1990

Divorce, Interspousal Torts, and Res Judicata

Andrew Schepard
Maurice A. Deane School of Law at Hofstra University

Divorce, Interspousal Torts, and Res Judicata

ANDREW SCHEPARD*

Contents

*Andrew Schepard is an Associate Professor of Law at Hofstra University School of Law in New York. He received a B.A. from City College of New York in 1969, an M.A. from Columbia University, in 1969, and a J.D. from Harvard Law School in 1972. He is of counsel to William S. Beslow, Esq. in New York City.

Author's Note: The author wishes to thank Hofstra Law School colleague Eric Freedman, who provided invaluable comments on an earlier draft and Lisa Isaacson, Hofstra Law School class of 1990, for her research help.

I. Introduction: Hal and Wendy's Divorce and Wendy's Tort Action[1]

Hal and Wendy married twenty-five years ago and lived together in a jointly owned home for eighteen years. They have no children.

About five years ago, Hal and Wendy's marriage became troubled. Hal began seeing other women, but kept this fact from Wendy. Wendy began seeing other men, but kept this fact from Hal.

Hal and Wendy lived together intermittently over the next two years, alternating between periods of alienation and reconciliation. Hal shuttled between the marital home and a nearby rented apartment. Their sexual relationship followed a similar path.

One day, Wendy saw Hal with one of his girlfriends and became furious. She proclaimed reconciliation was impossible, hired a lawyer, and sued Hal for divorce. Hal, who claimed to still love Wendy, answered her complaint and tried to stall the divorce process as much as possible. Their sexual relationship continued intermittently.

Wendy resolved to end her marriage to Hal when she decided to marry her most recent lover, Joe. At Wendy's insistence, Wendy and Hal began negotiations for a settlement leading to a consent divorce.

During the period of negotiations, Wendy noticed small blisters near her vulva. Wendy's doctor diagnosed her as infected with the herpes simplex virus. Her sores crusted over and healed; the virus became latent. Wendy is receiving appropriate medication.

Wendy's fury against Hal reached volcanic proportions after her diagnosis. While Wendy had sexual intercourse with other men during the periods of separation from Hal, she firmly believes Hal deliberately infected her during their "on again, off again period."

Wendy's lawyer advised her that she could file a tort action for damages against Hal alleging deliberate or negligent transmission of the herpes virus.[2] When her lawyer brought up the idea, Wendy feared that if she filed the tort suit before the divorce settlement was concluded, Hal would use it as an excuse to delay reaching an agreement. She wanted a divorce as quickly as possible to marry Joe.

Wendy's lawyer agreed with Wendy's strategic analysis. He advised Wendy not to mention her potential tort claim to Hal or file suit until after the divorce decree was final. The lawyer also told Wendy he would

---

1. Wendy and Hal's story is an amalgam of the following cases: Overberg v. Lusby, 727 F. Supp. 1091 (E.D. Ky. 1990); Stuart v. Stuart, 143 Wis. 2d 377, 421 N.W.2d 505 (1988); J.Z.M. v. S.M.M., 226 N.J. Super. 642, 545 A.2d 249 (1988); Stafford v. Stafford, 726 S.W.2d 14 (Sup. Ct. Tex. 1987); S.A.V. v. K.G.V., 708 S.W.2d 651 (Sup. Ct. Mo. 1986); and McNevin v. McNevin, 447 N.E.2d 611 (Ct. App. Ind. 1983). The facts are chosen to raise clearly the legal issues on which this article focuses.

2. *See* R.A.P. v. B.J.P., 428 N.W.2d 103 (Minn. Ct. App. 1988); Maharam v. Maharam, 123 A.D.2d 165, 510 N.Y.S.2d 104 (1986).

not mention the possible tort claim to Hal's lawyer or the judge. Wendy's required financial disclosure statement thus did not list her potential tort claim in the column under "assets." Hal never became aware of Wendy's tort claim until after the divorce was final.

Hal and Wendy settled their known differences, divided their assets fifty-fifty (everything of substance either owned was marital property), and signed a separation agreement. Wendy's lawyer believed that, absent the tort claim, the division of assets closely approximated the way the divorce court would have decided the matter had agreement not been reached.

