimony on BWS to explain the victim's actions and to bolster her credibility. <sup>n139</sup> Over the defendant's objections, the court held that the evidence regarding BWS was admissible, stating:

It would seem anomalous to allow a battered woman, where she is a criminal defendant, to offer this type of expert testimony in order to help the jury understand the actions she took, yet deny her that same opportunity when she is the complaining witness and/or victim and her abuser is the criminal defendant. <sup>n140</sup>

While BWS evidence has been used effectively in assisting the credibility and defense of victims, it has not been employed on the same scale in civil cases. Even though BWS is used to explain why the victim stays with her abuser

and does not seek help, courts have been loath to consider BWS when applying the statute of limitations. The statute has thus barred many victims of domestic violence from seeking recovery for the injuries that were caused by the abuse.

[\*181]

#### IV. Discussion: Statute of Limitations

The underlying purpose behind statutes of limitations lies in the desire to settle disputes quickly and efficiently. <sup>n141</sup> By barring stale claims, courts encourage claims to be brought swiftly in order to "avoid the unfairness and injustice which stem from litigation based on distant circumstances and faded memories." <sup>n142</sup> The statute thus protects defendants who would be unable to properly defend themselves in situations where witnesses have disappeared and evidence has been lost with the passage of time.

The specific number of years in which a plaintiff has to file a lawsuit is mandated by statutes in most states, <sup>n143</sup> but the exact time at which a cause of action accrues is usually left to judicial determination. <sup>n144</sup> Usually, accrual is determined by the date of the last wrongful act. <sup>n145</sup> Once a cause of action is determined to have accrued, the statute begins to run. <sup>n146</sup>

The most obvious effect that statutes of limitation can have is the denial of access to the courts. <sup>n147</sup> Since mechanistic application of the statute can result in injustice and unnecessary harm to plaintiffs, courts and legislatures have been willing to create equitable exceptions to the statute. <sup>n148</sup> These exceptions toll the statute of limitations for a reasonable period of time under certain circumstances.

A plaintiff's insanity or duress can be used to toll the statute in some states. <sup>n149</sup> In New Jersey, for example, it is statutorily [\*182] mandated that the statute of limitations is tolled for a plaintiff who is insane at the time the cause of action accrues, <sup>n150</sup> and the statute begins to run when the plaintiff regains sanity. <sup>n151</sup> Some states, however, do not allow the statute to be tolled for any disability. <sup>n152</sup>

Yet, when a mental impairment makes it difficult or impossible to be aware of one's cause of action, a plaintiff can not be said to have "slept on [her] rights." <sup>n153</sup> Therefore, it would be manifestly unjust to apply the statute in these circumstances. Likewise, when a plaintiff is placed under such duress by the defendant that she feels unable to bring an action expeditiously, it would contravene public policy to punish the plaintiff for not doing what she perceived to be an impossible task. <sup>n154</sup> In this respect, a plaintiff's mental state is used to toll the statute. Courts are increasingly willing to toll the limitations period when rigid application would "'inflict obvious and unnecessary harm upon individual plaintiffs' without materially advancing the objectives they are designed to serve." <sup>n155</sup> It was this policy that prompted the Giovine court to create an equitable exception for battered woman's syndrome. [\*183]

##### A. Giovine and Domestic Abuse: Continuous Tort Doctrine

Since battered woman's syndrome has gained scientific acceptance, some women have used it to recover under traditional tort law. <sup>n156</sup> These claims, however, were predicated upon specific acts of tortious conduct that occurred within the statute of limitations. Despite the recognition of BWS as a medical condition, women have traditionally been unable to receive compensation for the condition itself.

It is in this regard that *Giovine v. Giovine* becomes so significant. It was the first case to hold that a plaintiff could recover for the syndrome itself. Consequently, the plaintiff was allowed to seek compensation for the years of abuse that contributed to her present medical condition. <sup>n157</sup> To prove that she was suffering from BWS, the plaintiff would be allowed to introduce the many instances of abuse which occurred from the beginning of the relationship. <sup>n158</sup> This abusive conduct would be likened to a "continuous tort," and the statute of limitations would be tolled until the last battering incident occurred. <sup>n159</sup>



Giovine has its roots in *Cusseaux v. Pickett*, the first civil case in New Jersey to recognize BWS. <sup>n160</sup> In *Cusseaux*, the plaintiff alleged that the defendant had committed numerous acts of "abuse and violence" against her during their ten-year relationship. <sup>n161</sup> The violence was so severe that she had to seek medical treatment on several occasions. <sup>n162</sup> The plaintiff claimed that she suffered [\*184] from the medical condition of battered woman's syndrome as a result of the defendant's physical and emotional abuse. <sup>n163</sup>

In denying the defendant's motion to dismiss, the trial court recognized BWS as an independent cause of action under New Jersey law. <sup>n164</sup> The court therefore created an equitable exception to the statute of limitations for victims of domestic abuse. As the court stated:

It would be contrary to the public policy of this State, not to mention cruel, to limit recovery to only those individual incidents of assault and battery for which the applicable statute of limitations has not yet run. The mate who is responsible for creating the condition suffered by the battered victim must be made to account for his actions - all of his actions. Failure to allow affirmative recovery under these circumstances would be tantamount to the courts condoning the continued abusive treatment of women in the domestic sphere. This the courts cannot and will never do. <sup>n165</sup>

On appeal, the plaintiff in *Giovine* argued that the trial court erred both by not following *Cusseaux* and by striking the claims based on domestic abuse that fell outside of the statute of limitations. <sup>n166</sup> The plaintiff claimed that the pattern of violence she [\*185] experienced constituted a continuous tort sufficient to toll the statute. <sup>n167</sup> The Appellate Division, while agreeing with *Cusseaux's* premise, held that BWS does not constitute a continuous tort in and of itself, but that it is the medical condition resulting from a pattern of abuse which constitutes the tort. <sup>n168</sup> The court declared that the plaintiff must show that the conduct leading to the condition of BWS must be considered the continuous tort. <sup>n169</sup> While this seems to have limited the *Cusseaux* decision, the *Giovine* court noted that its disagreement was predicated upon semantics. <sup>n170</sup>

As the dissent in *Giovine* correctly noted, the majority had created a new cause of action for BWS. <sup>n171</sup> If a woman seeks recovery for damages attributable to the syndrome, she will be permitted to introduce evidence of the defendant's prior abusive behavior. This evidence will support her claim and show that the defendant's conduct was sufficient to cause the plaintiff's condition. By allowing the plaintiff to recover for the history of violence under the name of the syndrome, the pattern of abuse will be necessarily considered a continuous tort. Because BWS, by its very nature, is the result of continuous and prolonged abuse, <sup>n172</sup> when the plaintiff receives compensation for the syndrome, she simultaneously receives compensation for the history of abuse that caused it. <sup>n173</sup> Taking the nature of the syndrome into consideration, a [\*186] holding that the conduct that caused the condition constitutes a continuous tort seems only logical.

#### 1. Continuous Tort Doctrine.

- A continuous tort is "one inflicted over a period of time; it involves wrongful conduct that is repeated until desisted ... A continuing tort sufficient to toll the statute of limitations is occasioned by continual unlawful acts, not by continual ill effects from an original violation." <sup>n174</sup> Thus, the cause of action for a continuous tort does not accrue until the tortious conduct ceases. <sup>n175</sup> This doctrine is usually applied where each contributing incident is insufficient to constitute an individual cause of action, but it has also been applied to a continuous pattern of illegal acts. <sup>n176</sup> Generally, it is the cumulative effect of the defendant's conduct that forms the basis of recovery. <sup>n177</sup>

The continuous tort doctrine has been applied to expand the statute of limitations in many different scenarios. <sup>n178</sup> In *Page v. United States*, <sup>n179</sup> an army veteran sued the Veterans Administration (VA) for injuries he suffered after receiving allegedly negligent medical treatment at a VA hospital. <sup>n180</sup> He claimed that he was wrongly prescribed

harmful addictive drugs without being properly monitored by the hospital, and that this caused him "severe physical and mental injury." <sup>n181</sup> Since it would be unrealistic to view each prescription as a separate and actionable injury, the court held that the cumulative effect of the treatment was a continuous [\*187] tort. <sup>n182</sup> Therefore, the cause of action against the VA hospital accrued when the plaintiff received his last prescription. <sup>n183</sup>

A continuous tort is not limited to a pattern of acts that would be insufficient, in and of themselves, to form separate causes of action. In *Landman v. Royster*, <sup>n184</sup> the conduct forming the continuous tort consisted of "six years of arbitrary, illegal and unjust treatment." <sup>n185</sup> The plaintiff, a prison inmate, was subjected to prolonged solitary confinement and constant abuses and degradations by prison officials in retaliation for assisting other inmates in filing legal petitions. <sup>n186</sup> The court found that he had suffered "severe psychic and physical injuries" from this pattern of treatment. <sup>n187</sup> Noting that each illegal incident contributed to the plaintiff's present medical condition, the court granted him relief on the cumulative effect of the illegal treatment. <sup>n188</sup> The court stated: "When injury is caused cumulatively by a continuing wrong, the statute of limitations begins to run when the wrongful action ceases." <sup>n189</sup> Thus, the plaintiff was not barred by the statute of limitations, and he received compensation for the acts of the prison guards that were inflicted beyond the statutory period, even though each incident may have been independently actionable.

