

# ACFLS

# FAMILY LAW SPECIALIST

JOURNAL OF THE CALIFORNIA ASSOCIATION OF CERTIFIED FAMILY LAW SPECIALISTS

## THE INTERSECTION OF FAMILY LAW AND TORTS IN DOMESTIC ABUSE CASES

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### I. Introduction

Our traditional notions of how legal system should operate have siloed areas of practice and systems of justice. The criminal justice system and the civil courts exist independently of each other and do not integrate seamlessly. Attorneys generally practice in one specialty of law and are not competent to meet all the legal needs of all clients. In the process of freeing oneself from a toxic relationship, a survivor of domestic abuse<sup>1</sup> may interface with several different court systems and various types of attorneys.

In a domestic violence case, the victim of abuse may interface with as many as four different types of attorneys. The district attorney represents the state’s interest in accountability and justice. The defense attorney or victim’s rights attorney represents the victim in criminal case. Which of these two types of attorneys a victim ends up working with will depend on whether the victim realizes he or she can have independent representation separate from the batterer’s defense team.<sup>2</sup> The family law attorney assists in obtaining a domestic violence restraining order under the Domestic Violence Prevention Act,

and in securing remedies under the Family Code. This type of attorney is likely to have little knowledge of tort remedies. Finally, the personal injury attorney assists the victim in obtaining civil damages, but is often less interested in the “messy details” of the relationship, as the emotions involved in domestic abuse are often foreign to the typical practitioner of slip and fall injuries.

If our intention is to support survivors in their quest for freedom and justice, why are we promoting a system that requires a survivor to navigate so many different systems, while maintaining separate cases for accountability, safety, dissolution, and damages, through connections with four or more different specialty attorneys?

The tort of domestic violence is a subset of personal injury law. Indeed, it is the most personal of injuries a victim can suffer. A victim’s injuries are compounded by the fact that they were committed by the person with whom the victim shared his or her life—a trusted person, someone the victim loved. Domestic violence law really is its own specialty area of practice, as the needs of domestic violence victims span criminal, civil, family, and all areas of practice. When attorneys have

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1. Advance the knowledge of Family Law Specialists;
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3. Promote and encourage ethical practice among members of the bar and their clients; and
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a discreet approach to their practice, the legal needs of domestic abuse victims are often overlooked. Domestic violence law requires a subset of knowledge that is unique to the experiences and dynamics of power and control as they play out in every aspect of life. Because domestic abuse victims have needs and rights that transcend all areas of practice, where an attorney is only knowledgeable in one area, he or she may be doing a disservice to the client.

While of course as attorneys we would never want to disadvantage our client, we also have the personal incentive not to violate the Rules of Professional Conduct. We have an ethical obligation to inform clients of potential causes of action. This can be found in our duties of competence, diligence, and communication.<sup>3</sup> When representing a victim of domestic abuse in a family law case, it is incumbent upon the attorney to explore, or to refer for consultation, the possibilities of tort remedies.

## II. Available Tort Remedies

### Domestic Violence

#### *The Statute*

The tort of domestic violence requires the infliction of injury from abuse caused by a person having a relationship with the victim.<sup>4</sup> “Abuse” is defined both by the Penal Code and the Family Code.<sup>5</sup> The relationship requirement is defined by the Family Code.<sup>6</sup> From a personal injury perspective, physical abuse is easily identifiable and easily provable. However, in addition to physical abuse, Family Code section 6320 creates liability for coercive control, a pattern of behavior that unreasonably interferes with a person’s free will and personal liberty.<sup>7</sup> Codified examples include isolation, deprivation of basic necessities, and controlling movements, communications, or finances.<sup>8</sup> Suing someone for emotional harm, without accompanying physical harm, is complicated by issues of causation and proving damages.<sup>9</sup>

### *Legislative History*

California was the first state in the country to recognize a unique tort of domestic violence. Prior to the inception of Civil Code section 1708.6, Californians would pursue domestic violence tort remedies through general assault and battery claims. Indeed, in many states, these are still the only options for victims to redress civil claims of domestic violence.<sup>10</sup> Nine states still uphold interspousal tort immunity,<sup>11</sup> a concept abolished by California in 1962.<sup>12</sup> However, even those states that bar intentional torts between spouses during marriage permit such actions after dissolution for tortious abuse during the marriage.<sup>13</sup>

In enacting Civil Code section 1708.6 in 2002, the California Legislature made the following findings:

(a) Acts of violence occurring in a domestic context are increasingly widespread.