Wendy and Hal's agreement contained a clause stating that they "have made a full and complete disclosure of all the assets that have been accumulated during the term of the marriage." It did not, however, contain a general release clause.

On stipulation, the divorce court granted Wendy a divorce after a brief inquest. The separation agreement was incorporated into the court's decree.

As planned, on the last day within the period of the applicable statute of limitations, Wendy filed a tort action against Hal. She seeks thousands of dollars in compensatory and punitive damages. The lawyer representing Wendy in the tort action is the same lawyer who represented her in the divorce action.

Hal's answer denies Wendy's allegations, and raises the affirmative defense of res judicata. Hal then immediately moves to dismiss Wendy's complaint, arguing that her "interspousal tort" claim should have been litigated in her divorce action.

II. Overview

With varying levels of enthusiasm, a number of recent cases from different states hold that Hal's motion will be denied. In these states, Wendy will be allowed to litigate her tort claim in a subsequent separate action, even though she deliberately concealed her intention to file suit from Hal and the divorce court during the divorce action.[3]

In effect, these courts exempt Wendy's interspousal tort claim from the basic principle of res judicata: "[a] party should not be allowed to relitigate

3. Abbott v. Williams, 888 F.2d 1550 (11th Cir. 1989) (interpreting Alabama law); Nelson v. Jones, 787 P.2d 1031 (Sup. Ct. Alaska 1990); de la Croix de Lafayette v. de la Croix de Lafayette, 15 Fam. L. Rep. (BNA) 1501 (D.C. Super. Ct. Aug. 14, 1989); Stuart v. Stuart, 143 Wis. 2d 377, 421 N.W.2d 505 (1988); McCoy v. Cooke, 165 Mich. App. 662, 419 N.W.2d 44 (1988); Noble v. Noble, 761 P.2d 1369 (Sup. Ct. Utah 1988); Heacock v. Heacock, 402 Mass. 21, 520 N.E.2d 151 (1988); Simmons v. Simmons, 773 P.2d 602 (Colo. Ct. App. 1988); Nash v. Overholser, 114 Idaho 461, 757 P.2d 1180 (1988); Slansky v. Slansky, 556 A.2d 94 (Sup. Ct. Vt. 1988); Aubert v. Aubert, 529 A.2d 909 (S. Ct. N.H. 1987); McNevin v. McNevin, 447 N.E.2d 611 (Ct. App. Ind. 1983).

a matter that it already had the opportunity to litigate."[4] They reason that Wendy's divorce and tort claims are separate and independent causes of action that do not have to be joined in a single proceeding. Typical is a recent pronouncement of the Massachusetts Supreme Judicial Court:

> A tort action is not based on the same underlying claim as an action for divorce. The purpose of a tort action is to redress a legal wrong in damages; that of a divorce action is to sever the marital relationship between the parties, and, where appropriate, to fix the parties' respective rights and obligations with regard to alimony and support, and to divide the marital estate. Although a judge in awarding alimony and dividing marital property must consider, among other things, the conduct of the parties during the marriage, the purpose for which these awards are made do not include compensating a party in damages for injuries suffered. The purpose of an award of alimony is to provide economic support to a dependent spouse, that of the division of marital property is to recognize and equitably recompense the parties' respective contributions to the marital partnership.[5]

A significant minority of courts, however, do not concur in the "different causes of action" analysis. Rather, applying the "same transaction" test,[6] they hold that Wendy's subsequently filed interspousal tort action is barred by res judicata.[7] These courts reason, in essence, that Wendy's action for divorce and her tort claim both evolve from a common factual nucleus and raise interrelated economic issues that should be resolved in a single proceeding. They view the parties and their marital relationship as the appropriate basic unit of litigation, not the different legal theories that can be placed on events that occurred during the marriage.

The majority-minority split has great significance because of two social trends: an increase in divorce litigation and an increase in the receptiveness of the courts to providing compensation for torts committed by one spouse against another during marriage.