Similarly, some of the defendant's acts constituting the continuous tort in *Giovine* may have been sufficient to form independent claims of action. <sup>n190</sup> This, however, was irrelevant to [\*188] the court's analysis; instead, the court focused on the cumulative effect of the treatment. Since the plaintiff sought recovery directly for the syndrome, the continuous tort could comprise all of the defendant's abusive acts that helped create her condition. <sup>n191</sup>

## 2. Domestic Violence.

- The allegation that a pattern of domestic abuse constitutes a continuous tort has been attempted in a few jurisdictions, although most of these attempts have met with little success. <sup>n192</sup> In *Laughlin v. Breaux*, <sup>n193</sup> the plaintiff alleged that she suffered from battered woman's syndrome as a result of her boyfriend's physical and mental abuse, and that this conduct formed a continuous tort. <sup>n194</sup> Admitting that all of the defendant's actions helped to form her BWS, the court nevertheless refused to find that the pattern of abuse constituted a continuous tort. <sup>n195</sup> The court also did not find that the plaintiff's condition rendered her unable to file suit within the statute of limitations. <sup>n196</sup>

A District of Columbia trial court was asked to recognize a separate independent tort of "spouse abuse" in *de la Croix de Lafayette*. <sup>n197</sup> The court refused to do so, holding that existing causes of action are sufficient to redress domestic abuse. <sup>n198</sup> Stressing the need for finality in the context of marital discord, <sup>n199</sup> [\*189] the court stated that "the decision to divorce or not should be made in an environment as free of extraneous financial and fault considerations as possible." <sup>n200</sup>

In *Curtis v. Firth*, <sup>n201</sup> the defendant's pattern of domestic abuse was found not to constitute a continuous tort in and of itself. However, the Supreme Court of Idaho held that the conduct underlying the plaintiff's claim of intentional infliction of emotional distress was a continuous tort. <sup>n202</sup> While the court allowed recovery, it did not go so far as to create a new cause of action for domestic abuse. <sup>n203</sup>

The reasoning used in *Curtis* is similar to that employed by the New Jersey Appellate Division in *Giovine*. In both cases, the court focused on the defendant's conduct and held that it formed a continuous tort. Since the abusive conduct was considered a continuous tort, the plaintiffs could receive compensation for their present medical conditions that resulted from the long-term mental and physical abuse. However, while it may appear that the plaintiff's recovery is the same whether it is pleaded as intentional infliction of emotional distress as in *Curtis*, or under the *Giovine* BWS tort, this is not the case. Recovery under the *Giovine* rationale goes much further in compensating the plaintiff for the entire pattern of abuse predating the injury.

The difference between the *Giovine* BWS tort and intentional infliction of emotional distress lies in more than just

the recognition of battered woman's syndrome as the object of recovery. Intentional infliction of emotional distress is a completely different cause of action and the method of recovery and objects of compensation are computed differently. A claim for intentional infliction of emotional distress must always be accompanied by some sort of physical injury, n204 except where the defendant's conduct was [\*190] extraordinarily outrageous. n205 Therefore, the claim of intentional infliction of emotional distress must be pleaded with, and in relation to, another intentional tort claim in the vast majority of instances. n206 It is this other intentional tort claim that must fall within the statute of limitations. Thus, if a plaintiff suffers from emotional distress based on a twenty year marriage of constant battering, she may claim intentional infliction of emotional distress only for those few batteries that occurred within the statute of limitations. Recovery for her condition would be allocated and apportioned only to those few batteries.

Furthermore, if the victim has a preexisting condition, such as BWS, she cannot recover for the aggravation of her condition under the tort of intentional infliction of emotional distress. The outrageousness of a defendant's conduct is judged against a reasonableness standard. n207 This means that numerous instances of abusive conduct that are not sufficiently "outrageous" by themselves but accumulate to cause severe emotional distress are not compensable. n208

In contrast, when a plaintiff sues under the Giovine rationale, she may recover for the present medical condition that is a result of the history of abuse suffered, including even those intentional torts that occurred outside the statute of limitations. This recovery will not be apportioned merely to the batteries that occurred within the limitations period, but for the entire history of abuse that contributed to the formation of the syndrome. Therefore, recovery [\*191] can be much greater under the Giovine BWS tort than under the tort of intentional infliction of emotional distress.

In addition, many jurisdictions do not even recognize the claim of intentional infliction of emotional distress under certain circumstances. n209 For example, in *Pickering v. Pickering*, n210 the Supreme Court of South Dakota held that the tort was unavailable when it was predicated on conduct that led to divorce. n211 Other jurisdictions that allow this cause of action require a much higher threshold in the context of marriage. For example, in *Hakkila v. Hakkila*, n212 a woman claimed intentional infliction of emotional distress for her husband's mental and physical abuses. n213 The court rejected the claim because the husband's actions did not meet the elevated standard of outrageousness appropriate for claims arising out of a marriage. n214

It is apparent that even if a plaintiff can state a valid claim under existing law, receiving even minimal compensation is far from a certainty. No matter what cause of action is asserted, the statute of limitations remains the single greatest bar to recovery, indiscriminately extinguishing any claim that falls outside of the applicable time period. Recognizing that a strict application of the statute impedes judicial access, many courts have created narrow exceptions to the limitations period. One of the most well-known examples can be seen in child sexual abuse cases where the victim psychologically repressed his or her memories of the abuse.

## B. Repressed Memory Syndrome: The Discovery Rule

### 1. Discovery Rule.

- The discovery rule, like the continuous tort doctrine, is an equitable exception to the statute of limitations. It is invoked to toll the statute until the plaintiff "discovers, or by an exercise of reasonable diligence and intelligence should have discovered that he may have a basis for an actionable claim." n215 This rule "eases the unconscionable result to innocent victims who [\*192] by exercising even the highest degree of care could not have discovered the cited wrong." n216

The rule was first recognized in New Jersey in 1961 in *Fernandi v. Strully* n217 as applied to foreign object medical malpractice actions. Since then, "subsequent decisions have gone much further and have acknowledged the relevance of the doctrine whenever equity and justice have seemed to call for its application." n218 In further expanding the rule, the New Jersey Supreme Court in *Lopez v. Swyer* n219 noted that courts applying the rule should balance the

unfairness to the plaintiff in denying access to the courts with the unfairness in requiring the defendant to defend against a stale claim. <sup>n220</sup>

This rule has been extended to cases where adult survivors of child sexual abuse have psychologically repressed the memories of their abuse. It is not until these victims undergo counseling that they become aware of the lost memories. Because they had not discovered that they had a cause of action until it was already barred, many courts use the discovery rule to allow victims the chance to sue their abusers for the mental distress caused by the abuse.

## 2. Repressed Memory Syndrome.

- Many victims of child sexual abuse repress memories of the abuse from their conscious [\*193] ness as part of a psychological coping mechanism. <sup>n221</sup> The memories are buried in an attempt to disassociate themselves from the traumatic event. <sup>n222</sup> The repression can have serious psychological effects that can last throughout adulthood. <sup>n223</sup> This phenomenon is known as repressed memory syndrome (RMS), and like BWS, it is a subcategory of Post Traumatic Stress Disorder. <sup>n224</sup>

The effects of post traumatic stress disorder explain why adult survivors of child sexual abuse do not readily seek treatment even after they discover that the abuse took place. <sup>n225</sup> Often, the [\*194] victims may blame themselves for the abuse, fear the consequences of public exposure, or think that they will not be believed. <sup>n226</sup> In addition, they may fear retaliation by their abusers. <sup>n227</sup> These reasons, which parallel many of the same reasons that prevent women suffering from BWS from seeking help, make it difficult, if not impossible, for child sexual abuse victims to file claims within the applicable statute of limitations.

The first case to consider the applicability of the discovery rule to child sexual abuse was *Tyson v. Tyson*. <sup>n228</sup> The plaintiff was between three and eleven years old when she was allegedly sexually abused by her father, <sup>n229</sup> but she claimed that she had completely repressed the memories of the abuse until she received psychological therapy at the age of twenty-six. <sup>n230</sup> Within the statutory time period of this discovery, she filed suit. <sup>n231</sup>

Relying on the policy behind the statute and the possible unfairness to the defendant, the Washington Supreme Court refused to toll the statute of limitations. <sup>n232</sup> The court stated that the discovery rule was not applicable to repressed memory syndrome cases because there was no objective evidence to support the plaintiff's claim of abuse. <sup>n233</sup> The state's statutory provisions that allowed child sexual abuse victims three years beyond the age of majority to sue their abusers were deemed to strike the proper balance between the plaintiff's right to bring an action and the prevention of spurious claims. <sup>n234</sup> [\*195]

As the *Tyson* dissent pointed out, the discovery rule is based upon notions of fundamental fairness, not empirical evidence. <sup>n235</sup> The dissent argued that the availability of objective evidence is but one factor to be considered in deciding whether or not to apply the discovery rule. <sup>n236</sup> Led by this dissenting opinion and popular criticism of the majority opinion, <sup>n237</sup> the Washington Legislature enacted legislation that overruled *Tyson* and mandated the application of the discovery rule to these type of cases. <sup>n238</sup> The legislature acknowledged that adult survivors of child sexual abuse "may repress the memory of the abuse or be unable to connect the abuse to any injury until after the statute of limitations has run." <sup>n239</sup>

Since *Tyson*, courts have become increasingly willing to allow plaintiffs to invoke the discovery rule in RMS cases. <sup>n240</sup> In *Johnson v. Johnson*, <sup>n241</sup> a case factually similar to *Tyson*, the plaintiff alleged that she repressed all memories of sexual abuse and was therefore unaware of the connection between her psychological injuries and the abuse. <sup>n242</sup> The court, applying the discovery rule, held that the plaintiff's cause of action accrued when she knew or should have known of her injury and that it was caused by the acts of another, and allowed her to proceed with her claim. <sup>n243</sup>

In Wisconsin, the Court of Appeals applied the discovery rule in a case in which the plaintiff knew of the sexual

abuse but was unable to make the connection between her psychological trauma and the abuse. <sup>n244</sup> The court stated that even if the victim had some doubts about the normalcy of her abuser's conduct, it was "because of [her abuser's] dominion and authority and her own [\*196] guilt, depression and dissociation, [that] she had no information to a reasonable probability of the nature of her injuries or the facts with respect to their cause." <sup>n245</sup>

Insanity and duress have also been used to toll the statute of limitations in RMS cases. In *Jones v. Jones*, <sup>n246</sup> the plaintiff claimed that her guilt, shame and the fear of disclosure, coupled with death threats and beatings by her father, caused her to suppress all memories of her incestuous relationship with him. <sup>n247</sup> She claimed that the statute was tolled by reason of her insanity, and additionally, that the coercive acts by her father caused her such duress that she was unable to file within the statutory time limit. <sup>n248</sup>

The Appellate Division of the New Jersey Superior Court held that the plaintiff's mental distress could constitute insanity that is sufficient to toll the statute of limitations. <sup>n249</sup> Commenting on the many recent studies conducted on child sexual abuse, the court noted the "disabling psychological impact" <sup>n250</sup> that incestuous sexual abuse can have, and the plausibility of plaintiff's claim that she had repressed her memories of the abuse. <sup>n251</sup> Regarding her allegations of duress, the court stated that despite the nonexistence of a statutory exception for duress, "a prospective defendant's coercive acts and threats may rise to such a level of duress as to deprive the plaintiff of his freedom of will and thereby toll the statute of limitations." <sup>n252</sup>

It is evident that courts have become willing to toll the statute of limitations in situations where plaintiffs are psychologically unable to file expeditiously. Whether invoking existing doctrines or creating equitable exceptions, courts are willing to toll the statute where strict application would be manifestly unjust. In this context, the disabling effects of post traumatic stress disorder show why child sexual abuse victims are incapable, through no fault of their own, to take action to help themselves. This same reasoning [\*197] applies to victims of domestic violence to explain why they are unable to bring timely claims against their abusers.