(b) These acts merit special consideration as torts, because the elements of trust, physical proximity, and emotional intimacy necessary to domestic relationships in a healthy society makes participants in those relationships particularly vulnerable to physical attack by their partners.

(c) It is the purpose of this act to enhance the civil remedies available to victims of domestic violence in order to underscore society’s condemnation of these acts, to ensure complete recovery to victims, and to impose significant financial consequences upon perpetrators.<sup>14</sup>

California’s enactment of Civil Code section 1708.6 followed the United States Supreme Court’s striking down the federal civil remedy for victims of violence against women, contained in the Violence Against Women Act of 1994.<sup>15</sup> Accordingly, it became the responsibility of individual states to address civil remedies for victims of domestic violence.<sup>16</sup> The enactment of Civil Code section 1708.6 just two years later affirmed California’s clear intent to fulfill the

promise of more complete remedies to victims of domestic violence.<sup>17</sup>

The analysis of Assembly Bill Number 1933 states, “[t]his bill strengthens and clarifies the relief available to victims of domestic violence in two ways. First, this bill offers a clear statement of the state’s policy that victims of domestic violence be able to bring suit against their abusers and recover damages. By creating a specific tort of domestic violence, this bill gives victims and the courts a clear statement of the rights and remedies of victims in these cases. Second, this bill allows an award of attorney’s fees in a case based on domestic violence, a remedy not available under existing law.”<sup>18</sup>

### **Continuing Tort Doctrine**

The Court of Appeal in *Pugliese v. Superior Court* addressed the question of whether a domestic violence victim could recover for acts of domestic violence occurring prior to the three-year statute of limitations prescribed by Code of Civil Procedure section 340.15.<sup>19</sup> In *Pugliese*, the divorced wife sued the former husband for assault, battery, intentional infliction of emotional distress, and violation of civil rights, alleging the former husband had engaged in a pattern of domestic abuse throughout their 13-year marriage and after divorce, the last act of which occurred within three years of the filing of the complaint.<sup>20</sup> The plaintiff sought damages for all acts of abuse, even those occurring prior to the three-year statute of limitations.<sup>21</sup> In response, the defendant in *Pugliese* moved to exclude all references to alleged acts of domestic violence that had occurred more than three years prior to the filing of the complaint.<sup>22</sup>

The Court of Appeal in *Pugliese* held domestic violence victims are entitled to seek recovery for all acts of domestic abuse occurring during the domestic relationship, so long as they are able to prove a continuing course of abusive conduct.<sup>23</sup> The *Pugliese* Court explained, “we believe the Legislature adopted by statute the continuing tort theory, thus allowing domestic violence victims to recover damages for all acts of domestic violence occurring during the marriage, provided the victim proves a continuing course of abusive conduct and files suit within three years of the ‘last act of domestic violence.’”<sup>24</sup>

The continuing tort doctrine is applicable to domestic violence as a “continuing wrong.”<sup>25</sup> And “where a tort involves a continuing wrong, the statute of limitations does not begin to run until the date of the last injury or when the tortious acts cease.”<sup>26</sup> The defendant in *Pugliese* attempted to argue the domestic violence consisted of discrete acts.<sup>27</sup> However, the *Pugliese* Court rejected this notion, recognizing, “[d]omestic violence is the physical, sexual, psychological, and/or emotional abuse of a victim by his or her intimate partner, with the goal of asserting and maintaining power and control over the victim. Most domestic violence victims are subjected to ‘an ongoing strategy of intimidation, isolation, and control that extends to all areas of a woman’s life, including sexuality; material necessities; relations with family, children, and friends; and work.’”<sup>28</sup>