"[J]udicial resources are finite and the number of cases that can be heard by the court is limited. Every dispute that is reheard means that another will be delayed."[8] State court dockets are crowded. Divorce litigation comprises a major portion of the caseload of many large state court

4. F. JAMES & G. HAZARD, CIVIL PROCEDURE § 11.2 at 589 (3d ed. 1985) [hereinafter JAMES & HAZARD].

5. Heacock v. Heacock, 402 Mass. 21, 520 N.E.2d 151, 153 (1988).

6. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 24(1) (1982).

7. Smith v. Smith, 530 So. 2d 1389 (Sup. Ct. Ala. 1988); Kemp v. Kemp, 723 S.W.2d 138 (Ct. App. Tenn. 1986); Tevis v. Tevis, 79 N.J. 422, 400 A.2d 1189, 1196 (1979). *Cf.* Boronow v. Boronow, 71 N.Y.2d 284, 519 N.E.2d 1375, 525 N.Y.S.2d 179 (1988) (ex-spouse generally precluded from raising questions of title to property in a subsequent action if full and fair opportunity to litigate those questions in the divorce action); Partlow v. Kolupa, 122 A.D.2d 509, 504 N.Y.S.2d 870 (1986), *aff'd mem.* 69 N.Y.2d 927, 509 N.E.2d 327, 516 N.Y.S.2d 632 (1987) (subsequent conversion action filed by wife barred by divorce judgment); Davis v. Dieujuste, 496 So. 2d 806 (Fla. Sup. Ct. 1986) (property rights).

8. J. FRIEDENTHAL, M. KANE & A. MILLER, CIVIL PROCEDURE § 14.3 at 615 (1985) [hereinafter FRIEDENTHAL, KANE & MILLER].

systems.[9] The policy interest in conserving scarce judicial resources by concentrating all claims between the divorcing couple into a single proceeding is thus great and weighs in favor of a broad application of res judicata principles.

There is also a related social interest in reducing the private transaction costs (the most significant component of which is legal fees) of settling marital differences. Divorce is generally a zero sum economic transaction: there is not enough money in the marital settlement pot for both spouses to live postdivorce at the same standard of living as before the divorce. Increasing the transaction costs of the divorce settlement by reopening proceedings reduces further the total resources available for the postdivorce family to live on. The result of allowing Wendy to file her tort claim after the divorce settlement may be to transfer more money from Hal to Wendy; Hal, however, will be poorer, and both Hal's and Wendy's lawyers will be richer.

Also weighing in favor of a broad application of res judicata is the policy of repose that underlies it.[10] Divorce is a wrenching, all-consuming emotional experience,[11] perhaps more so than the events underlying most other kinds of litigation. It rips apart the basic social institution that provides emotional stability and security for individuals.[12] Hal's and Wendy's well-being, and their continued productive functioning as members of society, require that their emotional stability be reestablished quickly and firmly by a final settlement of marital differences.[13]

Giving Wendy a second chance to raise an interspousal tort claim also means she need not disclose her intention to sue Hal the first time around. Hal thus has no opportunity to attempt to negotiate settlement of the tort claim as part of the divorce settlement. He has a more than colorable basis for arguing that the rules of procedure discourage Wendy and her

---

9. In New York in 1988, for example, uncontested matrimonial actions numbered 48,185. Notes of issue indicating readiness for trial were filed in 9,488 matrimonial cases. The total number of notes of issue disposed of was 62,752. Telephone interview with Chester Mount, Manager of Data Services, New York State Office of Court Administration (October 23, 1989). Apparently, no similar statistics are kept on a national level. Telephone interview with Todd Stickel, Staff of the National Center for State Courts, Williamsburg, Virginia (August 18, 1989).

10. FRIEDENTHAL, KANE & MILLER, *supra* note 8, § 14.3 at 615.

11. *See generally* J. WALLERSTEIN & J. KELLY, SURVIVING THE BREAK-UP: HOW PARENTS AND CHILDREN COPE WITH DIVORCE (1980).

12. C. LASCH, HAVEN IN A HEARTLESS WORLD (1977); Demos, *Images of the American Family, Then and Now* in CHANGING IMAGES OF THE FAMILY 43–60 (V. Tufte & B. Myerhoff, eds. 1979). ("[W]e have isolated family life as the primary setting—if not, in fact, the only one—for *caring* relationships between people") (emphasis in original).