### C. Comparing BWS to RMS: Tolling the Statute of Limitations for Post Traumatic Stress Disorder

Courts that have tolled the statute of limitations for plaintiffs suffering from RMS have employed similar reasoning to the *Giovine* court's rationale behind creating a new cause of action for BWS. This is not surprising because both BWS and RMS are subcategories of the same medical condition - post traumatic stress disorder. <sup>n253</sup> This psychological condition is used to explain why these plaintiffs are unable to assert timely claims against their abusers.

Both victims of child sexual abuse and of spousal abuse are subjected to a pattern of violence that can traumatize them into helplessness. Common characteristics of people suffering from RMS or BWS include low self-worth, distrust of others and the feeling that nothing they do can influence their situation. <sup>n254</sup> Many victims perceive their abuse as normal, or they feel they are responsible for the abuse and try to keep it secret. <sup>n255</sup> They consequently have a difficult time seeking help and are left to deal with their emotional problems alone. <sup>n256</sup> This is especially true for children who have not experienced any other kind of treatment and women who have grown up in violent households. <sup>n257</sup> When their abusers impose secrecy upon them, often coupled with threats of violence, they can become "trapped by their own fear." <sup>n258</sup> They consequently internalize their feelings which can lead to other psychosomatic physical injuries. <sup>n259</sup>

Societal factors also help to explain why these victims do not bring charges against their abusers within the statute of limitations. Fear that their allegations will not be believed, a sense of humilia- [\*198] tion and shame, <sup>n260</sup> and a dependency on their abusers, both economical and psychological, all lead to another level of subjugation and control over the victims. This further reinforces their feelings of helplessness and futility, and explains why they do not take affirmative action to improve their situations.

The means by which the statute is tolled is articulated differently in each case, but they are essentially the same. In each case the court is faced with a plaintiff who has failed to file a claim within the statute of limitations. The court then

creates an equitable exception to toll the statute in the interest of fundamental fairness. There has been a definite trend to create such exceptions for adult survivors of child sexual abuse who suffer from the effects of post-traumatic stress disorder. It must follow that battered women who suffer from the same condition as a result of a similar pattern of abuse should be granted the same protection under the law that has been afforded to child sexual abuse victims.

The law has already recognized the devastating effects of child sexual abuse and has heeded the call to protect its victims. Similarly, the problems of domestic violence have been brought to the surface, as seen by the enactment of various criminal and quasi-criminal anti-abuse laws. <sup>n261</sup> The next logical step in helping these victims is civil remuneration. It is time that the law act on behalf of battered women in the same way it has for adult survivors of child sexual abuse.

#### D. Potential Criticisms and the Viability of the Giovine BWS Tort

As with any new cause of action, there will be criticisms. Concerns will arise that a "flood of litigation" <sup>n262</sup> will result from the expansion of existing law. Critics will caution that the number of lawsuits will increase as this new tort becomes used as a weapon in hostile divorce proceedings, rather than a means by which to compensate serious harm. These opponents may further contend that this new tort will not serve its intended purpose, but will create an opportunity for a plethora of frivolous claims.

The "floodgates" criticism is largely unsubstantiated. When courts first began to recognize the claim of intentional infliction of [\*199] emotional distress, the same concerns were raised. <sup>n263</sup> Those fears proved illusory. The plaintiff's heavy burden in proving outrageous conduct was made sufficiently high to discourage meritless claims. <sup>n264</sup> The very fact that most claims for intentional infliction of emotional distress do not succeed shows that this has been an effective means of stemming frivolous litigation. <sup>n265</sup>

Similarly, tolling of the statute of limitations for BWS does not translate into instant recovery. It merely gives victims of domestic abuse their day in court. They must still establish pretrial that they are suffering from BWS and that the syndrome was the reason they were unable to file within the statutory time limit. <sup>n266</sup> The trial judge then has the ultimate discretion to decide if tolling the statute and allowing the plaintiff to proceed with her cause of action is warranted under the circumstances. <sup>n267</sup> These limitations are sufficient to filter any meritless claims out of the system.

Furthermore, the mere possibility of increased litigation is not a valid reason to preclude a viable cause of action. If the new cause of action allows many more people to receive compensation for their injuries, it has served its purpose, not thwarted the system. "It is the business of the law 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." <sup>n268</sup>

Another potential criticism of the BWS tort is that it conflicts with the underlying policy behind statutes of limitations. Barring claims outside of the limitations period ensures that the defendant will not be unfairly prejudiced by having to defend against a stale claim. Consequently, it may be said that tolling the statute of limitations for BWS eliminates this protection. A defendant would [\*200] be expected to account for each incident that caused the plaintiff's condition, no matter how long ago it allegedly occurred.

While tolling the statute of limitations for BWS could have a prejudicial effect on the defendant, it is balanced by the increased difficulty placed on the plaintiff. The plaintiff must always prove her case. Meeting this burden is much harder when the allegations refer to incidents that have occurred many years prior to the litigation. Moreover, such evidence may be viewed with more skepticism by both the judge and the jury because the potential for inaccuracy is increased as the evidence becomes older.

Taking this into consideration, it would not be unfair to toll the statute of limitations under these circumstances. The policy behind barring old claims is grounded in fairness to the parties. Where applying the statute would contravene

this policy, courts have a duty to create remedies. This is precisely why courts have developed equitable exceptions to the statute of limitations. It would therefore be manifestly unjust to bar the claims of a plaintiff who suffers from BWS when she can show that she was unable to file expeditiously because of her condition.

Finally, it may be said that the Giovine BWS tort goes too far in its attempt to remedy the problems of domestic abuse. Critics will contend that existing causes of action are adequate to compensate injuries arising out of a marriage. A woman who alleges a claim of battery may, if successful, recover for medical expenses, lost wages and pain and suffering, which would include "the psychological sequelae of any act of battering."<sup>n269</sup> Furthermore, the possibility exists that creating liability for BWS would allow the plaintiff to recover twice: once for the individual batteries, and once for the cumulative effect of the batteries under the guise of the syndrome. This double-recovery would have the effect of punishing the defendant rather than compensating the plaintiff.

Unfortunately, the existing civil remedies available to victims of domestic violence have been wholly ineffective in compensating the types of injuries arising from long-term abuse. No matter what types of damages are awarded, they can only be apportioned to the tortious acts that occurred within the statute of limitations. This type of recovery totally ignores the problem of long-term spousal abuse and the resulting psychological condition that perpetuates it. The plaintiff must be able to receive compensation for all of the [\*201] batteries that were committed during the abusive relationship. Allowing recovery for the present medical condition of battered woman's syndrome, which is the result of the history of abuse, is the only way to achieve fair compensation.

Furthermore, the concerns that a plaintiff would receive an excessive award are unfounded. With precise jury instructions under the law and careful evaluations of the verdicts, the chances of a plaintiff receiving an unreasonably large sum are remote. Moreover, even in the unlikely event that this should occur, these verdicts are subject to review. This ensures that the plaintiff can recover no more than is warranted by the factual findings.

## V. Conclusion

Formulating the condition of battered woman's syndrome into a recoverable cause of action underscores the seriousness of domestic violence and finally provides victims of domestic abuse the ability to seek complete recovery for long-term domestic abuse. This sends a message to society that spousal abuse will no longer be tolerated by the law, and will encourage more victims to file charges against their abusers, knowing that their attempts to hold their abusers liable will not be futile. Giving credence to BWS will increase the awareness and understanding of the problem and help to change the societal attitudes that have condoned spousal abuse.

For too long the problem of domestic violence has been ignored by the law. Allowing recovery for the syndrome is the next logical step in addressing the problem. Just as New Jersey set a national precedent by declaring battered woman's syndrome evidence admissible in a criminal trial, so should it lead the country in allowing civil recovery for battered woman's syndrome.