### **Sexual Battery**

Domestic abuse is not limited to physical violence. Many victims of domestic abuse are also experiencing sexual assault by their partners. The tort of sexual battery is available both to those who do not intimately know their assailant and those who do. California Civil Code section 1708.5 provides a cause of action for acts with intent to cause a harmful or offensive contact with the intimate parts of another, or by use of his or her intimate part, and a sexually offensive contact with that person directly or indirectly results.<sup>29</sup> The statute of limitations is the latter of ten years or three years from the discovery of the harm.<sup>30</sup>

### **Gender Violence**

Gender violence encompasses acts that would constitute a criminal offense under state law. It involves the use, attempted use, or threatened use of physical force, committed at least in part based on the gender of the victim, regardless of whether those acts resulted in prosecution.<sup>31</sup> Gender violence is also a physical intrusion of a sexual nature under coercive conditions.<sup>32</sup> By definition, domestic abuse is also gender violence.

### **Sexually Transmitted Diseases**

Case law is settled that an individual has a duty not to transmit a sexually transmitted disease if the individual knows or should know that he or she is infected.<sup>33</sup> Numerous possible causes of action may address the transmission of sexually transmitted diseases. One could plead battery, intentional or negligent infliction of emotional distress, fraud by concealment, fraud by misrepresentation, or negligent misrepresentation. Depending on the theory of liability, actual or constructive knowledge is required.

These cases are challenging and carry the reality of diminished privacy, and complex issues of proof and causation. The statute of limitations will depend on the legal theory; negligence-based theories carry a two-year statute of limitations,<sup>34</sup> whereas the statute of limitations for fraud-based theories is three years.<sup>35</sup>

### **Human Trafficking**

Some dissolution of marriage clients may in fact be victims of human trafficking, who are escaping an environment of forced labor or services. The elements of a human trafficking cause of action require the deprivation or violation of the personal liberty of a person by substantially restricting his or her liberty. This is accomplished by force, fear, fraud, deceit, coercion, violence, duress, menace, or threat of unlawful injury, under circumstances where the victim reasonably believed it was likely that the person making the threats would carry them out.<sup>36</sup> These cases require a sharp eye and assessment of the true living situation of the parties. Where dynamics of control and coercion have overridden your client’s freedom, consider whether human trafficking has taken place.

### **Stalking**

Stalking can occur during the relationship or after. The image of an obsessive outcast leaving a flower on the car

of a stranger is not the norm. Stalking happens whenever a person engages in conduct intending to follow, alarm, or harass an individual, and the individual reasonably feared for his or her safety or suffered substantial emotional distress.<sup>37</sup> This dynamic happens when an abusive partner attempts to maintain control within the relationship, most commonly when the survivor client attempts to leave the relationship.

### **Distribution of Sexually Explicit Materials**

This is more commonly referred to as “revenge porn,” but perhaps we should reconsider our use of that terminology. “Revenge” suggests the target of the crime has done something wrong and is therefore deserving of retaliation. The word “porn” has consent inherent within it. The distribution of sexually explicit materials is image-based sexual abuse. It is a crime and it is also a tort. The elements require the intentional distribution by any means of the image of another, without the other’s consent, where the defendant knew the plaintiff had a reasonable expectation the material would remain private, and the image exposes an intimate body part of the other person or shows him or her engaging in a sexual act.<sup>38</sup>

### **Unlawful Recordings**

Because California is a two-party consent state, a civil cause of action exists to provide damages based on unlawful recordings, which include willful eavesdropping or recording of confidential communication.<sup>39</sup> This cause of action may not be brought where there is an exception in a restraining order that allows a protected party to record the restrained party,<sup>40</sup> or where a victim of domestic violence records for the purposes of collecting evidence to obtain a domestic violence restraining order.<sup>41</sup>

### **III. Damages (What is at Stake)**

No financial amount can compensate a survivor of domestic violence for the abuse he or she has suffered. However, financial recovery can go a long way to helping a survivor rebuild his or her life and to hold the abuser accountable. In addition to the compensation for injuries, a civil tort claim may provide a victim the forum for justice that he or she was denied in the criminal court. It can also provide the accountability that can be lost in the dissolution of marriage case in our no-fault state.