### Legal Topics:

For related research and practice materials, see the following legal topics:  
 Criminal Law & Procedure  
 Criminal Offenses  
 Crimes Against Persons  
 Domestic Offenses  
 General Overview  
 Criminal Law & Procedure  
 Defenses  
 Battered Person Syndrome  
 Torts  
 Procedure  
 Statutes of Limitations  
 Accrual of Actions  
 Continuous Torts

### FOOTNOTES:

n1. *Giovine v. Giovine*, 663 A.2d 109 (N.J. Super. Ct. App. Div. 1995).

n2. *Id.* at 112.

n3. *Id.*

n4. *Id.* at 118.

n5. *Id.* at 113.

n6. For a discussion of the continuous tort doctrine, see *infra* part IV.A.1.

n7. *Giovine*, 663 A.2d at 114.

n8. *Id.* (quoting *Cusseaux v. Pickett*, 652 A.2d 789 (N.J. Super. Ct. Law Div. 1994)).

n9. *Id.* at 123-24.

n10. The applicable statute of limitations for "an injury to [a] person caused by [a] wrongful act" in New Jersey is two years. N.J. Stat. Ann. 2A:14-2 (West 1987).

n11. For a detailed discussion of statutes of limitation, see *infra* part IV.

n12. Rhonda L. Kohler, Comment, *The Battered Woman and Tort Law: A New Approach to Fighting Domestic Violence*, 25 *Loy. L.A. L. Rev.* 1025, 1034 (1992). Post traumatic stress disorder refers to the psychological impact caused by traumatic events. James Wilson Harshaw III, Comment, *Not Enough Time?: The Constitutionality of Short Statutes of Limitations for Civil Child Sexual Abuse Litigation*, 50 *Ohio*



St. L.J. 753, 756 (1989).

n13. *State v. Kelly*, 478 A.2d 364, 371-72 (N.J. 1984). For a detailed discussion of battered woman's syndrome, see *infra* part III.A.

n14. See *infra* part III.A.

n15. *Id.*

n16. *Id.*

n17. Thom Weidlich, "Battered Woman' Tort Gains, Nat'l L.J., Aug. 28, 1995, at A6. In June 1994, a Washington Superior Court recognized a tort of "domestic violence." *Jewett v. Jewett*, No. 93-20-01846-5 (Wash. Super. Ct., Spokane Co. 1994).

n18. See *infra* part IV.B.

n19. As the vast majority of domestic abuse is committed by men, this Comment refers to the plaintiffs in domestic abuse cases by the female pronoun. "In 95% of all domestic violence assaults, crimes are committed by men against women." U.S. Dep't of Justice, Bureau of Justice Statistics, Report To The Nation on Crime And Justice (1983). This is in no way intended to undermine or ignore the seriousness of domestic abuse when the victim is male.

n20. For example, the English common law "Rule of Thumb" permitting a man to beat his wife with a stick no thicker than his thumb was not eliminated until the end of the nineteenth century. R. Barri Flowers, *The Victimization And Exploitation Of Women And Children: A Study Of Physical, Mental And Sexual Maltreatment In The United States* 157 (1994).

n21. William Blackstone, *Commentaries* \*433-45. "The husband and wife are one person in the law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband." *Id.* at \*442. The notion of husband and wife becoming one legal entity is based upon the Biblical notion that two people become "one flesh" upon marriage. Carl Tobias, *Interspousal Tort Immunity In America*, 23 Ga. L. Rev. 359, 363-64 (1989).

As early as the Roman Era, a woman was viewed as the property of her husband and he could beat her for nearly any reason. See R. E. Dobash & R. Dobash, *Violence Against Wives* 34-36 (1979). For example, any offense that tarnished her husband's honor and reputation was seen as a legitimate legal justification for a beating. *Id.* at 36-37.

n22. Restatement (Second) Of Torts 895F cmt. b (1979).

n23. Id.

n24. Id. at cmt. c. See Douglas D. Scherer, Tort Remedies for Victims of Domestic Abuse, 43 S.C. L. Rev. 543, 561-63 (1992).

n25. Restatement (Second) Of Torts 895F cmt. c. Neither spouse could sue the other for torts such as "assault and battery, false imprisonment, defamation, malicious prosecution or personal injuries resulting from negligence." Id.

n26. Id. at cmt. c. See Tobias, *supra* note 21, at 383-92 (explaining the incorporation of interspousal immunity into the common law).

n27. Restatement (Second) Of Torts, 895F cmt. d. (1979).

n28. Id.

n29. 218 U.S. 611 (1910).

n30. Id. The Court reasoned that allowing tort claims between husband and wife would

open the doors of the courts to accusations of all sorts of one spouse against the other, and bring into public notice complaints for assault, slander and libel, and alleged injuries to property of the one or the other, by husband against wife or wife against husband. Whether the exercise of such jurisdiction would be promotive of the public welfare and domestic harmony is at least a debatable question.

Id. at 617-18.

n31. Id. at 619-24 (Harlan, J. dissenting).

n32. Tobias, *supra* note 21, at 409-22.

n33. *Id.* at 467-72.

n34. Scherer, *supra* note 24, at 562-63. See also Wayne F. Foster, Annotation, Modern Status of Interspousal Tort Immunity in Personal Injury and Wrongful Death Actions, 92 A.L.R.3d 901 (1979).

n35. See 34 Cong. Q. Almanac 580 (1978).

n36. See 36 Cong. Q. Almanac 443 (1980).

n37. Developments in the Law: Legal Responses to Domestic Violence: New State and Federal Responses to Domestic Violence, 106 Harv. L. Rev. 1528, 1543 (1993) [hereinafter Legal Responses]. Many conservative groups, including the Moral Majority, felt the legislation was an attack on the family and that it promoted radical feminist objectives. Opponents also considered it to be an undue interference into the realm traditionally occupied by state and local governments. *Id.* Proponents of the legislation, however, argued that there was currently insufficient state and local funding to deal with domestic abuse victims. Bernadette Dunn Sewell, Note, History of Abuse: Societal, Judicial, and Legislative Responses to the Problem of Wife Beating, 23 Suffolk U. L. Rev. 983, 998 n.110 (1989).

n38. 42 U.S.C. 10401-10418 (1988).

n39. Legal Responses, *supra* note 37, at 1543. The Act, like the 1970s legislation, was designed primarily to aid the abuse victims, rather than to prevent the abuse itself. *Id.*

n40. 42 U.S.C. 13931-14040 (1994).

n41. 42 U.S.C. 13701-14223 (1994).

n42. 42 U.S.C. 13971(a) (1994).

n43. 42 U.S.C. 13981(c) (1994). This section of the Violence Against Women Act has been the most controversial. The first action brought under this section was dismissed by Judge Jackson L. Kiser of the United States District Court for the Western District of Virginia, who held 13981 to be unconstitutional. *Brzonkala v. Virginia Polytechnic & State Univ.*, 935 F. Supp. 779 (W.D. Va. 1996). Following *United States v. Lopez*, 115 S. Ct. 1624 (1995), he concluded that 13981 was an impermissible exercise of Congressional power under either the Commerce Clause or the Fourteenth Amendment. *Brzonkala*, 935 F. Supp. 779. Judge Kiser reasoned that

without a doubt violence against women is a pervasive and troublesome aspect of American life which needs thoughtful attention. But Congress is not invested with the authority to cure all of the ills of mankind. Its authority to act is limited by the Constitution, and the constitutional limits must be respected if our federal system is to survive.

*Id.* at 801. Interestingly, in a similar case decided five weeks earlier, Judge Janet Bond Arterton of the United States District Court for the District of Connecticut held that 13981 was constitutional. *Doe v. Doe*, 929 F. Supp. 608, 610 (D. Conn. 1996) (holding that "[a] rational basis exists for concluding that gender-based violence, which the [Violence Against Women Act's] Civil Rights Remedy regulates, is a national problem with substantial impact on interstate commerce and thus is a proper exercise of congressional power under the Commerce Clause.").

n44. 42 U.S.C. 14036 (1994).

n45. Sewell, *supra* note 37, at 1002.

n46. Restraining orders, however, are often less than effective because they are often difficult to enforce and can provoke a violent spouse to retaliate. See Kohler, *supra* note 12, at 1033. Traditional police responses have also been criticized for their ineffectiveness. See Sewell, *supra* note 37, at 1006-08. See also Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 Wash. L. Rev. 267, 298-302 (1985) (describing the traditional justifications for police nonintervention in domestic affairs). Some states have enacted mandatory arrest policies for domestic abuse situations. Nancy James, *Domestic Violence: A History of Arrest Policies and a Survey of Modern Laws*, 28 Fam. L.Q. 509, 513 (1994). The effectiveness of mandatory arrest policies, however, has been somewhat controversial. See Joan Zorza, *Mandatory Arrest for Domestic Violence*, A.B.A. Crim. Just., Fall 1995 at 2 (discussing the contemporary studies on various police responses to domestic violence).

n47. See generally Scherer, *supra* note 24 (discussing the remedies available under traditional tort causes of action).

n48. Joan Zorza, *Women Battering: High Costs and the State of the Law*, 28 Clearinghouse Rev. 383, 386 (1994).

n49. Roger Langley & Richard Levy, *Wife Beating: The Silent Crisis*, 11-15 (1977).

n50. Flowers, *supra* note 20, at 158 (1994). In a 1985 survey, Richard Gelles, a sociologist at the University of Rhode Island, found that of the 60 million couples living in the United States, about 3.4 percent experience "severely abusive" incidents of "kicking, choking, or threatening with a knife or gun." Rachel L. Jones, In Senate and Court, Setbacks for Efforts Against Spousal Abuse, *Phila. Inquirer*, Aug. 17, 1996, at A3.

n51. Federal Bureau of Investigation, U.S. Dep't of Justice, *Crime in the U.S.: Uniform Crime Report 1975* (pp. 18-19). The Bureau of Justice Statistics declared that "underreporting remains the most serious analytic problem. Available measurements of domestic violence, no matter what their origin or intent, are too low." U.S. Dep't of Justice, Bureau of Justice Statistics, *Intimate Victims: A Study Of Violence Among Friends And Relatives*, 3 (1980). See also Lenore Walker, *The Battered Woman 19-20* (1979) (refuting the myth that domestic abuse affects only a small percentage of the population).

n52. See Scherer, *supra* note 24, at 555-61 (discussing the remedies available under these traditional torts).

n53. 850 P.2d 749 (Idaho 1993).

n54. *Id.* at 751.

n55. *Id.*

n56. *Id.* The Supreme Court of Idaho remanded the case for a more thorough consideration of the defendant's motion for a new trial on the basis of excessive damages. On remand, the trial court denied the motion and this denial was upheld by the supreme court. *Curtis v. Firth*, 869 P.2d 229 (Idaho 1994).

n57. But see *Hakkila v. Hakkila*, 812 P.2d 1320 (N.M. Ct. App. 1991). The New Mexico Court of Appeals found that a husband's actions against his wife were insufficient to form a claim of intentional infliction of emotional distress. The husband's conduct consisted of assaulting and battering his wife, insulting her in public, and locking her out of the house in the dead of winter. *Id.* at 1321. He also pushed her face into a pot of dirt and slammed a truck camper shell on her head. *Id.* at 1322. The *Hakkila* court held that the threshold for the tort of intentional infliction of emotional distress in the marital context must be much higher than in the ordinary context. *Id.* at 1326.

n58. *Gay v. Gay*, 302 S.E.2d 495 (N.C. Ct. App. 1983).

n59. *Mogford v. Mogford*, 616 S.W.2d 936 (Tex. Civ. App. 1981). The court explicitly rejected the defendant's claim that the trial court was unable to consider a tort action in a divorce proceeding. *Id.* at 940-41.

n60. *Beam v. Beam*, 569 P.2d 719 (Wash. Ct. App. 1977).

n61. In the case of husband battering, there are other societal factors preventing the victim from bringing suit, such as fear of being exposed as "less of a man." Husband battering, however, is beyond the scope of this Comment.

n62. Walker, *supra* note 51, at 31, 33-34. Through her extensive studies of battered women, Dr. Walker has found that many battered women believe the notion that "a woman's proper place is in the home" and that this contributes to the overall dynamic of domination and control of the husband over the wife. *Id.* at 33-34.

n63. *Id.* at 170. Many battered women are aware that "if they attempt to seek out help, they must be prepared for immediate publicity, embarrassment and the potential ruination of their husbands' careers." *Id.* at 167.

n64. *State v. Kelly*, 478 A.2d 364, 372 (N.J. 1984).

n65. *Id.* at 371-72 (citing *Battered Women, A Psychological Study Of Domestic Violence* 60 (M. Roy ed. 1977)). Being raised in a violent setting also helps explain why a husband may batter his wife. Waits, *supra* note 46, at 288. "In a study of men in a Washington state abuser's program, 63% had either experienced physical abuse, or had witnessed physical abuse involving their parents, when they were children." National Center On Women And Family Law, *Women Battering: The Facts* 7 (1989) [hereinafter National Center].

n66. *Kelly*, 478 A.2d at 372. Dr. Walker describes two ways economics is used in a battering relationship: (1) to trap the wife in marriage for fear of leaving and being poor, and (2) to use money as a coercive weapon to maintain control over the wife. Walker, *supra* note 51, at 129-44.

While economics can be a major factor in explaining why a wife remains with her batterer, domestic abuse is not confined to lower economic classes or economically dependent women. *Id.* at 18-19. "Although some battered women are jobless, many more are highly competent workers and successful career women. They include doctors, lawyers, corporation executives, nurses, secretaries, full-time homemakers, and others." *Id.* at 19.

n67. *Id.*

n68. Waits, *supra* note 46, at 283. "Three-fourths of domestic assaults occur while victims are separated or divorced from their assailants." National Center, *supra* note 65, at 29 (citing U.S. Dep't of Justice, Report To The Nation On Crime And Justice-The Data 21 (1983)).

n69. Kelly, 478 A.2d at 372 (citing T. Davidson, *Conjugal Crime*, at 50 (1978)).

n70. Sewell, *supra* note 37, at 1006-08.

n71. James, *supra* note 46, at 513.

n72. Scherer, *supra* note 24, at 562-63.

n73. *Id.*

n74. *Tevis v. Tevis*, 400 A.2d 1189, 1196 (N.J. 1979). This is also known as the "single controversy doctrine."

n75. 400 A.2d 1189 (N.J. 1979).

n76. *Id.* at 1196. The New Jersey Superior Court stated that the effect of the "entire controversy doctrine" was "to preclude a party from withholding from the action for separate and later litigation a constituent component of the controversy even where that component is a separate and independently cognizable cause of action." *Brown v. Brown*, 506 A.2d 29, 32 (N.J. Super. Ct. App. Div. 1986). The Brown court created an equitable exception to the doctrine when the conduct comprising the tort occurred during the pendency of the marital proceeding. *Id.* Thus, the entire controversy doctrine applies to bar separate litigation of claims occurring up until the institution of the dissolution proceeding.

n77. In addition to not being permitted to bring marital tort actions independently, many victims of domestic violence are also precluded from trying their claims in front of a jury. In New Jersey, all related marital claims are resolved in the Family Part, a division of the chancery courts, where jury trials are not allowed. Recently, however, the New Jersey Supreme Court held that "when the Family Part is convinced that society's interest in vindicating a marital tort through the jury process is the dominant interest in the matter, it may order that the marital tort be tried by a jury." *Brennan v. Orban*, 678 A.2d 667 (N.J. 1996). This holding expands upon *Giovine*, which also confronted the issue of permitting jury trials for marital torts. 663 A.2d at 122-23 (holding that a marital tort claimant may be entitled to a jury trial if she can

establish "that the injury is serious and significant, resulting in permanent physical or psychological injury ... [or] ... that the nature of the injury, whether physical or psychological, requires complex medical evidence.").

While the majority's "apparent conclusion that joinder of the marital tort claim with the divorce proceeding ordinarily should be required" leaves the entire controversy doctrine intact, Brennan, 678 A.2d at 680 (Stein, J., dissenting), this decision exemplifies New Jersey's continuing efforts to provide redress for victims of domestic violence.

n78. For a detailed discussion of statutes of limitation, see *infra* part IV.

n79. See Tevis, 400 A.2d at 1194 (discussing statutes of limitation).

n80. 850 P.2d 749 (Idaho 1993).

n81. See Joan M. Schroeder, Comment, Using Battered Woman Syndrome Evidence in the Prosecution of a Batterer, 76 Iowa L. Rev. 553, 560-62 (1991) (discussing the need for expert testimony on BWS in the prosecution of a batterer).

n82. 652 A.2d 789 (N.J. Super. Ct. Law Div. 1994).

n83. *Id.* at 793.

n84. 663 A.2d 109 (N.J. Super. Ct. App. Div. 1995).

n85. Cusseaux, 652 A.2d at 789 (N.J. Super. Ct. Law Div. 1994).

n86. *Id.* at 791-92.

n87. See *Bechtel v. State*, 840 P.2d 1 (Okla. Crim. App. 1992) (discussing battered woman's syndrome and post-traumatic stress disorder).



n88. Kelly, 478 A.2d at 371.

n89. Walker, *supra* note 51, at 55-70.

n90. *Id.* at xv.

A battered woman is a woman who is repeatedly subjected to any forceful physical or psychological behavior by a man in order to coerce her to do something he wants her to do without any concern for her rights. Battered women include wives or women in any form of intimate relationship with men. Furthermore, in order to be classified as a battered woman, the couple must go through the battering cycle at least twice. Any woman may find herself in an abusive relationship with a man once. If it occurs a second time, and she remains in the situation, she is defined as a battered woman.

*Id.*

n91. *Id.* at 55.

n92. *Id.* at 56-59.

n93. *Id.* at 55-59.

n94. Walker, *supra* note 51, at 55-59.

n95. *Id.* at 63. Dr. Walker's studies show that a battered woman often becomes "anxious, depressed and complains of other psychophysiological symptoms. Sleepless nights, loss of appetite, or their opposites, overeating, oversleeping and constant fatigue are frequently reported during this time. Many women suffer from severe tension headaches, stomach ailments, high blood pressure, allergic skin reactions, and heart palpitations." *Id.* at 61.

n96. *Id.* at 59.

n97. "Phase two is characterized by the uncontrollable discharge of the tensions that have built up during phase one. This lack of control and its major destructiveness distinguish the acute battering incident from the minor battering incidents in phase one." *Id.* at 59.

n98. *Id.* at 59-65.

n99. Walker, *supra* note 51, 59-65.

n100. *Id.* at 65-70.

n101. *Id.*

n102. In this stage, the man will often "give up drinking, dating other women, visiting his mother, or whatever else affects his internal anxiety state." *Id.* at 66.

There have been many studies on the effect of alcohol in a battering relationship. While alcohol was previously thought to be the cause of domestic batteries, studies have shown that beatings will occur whether the batterer is sober or intoxicated. Waits, *supra* note 46, at 290. "His drinking may well facilitate his battering, but it is not its cause." *Id.*

n103. Walker, *supra* note 51, at 65-70.

n104. See generally Schroeder, *supra* note 81 (discussing how evidence of BWS can explain a battered woman's actions that a jury might otherwise consider to be inconsistent with being a victim).

n105. Walker, *supra* note 51, at 67-68.

n106. *Id.* at 67.

n107. *Id.* at 47-50.

n108. *Id.* at 42-54.

n109. *Id.* at 49.

n110. Walker, *supra* note 51, at 50.

n111. See Kelly, 478 A.2d at 372.

n112. Walker, *supra* note 51, at 75.

n113. *Id.* at 50.

n114. Kelly, 478 A.2d at 372.

n115. For example, a Vermont trial court found that a wife's claims of marital abuse were "'blown way out of proportion as evidenced by the fact that she stayed throughout the four years of marriage.'" *Blair v. Blair*, 575 A.2d 191, 193 (Vt. 1990) (quoting the findings of the trial court). The Vermont Supreme Court remanded this case, noting that the wife fit the profile of a battered woman and the trial court's findings were based on discredited myths about battered women. *Id.* at 192-93.

n116. The California Supreme Court recently noted that

... the preferred term among many experts today is "expert testimony on battering and its effects" or "expert testimony on battered women's experiences." Domestic violence experts have critiqued the phrase "battered women's syndrome" because (1) it implies that there is one syndrome which all battered women develop, (2) it has pathological connotations which suggest that battered women suffer from sort of sickness, (3) expert testimony on domestic violence refers to more than women's psychological reactions to violence, (4) it focuses attention on the battered woman rather than on the batterer's coercive and controlling behavior and (5) it creates an image of battered women as suffering victims rather than as active survivors.