As in any personal injury case, it is possible to recover special and general damages. Some torts also specifically provide for statutory attorney fees.<sup>42</sup> Calculation of damages is an art, not a science. Of course, it is easy to quantify medical costs, lost wages, and damaged property. However, the calculation of emotional and psychological damages is more nuanced. Experts can be used to value less tangible items such as the cost of future therapy, the value of the impact on relationships, and the impact on a victim’s ability to work. Once these concrete numbers are established, the goal is to determine what a client feels can make them whole.

The assets of the defendant must also be considered. It provides little leverage for settlement to demand in excess of what a defendant has. That will only serve to motivate the

defendant to litigate. Similarly, a judgment in excess of what a defendant has provides no tangible relief to a survivor. Domestic violence tort remedy is complicated by the lack of insurance coverage availability. Exclusions for intentional torts require that recovery be out of the defendant’s assets rather than insurance coverage.

The act of valuing your case is one that must be done in conjunction with your client in consideration of his or her goals and the overall strategy of all open and potential cases.

### **IV. Litigating the Civil Financial Settlement Within the Existing Family Law or Restraining Order Case**

It is not always necessary to bring a separate tort action when representing a victim of domestic abuse in their dissolution or restraining order case. The Domestic Violence Prevention Act provides for prevailing party attorney’s fees as well as payment for costs and services.<sup>43</sup> A domestic violence victim’s needs may be met by pursuing his or her damages amount within these categories.

In addition, a global settlement in a dissolution can include civil damages. The tort claim resulting from a domestic violence case may be resolved by the tortfeasor spouse agreeing to an unequal division of community property in compensation for his or her tortious actions. This has the added tax benefit to the injured spouse in that the equalization payment is part of the dissolution and thereby tax-exempt as a transfer incident to divorce.<sup>44</sup>

However, addressing these potential tort claims can stall settlement of the dissolution of marriage case. The abusive spouse will no doubt want confirmation the Marital Settlement Agreement includes a provision stating it resolves all claims between the parties. You may have to file a separate tort action to address those claims. Be aware that by agreeing to a “waiver of all claims” or “resolving all claims” without a knowing and informed waiver by the client of his or her tort claims is not an informed waiver. Make sure you do not foreclose your client’s options with an uninformed settlement.

If you are litigating a dissolution of marriage and civil case simultaneously, California Rules of Court 5.2 gives the family court discretion to take jurisdiction over related matters.<sup>45</sup> A dissolution of marriage proceeding may be consolidated with a civil action in certain instances.<sup>46</sup> However, given the right to trial by jury in a civil case, the family law judge may require a jury trial waiver as a condition of consolidation. In the alternative, the judge may decide nonjury matters and submit the other issues to a jury.

### **V. Conclusion**

When practitioners have tunnel vision about their area of practice, it is the client who is hurt. If you are not prepared to advise your client on all their options, seek competent counsel in related areas of law. No attorney knowingly wants to revictimize a survivor of domestic abuse, and by foreclosing options for a survivor without their knowledge, you may be depriving the survivor of agency in their process of healing and justice.