*People v. Humphrey*, 921 P.2d 1, 7 n.3 (Cal. 1996) (quoting amici curiae California Alliance Against Domestic Violence et al.).

n117. *Dyas v. United States*, 376 A.2d 827 (D.C.), cert. denied, 434 U.S. 973 (1997).

n118. Fed. R. Evid. 702.

n119. *Hawthorne v. State*, 408 So. 2d 801, 805 (Fla. Dist. Ct. App. 1982) (construing *Dyas*, 376 A.2d 827).

n120. *Frye v. United States*, 293 F. 1013, 1014 (D.C. 1923).

n121. *Schroeder*, supra note 81, at 562.

n122. The *Frye* Court noted:

Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

*Frye*, 293 F. at 1014.

n123. Rule 702 states that

if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Fed. R. Evid. 702.

n124. 509 U.S. 579 (1993).

n125. The Third Circuit was the first circuit to abandon the Frye test for Federal Rule of Evidence 702 in *United States v. Downing*, 753 F.2d 1224 (3d Cir. 1985).

n126. New Jersey has rejected the "general acceptance" test for the Third Circuit's approach which is drawn from Rule 702. *Rubanick v. Witco Chemical Corp.*, 593 A.2d 733 (N.J. 1991). N.J. R. Evid. 702.

n127. 478 A.2d 364 (N.J. 1984).

n128. *Id.* at 368.

n129. *Id.*

n130. *Id.*

n131. The Court noted:

The record before us reveals that the battered woman's syndrome has a sufficient scientific basis to produce uniform and reasonably reliable results as required by *State v. Cavallo*, and Evid R. 56(2). The numerous books, articles, and papers ... indicate the presence of a growing field of study and research about the battered woman's syndrome and recognition of the syndrome in the scientific field.

*Id.* at 380.

For cases discussing BWS evidence as being "beyond the understanding of the average layman," see *Smith v. State*, 277 S.E.2d 678 (Ga. 1981) (holding that BWS evidence was admissible because jurors would not ordinarily understand a battered woman's actions); *Ibn-Tamas v. United States*, 407 A.2d 626 (D.C. 1979) (holding that BWS evidence should have been allowed because it was beyond the understanding of the average layman); *State v. Borrelli*, 629 A.2d 1105 (Conn. 1993) (holding that the Frye test was inapplicable to BWS testimony and BWS was beyond the experience of the average juror).

n132. *Commonwealth v. Dillon*, 598 A.2d 963, 968 (Pa. 1991) (Cappy, J., concurring). BWS has gained such popular acceptance that its exclusion from a woman's defense at trial has been held to be ineffective assistance of counsel. *Commonwealth v. Stonehouse*, 555 A.2d 772 (Pa. 1989). Since BWS has received recognition as a medical condition, many women who have been convicted of killing their abusers and who did not introduce BWS testimony at trial have been given a second chance. Statistics from the National Clearinghouse for the Defense

of Battered Women show that seventy-two women from eleven states have been granted clemency since 1990. M. A. Stapleton, *Battered Woman's Advocate Downplays Setback*, Chi. Daily L. Bull., Oct. 9, 1995, at 1.

BWS evidence has also been used in custody cases. See *In re Betty J.W.*, 371 S.E.2d 326 (W. Va. 1988) (using BWS to explain the mother's failure to protect the child from her husband's abuse); *R.H. v. B.F.*, 653 N.E.2d 195 (Mass. App. Ct. 1995) (using BWS to refute the husband's contention that the wife was the abusive partner); see also *Knock v. Knock*, 621 A.2d 267 (Conn. 1993) (using BWS to show that the husband had been abusive toward the wife).

n133. "[Battered woman's syndrome] is some evidence to be considered to support a defense, such as self-defense, duress, compulsion, and coercion... Such evidence is used by the jury to understand the defendant's actions, and goes to her state of mind." *United States v. Brown*, 891 F. Supp. 1501, 1505-06 (D. Kan. 1995). See also *People v. Yaklich*, 833 P.2d 758, 761 (Colo. Ct. App. 1991).

n134. *Hawthorne v. State*, 408 So. 2d 801, 806-07 (Fla. Dist. Ct. App. 1982).

Most recently, the California Supreme Court held that BWS evidence was relevant and admissible to show the objective reasonableness of the defendant's belief that she was in imminent danger. *People v. Humphrey*, 921 P.2d 1 (Cal. 1996). The court echoed the reasoning of the New Jersey Supreme Court, declaring that "'the expert's testimony might also enable the jury to find that the battered [woman] ... is particularly able to predict accurately the likely extent of violence in any attack on her. That conclusion could significantly affect the jury's evaluation of the reasonableness of the defendant's fear for her life.'" *Id.* at 9 (quoting *State v. Kelly*, 478 A.2d 364, 378 (N.J. 1984)). The Humphrey court also found that evidence of BWS was relevant to support the defendant's credibility. *Id.* at 9-10.

n135. *Commonwealth v. Dillon*, 598 A.2d 963, 966 (Pa. 1991) (Nix, C. J., concurring).

n136. *Id.* The Pennsylvania Supreme Court held that evidence of the abuser's violent conduct is relevant to show that defendant was put in fear and therefore her actions were reasonable under the circumstances. *Id.* at 964. The court also held that this could further buttress her self-defense claim by showing that the decedent was the aggressor. *Id.* at 965.

Battered woman's syndrome evidence has also been used to bolster other defenses such as duress, compulsion or coercion. See *United States v. Brown*, 891 F. Supp. 1501 (D. Kan. 1995) (holding that evidence of BWS met the standards for admissibility and was relevant to support the defense claim of compulsion).

For an example of the unsuccessful use of BWS evidence relating to the defense of compulsion, see *People v. Smith*, 608 N.E.2d 1259 (Ill. App. Ct. 1993). In that case, the defendant was convicted of force-feeding her three-month old baby sulfuric acid as part of a fraudulent products liability scheme against a baby-formula manufacturer. She claimed that she was suffering from BWS and acting under compulsion from her husband. In its findings, the trial court reported that it was "aware" of the effects of BWS and the compulsion of her husband, but sentenced the defendant to sixty years due to the seriousness of the crime. *Id.* at 1266.

n137. 577 A.2d 1282 (N.J. Super. Ct. App. Div. 1990).

n138. *Id.* at 1288.

n139. *Id.* at 1286-88.

n140. *Id.* at 1287. In a similar rape case, the defendant argued that the victim's actions were inconsistent with someone who had been raped because she remained in the relationship with defendant and failed to report the rapes immediately after they happened. *State v. Ciskie*, 751 P.2d 1165 (Wash. 1988). The Supreme Court of Washington held that evidence of BWS is admissible to explain the defendant's actions and to dispel the common myth that rape victims always complain immediately to authorities. *Id.* at 1171-72. The court noted that unless a juror was involved in a battering relationship, the juror could easily misunderstand the victim's response. *Id.* at 1170-71. The court also described a typical response to battering as being characterized by "overwhelming terror, shame, and guilt, as well as condemnation due to their inability to leave the situation." *Id.* at 1170 (citing Ferraro & Johnson, *How Women Experience Battering: The Process of Victimization*, 30 *Soc. Probs.* 325 (1983)). See also *Arcoren v. United States*, 929 F.2d 1235 (8th Cir. 1990) (using BWS to explain why victim recanted her police statement at trial). But see *State v. Ellis*, 656 A.2d 25 (N.J. Super. Ct. App. Div. 1995) (reversing trial court because jury was improperly instructed on the limited use of BWS evidence).

n141. Dan Dobbs, *Torts and Compensation: Personal Accountability and Social Responsibility for Injury* 297 (2d ed. 1993).

n142. *Tevis v. Tevis*, 400 A.2d 1189, 1194 (N.J. 1979) (citing *Kaczmarek v. New Jersey Turnpike Auth.*, 390 A.2d 597 (N.J. 1978)). Another policy reason behind statutes of limitations is certainty. Dobbs, *supra* note 141, at 312. Once the statutory period has run, a person or entity could be sure that no charges would be filed against it. *Id.* This is especially important to insurance companies who would have to raise premiums to cover the possibility of future lawsuits against them. *Id.*

n143. Norrie Clevenger, Note, *Statute of Limitations: Childhood Victims of Sexual Abuse Bringing Actions Against Their Perpetrators After Attaining the Age of Majority*, 30 *J. Fam. L.* 447, 453-54 (1991).

n144. *Tevis*, 400 A.2d at 1194.

n145. Clevenger, *supra* note 143, at 453-54.

n146. *Id.* at 453.

n147. *Jones v. Jones*, 576 A.2d 316, 320 (N.J. Super. Ct. App. Div. 1990).

n148. *Id.*

n149. In the first New Jersey case to hold that a plaintiff's insanity could toll the statute of limitations, the plaintiff broke her hip when she fell on an icy sidewalk on the defendant's premises. *Kyle v. Green Acres at Verona, Inc.*, 207 A.2d 513 (N.J. 1965). She failed to bring an action within the two year statute of limitations, but claimed that this was because she developed a mental disability as a direct result of her injury. *Id.* Since her injury and consequential insanity were due to the negligence of the defendant, she claimed that the statute should be tolled until the time her sanity was restored. *Id.* at 517. The New Jersey Supreme Court recognized that her inability to file suit was attributable to defendant's act, and the court created an equitable exception to the statute. *Id.* at 519. The court held that "a defendant whose negligent act brings about plaintiff's insanity should not be permitted to cloak himself with the protective garb of the statute of limitations." *Id.* at 519.

n150. N.J. Stat. Ann. 2A: 14-21 (West 1987). For examples of other states that toll the statute of limitations for insanity, see *Tenn. Code Ann.* 28-1-106 (1980); *N.Y. Civ. Prac. L. & R.* 208 (Consol. 1990); *Ga. Code Ann.* 3-801 (1991); *Utah Code Ann.* 78-12-36 (1992).

n151. "' Insane' in the statute of limitations means such a condition of mental derangement as actually prevents the sufferer from understanding his legal rights or instituting legal action." *Kyle*, 207 A.2d at 521.

n152. See *Baily v. Lewis*, 763 F. Supp. 802 (E.D. Pa. 1991) (applying Pennsylvania law to forbid the tolling of the statute of limitations for insanity). See 42 Pa. Cons. Stat. Ann. 5533(a).

n153. *Chevron Oil Co. v. Huson*, 404 U.S. 97, 108 (1971).

n154. Tolling the statute of limitations for a plaintiff's duress is usually limited to the situation where the plaintiff's duress is part of the underlying cause of action. *Jones v. Jones*, 576 A.2d 316, 322 (N.J. Super. Ct. App. Div. 1990). See also *Overall v. Klotz*, 846 F. Supp. 297, 300 (S.D.N.Y. 1994).

n155. *Jones*, 576 A.2d at 320 (quoting *Galligan v. Westfield Centre Serv., Inc.*, 412 A.2d 122, 124 (N.J. 1980)).

n156. For a discussion on traditional civil remedies, see *supra* part II.C.

n157. *Giovine v. Giovine*, 663 A.2d 109, 123 (N.J. Super. Ct. App. Div. 1995).



n158. *Id.* at 119. "In order to prove the medical condition of battered woman's syndrome, plaintiff must be permitted to prove all acts of physical or psychological misconduct." *Id.*

n159. *Id.* at 118. The plaintiff would be able to introduce evidence of all the prior batterings including the first to establish the continual nature of the abuse. She would be able to receive compensation for all of the batteries except the first. Due to the cyclical nature of BWS, a woman cannot be said to be suffering from the condition until she goes through the cycle twice. See *supra* part III.A.

n160. *Cusseaux v. Pickett*, 652 A.2d 789, 792 (N.J. Super. Ct. Law Div. 1994).

n161. *Id.* at 790.

n162. *Id.* The plaintiff alleged that she was beaten with defendant's fists, and was struck with many objects including a heavy kitchen pot, an unidentified object, a large corningware dish, and a gallon container of Clorox bleach. *Id.* at 790 n.1. She also alleged that she received many injuries, such as a broken nose, and that she had to seek treatment at three separate hospital emergency rooms. *Id.*

n163. *Id.* at 790.

n164. *Id.* at 793. The court enumerated specific elements of the new tort:

The plaintiff must show 1) involvement in a marital or marital-like intimate relationship; and 2) physical or psychological abuse perpetrated by the dominant partner to the relationship over an extended period of time; and 3) the aforesaid abuse has caused recurring physical or psychological injury over the course of the relationship; and 4) a past or present inability to take any action to improve or alter the situation unilaterally.

*Id.* at 793-94.

The court also explicitly stated that this new cause of action was not limited to women or traditional heterosexual relationships. *Id.* at 794 n.7.

n165. *Cusseaux*, 652 A. 2d at 794.

n166. *Giovine*, 663 A.2d at 113. The *Giovine* court noted that the lower court was not bound by *Cusseaux* because it was a court of collateral jurisdiction, but the lower court failed to consider the New Jersey Legislature's policy statement in the Prevention of Domestic

Violence Act. Id. at 117 (construing N.J. Stat. Ann. 2C:25-17 to -33 (West 1995)). The Act's legislative findings state in pertinent part:

it is the responsibility of the courts to protect victims of violence that occurs in a family or family-like setting by providing access to both emergent and long-term civil and criminal remedies and sanctions, and by ordering those remedies and sanctions that are available to assure the safety of the victims and the public. To that end, the Legislature encourages ... the broad application of the remedies available under this act in the civil and criminal courts of this State.

N.J. Stat. Ann. 2C:25-18 (West 1995).

n167. *Giovine*, 663 A.2d at 113.

n168. *Id.* at 115.

n169. *Id.*

n170. *Id.* at 114. As the court stated:

plaintiff shall be entitled to sue her husband for damages attributable to his continuous tortious conduct resulting in her present psychological condition, provided she has medical, psychiatric, or psychological expert proof to establish that she was caused to have an inability "to take any action at all to improve or alter her situation."

*Id.* at 117 (quoting *Cusseaux*, 652 A.2d at 792).

n171. *Id.* at 124-30 (Skillman, J., concurring and dissenting). Justice Skillman commented that "the majority's discussion of the question whether battered woman's syndrome is a continuous tort is confusing and contradictory." *Id.* at 128. He noted that "it is inadvisable to create new causes of action in tort in advance of any necessity for doing so in order to achieve a just result." *Id.* at 125 (quoting *Neelthak Dev. Corp. v. Township of Gloucester*, 639 A.2d 1141, 1143 (N.J. Super. Ct. App. Div. 1994)). In his view, the existing tort causes of action are sufficient to compensate victims of domestic violence and the majority's creation of a new cause of action could be used to improperly "extend marital tort liability to conduct that would not give rise to legal liability in other contexts," such as verbal abuse. *Id.* at 126.

n172. See *supra* part III.A.

n173. See *supra* note 159.

n174. *Curtis v. Firth*, 850 P.2d at 749, 754 (Idaho 1993) (quoting 54 C.J.S. *Limitations of Actions* 177, at 231 (1987)).

n175. "It is well-settled that "when a tort involves continuing injury, the cause of action accrues, and the limitations period begins to run, at the time the tortious conduct ceases." *Id.* at 754 (quoting *Page v. United States*, 729 F.2d 818, 821-22 (D.C. Cir. 1984)).

n176. See *Landman v. Royster*, 354 F. Supp. 1302, 1315 (E.D. Va. 1973).

n177. *Curtis*, 850 P.2d at 754 (quoting *Page v. United States*, 729 F.2d 818, 821-22 (D.C. Cir. 1984)).

n178. See *Creswell Ranch & Cattle Co. v. Scoggins*, 39 S.W. 612 (Tex. Civ. App. 1897) (applying concept of continuous tort to trespass to land and nuisance); *Karjala v. Johns-Manville Prod. Corp.*, 523 F.2d 155 (8th Cir. 1975) (holding that plaintiff's exposure to asbestos is a continuing tort); *T & E Indus., Inc. v. Safety Light Corp.*, 546 A.2d 570 (N.J. Super. Ct. App. Div. 1988) (holding that continuous presence of toxic waste and resultant hazardous byproducts is a continuous tort); *Bustamento v. J.D. Tucker*, 607 So. 2d 532 (La. 1992) (holding that sexual harassment in the workplace was a continuous tort).

n179. *Page*, 729 F.2d at 818.

n180. *Id.* at 819.

n181. *Id.*

n182. *Id.* at 822-23.

n183. *Id.* at 823. While basing its holding on the premise that each individual act was insufficient to form an actionable claim in itself, the Page court did not limit its decision to this scenario. "Since usually no single incident can "fairly or realistically be identified as the cause of significant harm," it seems proper to regard the cumulative effect of the conduct as actionable." *Id.* at 821-22 (quoting *Fowkes v. Pennsylvania R.R. Co.*, 264 F.2d 397, 399 (3d Cir. 1959) (emphasis added)). But see *Davis v. Bostick*, 580 P.2d 544 (Or. 1978) (refusing to

find a continuous tort because each contributing abusive act was separately actionable).

n184. 354 F. Supp. 1302 (E.D. Va. 1973).

n185. *Id.* at 1315.

n186. *Id.* at 1305-07.

n187. *Id.* at 1307.

n188. *Id.* at 1315.

n189. Landman, 354 F. Supp. at 1315.

n190. The court noted that absent expert proof, "the wife cannot be deemed to be suffering from battered woman's syndrome, and each act of abuse during the marriage would constitute a separate and distinct cause of action in tort, subject to the statute of limitations." *Giovine*, 663 A.2d at 114 (construing N.J. Stat. Ann. 2A: 14-2 (West 1987) and *Laughlin v. Breaux*, 515 So. 2d 480, 483-83 (La. Ct. App. 1987)). The plaintiff's counterclaim referred to "a continuous and unbroken wrong" without specifying specific assaults or batteries except for the first battery. *Id.* at 112. This first battery is admissible to prove BWS, but it is not compensable. See *supra* note 159.

n191. *Giovine*, 663 A.2d at 119.

n192. See *Twyman v. Twyman*, 790 S.W.2d 819 (Tex. Ct. App. 1990). The Texas Court of Appeals recognized that negligent infliction of emotional distress by a husband against his wife could constitute a continuous tort in order to extend the statute of limitations in a divorce action. The court affirmed an award of \$ 15,000 based on her husband's continual course of conduct throughout the marriage. *Id.*

By the time this case reached the Supreme Court of Texas, however, the supreme court had already refused to recognize the tort of negligent infliction of emotional distress. See *Boyles v. Kerr*, 855 S.W.2d 593 (Tex. 1993) (Cornyn, J., opinion). Since the plaintiff's original pleading stated only a general claim of emotional duress, the appellate court's decision was reversed because the decision was based specifically on negligent infliction of emotional distress. *Twyman v. Twyman*, 855 S.W.2d 619, 621 (Tex. 1993). The supreme court, in the interest of justice, remanded the case to allow the plaintiff to bring a claim under intentional infliction of emotional distress. *Id.* at 626. While the appellate court's holding that the husband's conduct formed a continuous tort presented a hopeful picture for victims of long-term domestic violence, the supreme court never discussed this issue.

n193. Laughlin, 515 So. 2d 480.

n194. Id. at 482.

n195. Id. at 482-83.

n196. Id. at 482.

n197. de la Croix de Lafayette v. de la Croix de Lafayette, 15 Fam. L. Rep. (BNA) 1501 (D.C. Super. Ct. Fam. Div. Aug 14, 1989).

n198. Id.

n199. Id.

n200. Id.

n201. 850 P.2d 749 (Idaho 1993).

n202. Id. In upholding the jury verdict for the plaintiff, the court commented on the plaintiff's use of BWS evidence at trial. The evidence supported plaintiff's allegations of abuse and further helped to prove the outrageousness of the defendant's conduct. Id. at 757.

n203. Id.

n204. " Normally, severe emotional distress is accompanied or followed by shock, illness or other bodily harm, which in itself affords evidence that the distress is genuine and severe." Restatement (Second) Of Torts 46 cmt. k (1965). Therefore, although physical injury is not required, it is a guarantee that the claim is bona fide. Without physical injury, intentional infliction of emotional distress is extremely difficult to prove. Consequently, "i]n the great majority of the cases allowing recovery the genuineness of the mental disturbance has been evidenced by resulting physical illness of a serious character, and both the mental and the physical elements have been compensated." W. Page Keeton Et Al., Prosser And Keeton On The Law Of Torts 12 at 64 (5th ed. 1984).

n205. " Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible grounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Restatement (Second) Of Torts 46 cmt. d (1965).

n206. Torts usually pleaded along with intentional infliction of emotional distress are "assault, battery, false imprisonment, trespass to land, or the like." Id. at cmt. b.

n207. " Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!" Id. at cmt. d (emphasis added).