- 1 Where appropriate, I am interchanging the word “abuse” for “violence” in consideration of that fact that domestic abuse is a pattern of behavior that includes not only physical violence but also sexual, emotional, psychological, and financial abuse.
- 2 California Constitution article I, section 28, commonly known as “Marsy’s Law” or the Crime Victims’ Bill of Rights is the cornerstone of victim protections. Representation by a victim’s rights attorney as opposed to a criminal defense attorney could be the difference between survivor-centered advocacy and an extension of the defense team. Where victims are appointed defense attorneys from the same pool as the defendant, it creates a system where victims are not in fact getting independent representation for their rights, but rather are being represented by those who have interests aligned with their batterers. This in effect only serves to perpetuate the cycle of violence and the pattern of silencing victims.
- 3 Rules Prof. Conduct, rules 1.1, 1.3-1.4.
- 4 Civil Code, § 1708.6.
- 5 See Pen. Code, § 13700, subd. (a); *Pugliese v. Super. Ct.* (2007) 146 Cal.App.4th 1444, 1449, citing FC, § 6203 (“‘Abuse’ is defined as any of the following: ‘(a) Intentionally or recklessly to cause or attempt to cause bodily injury. [¶] (b) Sexual assault. [¶] (c) To place a person in reasonable apprehension of imminent serious bodily injury to that person or to another. [¶] (d) To engage in any behavior that has been or could be enjoined pursuant to Section 6320.’”).
- 6 See Code Civ. Proc., § 340.15, subd. (b); FC, § 6211.
- 7 FC, § 6320.
- 8 *Id.*
- 9 Of course, emotional harm also has components of physical injury; e.g. trauma manifests in physical symptoms like chronic back and neck pain, fibromyalgia, migraines, digestive problems, irritable bowel syndrome, chronic fatigue, some forms of asthma, adrenaline release, sleep disorders, and dysregulated cortisol. See van de Kolk, M.D., *The Body Keeps the Score, Brain, Mind, and Body in the Healing of Trauma* (2014).
- 10 Carey, *Domestic Violence Torts: Righting A Civil Wrong* (2014) 62 U. Kan. L. Rev. 695, 709; Scherer, *Tort Remedies For Victims of Domestic Abuse* (1992) 43 S.C. L. Rev. 543, 562; see also, e.g., *Newsome v. Cooper-Wiss, Inc.* (1986) 179 Ga.App. 670, 672 (battery common law tort cause of action); *Everett v. Goodloe* (2004) 268 Ga.App. 536, 543 (assault common law tort cause of action).
- 11 See Scherer, *Tort Remedies For Victims of Domestic Abuse*, 43 S.C. L. Rev. 543 at p. 562; see also, e.g., *Barnett v. Farmer* (Ga. Ct.App. 2011) 308 Ga.App. 358, 362 (note 15).
- 12 *Klein v. Klein* (1962) 58 Cal.2d 692, 693 (en banc) (with respect to negligence torts); *Self v. Self* (1962) 376 P.2d 65 (en banc) (with respect to intentional torts).
- 13 See Scherer, *Tort Remedies For Victims of Domestic Abuse*, 43 S.C. L. Rev. at pp. 562-563.
- 14 Section 1 of Stats. 2002, ch. 193 (Assem. Bill No. 1933).
- 15 *Pugliese v. Super. Ct., supra*, 146 Cal.App.4th at 1454.
- 16 *Id.*
- 17 *Id.*
- 18 Cal. Bill Analysis, Assemb. Bill No. 1933 Assemb., June 11, 2002.
- 19 *Pugliese v. Super. Ct., supra*, 146 Cal.App.4th at 1448.
- 20 *Id.* at 1450.
- 21 *Id.* at 1451.
- 22 *Id.* at 1447-1448.
- 23 *Pugliese, supra*, 146 Cal.App.4th at 1447.
- 24 *Ibid.*
- 25 *Pugliese, supra*, 146 Cal. App. 4th at 1451.
- 26 *Id.* at 1452, citing *Birschtein v. New United Motor Manufacturing, Inc.* (2001) 92 Cal.App.4th 994, 1003.
- 27 *Pugliese, supra*, 146 Cal.App.4th at 1452.
- 28 *Ibid.* (internal citations omitted).
- 29 Civ. Code, § 1708.5.
- 30 Code Civ. Proc., § 340.16.
- 31 Civ. Code, § 52.4.
- 32 *Id.*
- 33 *John B. v. Super. Ct.*, 38 Cal.4th 1177, 1188 (2006). “[T]o be stricken with disease through another’s negligence is in legal contemplation as it often is in the seriousness of consequences, no different from being struck with an automobile through another’s negligence.”
- 34 Code Civ. Proc., § 335.1.
- 35 Code Civ. Proc., § 338.
- 36 Civ. Code, § 52.5.
- 37 Civ. Code, § 1708.7.
- 38 Civ. Code, § 1708.85.
- 39 Civ. Code, § 637.2.
- 40 Pen. Code, § 633.6, subd. (a).
- 41 Pen. Code, § 633.6, subd. (b).
- 42 Civ. Code, § 1708.6.
- 43 Fam. Code, §§ 6342, 6344.
- 44 Int. Rev. Code § 1041.
- 45 Cal. Rules of Court, rule 5.2.
- 46 Code of Civil Procedure section 1048, subdivision (a) provides for a joint hearing or trial when actions involving a common question of law or fact are pending before the court.



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