n208. If, however, the defendant knows that the plaintiff is particularly susceptible to emotional distress and his actions are likely to cause harm, his conduct will more likely be regarded as outrageous. Id. at cmt. f. "It must be emphasized again, however, that major outrage is essential to the tort; and the mere fact that the actor knows that the other will regard the conduct as insulting, or will have his feelings hurt, is not enough." Id.

n209. Pennsylvania, for example, has not formally recognized intentional infliction of emotional distress at all. The Pennsylvania Supreme Court has merely acknowledged it without adopting it. *Kazatsky v. King David Memorial Park*, 527 A.2d 988 (Pa. 1987).

n210. 434 N.W.2d 758 (S.D. 1989).

n211. Id. at 761.

n212. 812 P.2d 1320 (N.M. Ct. App. 1991). See supra text accompanying note 57.

n213. Id. at 1322.

n214. *Id.* at 1327.

n215. *Lopez v. Swyer*, 300 A.2d 563, 565 (N.J. 1973).

n216. *Ault v. Jasko*, 637 N.E.2d 870, 871 (Ohio 1994). See also *Oliver v. Kaiser Community Health Found.*, 449 N.E.2d 438, 441 (Ohio 1983) ("By focusing on discovery as the element which triggers the statute of limitations, the discovery rule gives those injured adequate time to seek relief on the merits without undue prejudice to defendants.").

n217. 173 A.2d 277 (N.J. 1961). In this case, a wing-nut from a medical instrument was negligently left inside the plaintiff's abdomen during an operation. *Id.* The plaintiff was unaware of the object, which was part of a medical instrument, but suffered considerable pain for years after the operation. *Id.* The wing-nut was not discovered until an X-ray was taken after the statute of limitations had run. *Id.* at 278.

n218. *Lopez*, 300 A.2d at 566.

n219. 300 A.2d 563 (N.J. 1973).

n220. *Id.* at 567. But see *Tevis v. Tevis*, 400 A.2d 1189 (N.J. 1979). In *Tevis*, the New Jersey Supreme Court held that the discovery rule could not be used to save a plaintiff's claim against her husband. The court applied the statute of limitations strictly to bar her claims for the abuse she suffered throughout her marriage. The plaintiff argued that because interspousal tort immunity still existed when she was divorced, she had no cause of action at that time. The court invalidated the immunity in *Small v. Rockfield*, 330 A.2d 335 (N.J. 1974), and this is when the plaintiff claimed she discovered that she had a cause of action. *Tevis*, 400 A.2d at 1194. Even though she filed within the statutory time from the decision in *Small v. Rockfield*, and only six weeks past the limitations period as calculated from her divorce, the majority did not apply the discovery rule to toll the statute of limitations. *Id.* at 1197 (Pashman, J., dissenting).

n221. *Harshaw*, *supra* note 12, at 756.

n222. Naomi Berkowitz, Note, *Balancing the Statute of Limitations and the Discovery Rule: Some Victims of Incestuous Abuse Are Denied Access to Washington Courts - Tyson v. Tyson*, 10 U. Puget Sound L. Rev. 721 (1987).

Simply put, something happens that is so shocking that the mind grabs hold of the memory and pushes it underground, into some

inaccessible corner of the unconscious. There it sleeps for years, or even decades, or even forever - isolated from the rest of mental life. Then, one day, it may rise up and emerge into consciousness. Repression of traumatic memories keeps painful or unacceptable ideas, impulses, and feelings out of conscious awareness and "enables the victim to survive by controlling thoughts and feelings to the point at which there is no recognition of victimization." Recall of such memories can be triggered by psychotherapy, hypnosis, sodium pentothal, or events completely unrelated to therapy.

Joy Lazo, Comment, True or False: Expert Testimony or Repressed Memory, 28 Loy. L.A. L. Rev. 1353-54 (1995) (quoting Berkowitz, *supra*, at 729).

n223. Rosemarie Ferrante, Note, The Discovery Rule: Allowing Adult Survivors of Childhood Sexual Abuse the Opportunity for Redress, 61 Brook. L. Rev. 199, 207-10 (1995).

n224. Harshaw, *supra* note 12, at 756. Despite its growing acceptance by courts, repressed memory syndrome has not been universally recognized by the psychiatric community as reliable. See Julie M. Kosmond Murray, Comment, Repression, Memory, and Suggestibility: A Call For Limitations on the Admissibility of Repressed Memory Testimony in Sexual Abuse Trials, 66 U. Colo. L. Rev. 477, 494-514 (1995).

Recently, there have been lawsuits against therapists alleging that they implanted "false memories" of child abuse in their patients. See *Tuman v. Genesis Assoc.*, 894 F. Supp. 183 (E.D. Pa. 1995) (holding that parents' claims against therapist for implanting false memories of parents involvement in satanic rituals, murders, and incest in their daughter were sufficient to withstand the defendant's motion to dismiss); *Sullivan v. Cheshier*, 846 F. Supp. 654 (N.D. Ill. 1994) (holding that parents' claims against therapist for implanting false memories of sibling's sexual abuse in their daughter were sufficient to withstand the defendant's motion to dismiss).

n225. Harshaw, *supra* note 12, at 757. When a child is sexually abused by an adult, there are a combination of factors that prevent the child from escaping the abuse or seeking help. The abusers usually demand that the victims keep the events secret. *Tyson v. Tyson*, 727 P.2d 226, 234 (Wash. 1986) (Pearson, J. dissenting). This forces the victims to deal with the situation alone, which can result in internalization of "her self-blame, anger, fears, confusion, and sadness resulting from the incest." *Id.*

Moreover, children are taught to view adults as authority figures, and by being forced to engage in sexual acts with an adult, the child's sense of right and wrong is confused. Harshaw, *supra* note 12, at 756-57. "It is fundamental that in order for a person to take action for a wrong, that person must perceive it as wrong." *Id.* at 757. Also, a significant number of victims of child sexual abuse are abused by a relative or close personal friend. *Id.* at 756. Many times the adult will tell the child that the abuse is a normal expression of love. *Id.* at 757. This abuse "twists the child's perception of normalcy and breaks down the child's ability to trust others." *Id.*

n226. Harshaw, *supra* note 12, at 757-58.

n227. *Id.* at 758.

n228. 727 P.2d 226 (Wash. 1986). See Matthew J. Eisenberg, Comment, Recovered Memories of Childhood Sexual Abuse: The Admissibility Question, 68 Temp. L. Rev. 249, 254 n.36 (1995); see also Berkowitz, *supra* note 224.



n229. Tyson, 727 P.2d at 227.

n230. Id.

n231. Id.

n232. Id. at 230.

n233. Id. This was supported by the court's view that the testimony of treating psychologists and psychiatrists was not sufficiently reliable to produce accurate results. Id. at 229.

n234. Tyson, 727 P.2d at 229-30.

n235. Id. at 231 (Pearson, J., dissenting).

n236. Id.

n237. Murray, *supra* note 224, at 486.

n238. Wash. Rev. Code Ann. 4.16.340 (West 1995).

n239. Id. (Historical and Statutory Notes, citing 1991 Wash. Laws, ch. 212).

n240. Repressed memory syndrome cases usually involve one of two factual scenarios: where the plaintiff claims to have known about the sexual abuse but did not realize his or her psychological problems were a result of the abuse (Type I), or where the plaintiff did not know about the sexual abuse because he or she repressed the memory until shortly before filing suit (Type II). *Baily v. Lewis*, 763 F. Supp. 802, 805 (E.D. Pa. 1991). Most courts have been unwilling to apply the discovery rule to Type I cases while many courts have been increasingly willing to apply it to Type II cases. Eisenberg, *supra* note 228, at 255.

n241. 701 F. Supp. 1363 (N.D. Ill. 1988).

n242. *Id.* at 1364.

n243. *Id.* at 1370.

n244. *Hammer v. Hammer*, 418 N.W.2d 23 (Wis. Ct. App. 1987).

n245. *Id.* at 26.

n246. 576 A.2d 316 (N.J. Super. Ct. App. Div. 1990).

n247. *Id.* at 318.

n248. *Id.* at 319.

n249. *Id.* at 321.

n250. *Id.*

n251. Jones, 576 A.2d at 321.

n252. Id. at 322.

n253. See supra note 95 and part IV.B.2.

n254. See State v. Kelly, 478 A.2d 364, 371 (N.J. 1984); Clevenger, supra note 143, at 450.

n255. See Ferrante, supra note 223, at 206; Waits, supra note 46, at 279-82.

n256. See Ferrante, supra note 223, at 205-07; Waits, supra note 46, at 281.

n257. See Harshaw, supra note 12, at 757; Walker, supra note 51, at 146-50.

n258. Kelly, 478 A.2d at 372.

n259. See supra note 95 and part IV.B.2. "The disorders resulting from these events may be either a combination of physical and mental disorders, or solely a residual mental incapacity continuing after a physical injury has healed. PTSD can exist even when a trauma victim has not suffered demonstrable physical injury." Harshaw, supra note 12, at 756.

n260. Kelly, 478 A.2d at 372.

n261. See supra part II.B.

n262. Keeton et al., supra note 204, at 12, 56.

n263. Id.

n264. See *Davis v. Bostick*, 580 P.2d 544, 546 (Or. 1978). "We see no virtue in basing a rule of law on a speculative fear of increased litigation. We prefer to rely upon the burden of proof as the best protection against unwarranted, meretricious or merely vindictive litigation." Id.

n265. *Twyman v. Twyman*, 855 S.W.2d 619, 631 (Tex. 1993) (Hecht, J., concurring and dissenting). "A review of the cases in which intentional or reckless infliction of emotional distress is alleged indicates that while the claim is routinely asserted, it is seldom successful." Id.

n266. *Giovine v. Giovine*, 663 A.2d 109, 117 (N.J. Super. Ct. App. Div. 1995).

n267. Id. "The determination whether to toll the statute of limitations is a legal question "within the province of the court.'" Id. (quoting *Lopez v. Swyer*, 300 A.2d 563, 567 (N.J. 1973)).

n268. *Keeton et al.*, supra note 204, at 12, 56.

n269. *Giovine*, 663 A.2d at 125 (Skillman, J., concurring and dissenting).