13. *See* Boronow v. Boronow, 71 N.Y.2d 284, 290–91, 519 N.E.2d 1375, 1378–79, 525 N.Y.S.2d 179, 183 (1988) (parties generally precluded from subsequently litigating questions of title to property if had full and fair opportunity to raise them in divorce action) ("Fragmentation in this area would be particularly inappropriate and counterproductive . . . a continuation of the relationship and of the conflict among parties to a matrimonial litigation would be particularly perverse. . . .").

lawyer from being fully candid in the divorce settlement negotiations.

Procedural rules reflect a vision of how parties in a dispute should communicate with each other. Allowing relitigation of issues that should have been resolved in the first divorce proceeding encourages the notion that divorcing spouses are allowed to "sandbag" each other by somewhat deceptive strategic behavior during divorce settlement negotiations.

Courts recognize the importance of the social and private interests in stability of marital judgments and settlements by placing a heavy burden on a divorce litigant who challenges a separation agreement after the fact.[14] Broad application of res judicata to divorce actions serves these same ends.

The policies favoring a broad application of res judicata to bar subsequently filed interspousal torts must, however, be carefully balanced against the policies favoring justice in the individual case and practicality. Wendy is not a victim of grotesque physical abuse, but many other married women are. In the past decade, our collective social consciousness has been raised to recognize the serious problems of spousal abuse and domestic violence.[15] Courts have generally expanded the possibility of recovery for such tortious conduct by abolishing common law husband-wife immunity.[16] Requiring a brutalized spouse to assert a claim for tort for harm inflicted during the marriage in a divorce action, some fear, may simply enrage the abuser more and cause the wife more harm.

These concerns can be conceptually supported by the argument that Wendy's claims for tort and divorce are so fundamentally different that they should not be joined in a single proceeding. Wendy's divorce claim is simply designed to sever her marriage to Hal and to determine the economic rights resulting therefrom. Her tort action, in contrast, is de-

---

14. In essence, a litigant challenging a separation agreement has to show either (a) that the agreement is substantively unconscionable (a bargain " 'such as no [person] in his [or her] senses and not under delusion would make on the one hand, and as no honest and fair [person] would accept on the other.' " Christian v. Christian, 42 N.Y.2d 63, 71, 396 N.Y.S.2d 817, 823, 365 N.E.2d 849, 855 (1977) *quoting* Hume v. United States, 132 U.S. 406, 411, (1889) or (b) that the agreement was reached through a procedure that, in its totality, reeks of fraud or duress by one spouse. *Id.*

15. The scope of the problem is only partially captured in the following statistics: at least 1.8 million women are battered every year. Some form of domestic violence occurs in 25 percent of all marriages. About 20 percent of the women seeking emergency surgical procedures are victims of domestic violence. *Newsweek*, Dec. 12, 1988, at 59. The reported appellate cases indicate that women are the plaintiffs in the great percentage of interspousal tort claims filed following divorce. Men too, however, file such claims. In a recent Alaska Supreme Court case, for example, an ex-husband sued his ex-wife for abuse of process, defamation, and malicious prosecution based on false allegations of child abuse in criminal and child protective proceedings that were concluded before the divorce action was settled. The Court held the husband's claims were not barred by the divorce settlement. Nelson v. Jones, 787 P.2d 1031 (Sup. Ct. Alaska 1990).

16. A recent decision of the Texas Supreme Court which abolished husband-wife immunity completely listed thirty-nine jurisdictions which abolished the doctrine in whole or part. Price v. Price, 732 S.W.2d 316, 319 (Sup. Ct. Tex. 1987). *See generally* 92 A.L.R.2d 901.

signed to punish Hal and compensate Wendy because Hal breached the minimum standards of care and decency towards Wendy required of all members of a civilized society, irrespective of marital status.[17] Given these different purposes, it can be argued that Wendy's tort and the divorce claims should also be procedurally separate. Or, at the very least, joinder should be permissive, not mandatory.[18]

Furthermore, problems of judicial administration arise should res judicata compel the joinder of tort and divorce actions. The most prominent is the right to a jury trial.[19] Historically, divorce claims have been tried by a judge and tort claims decided by a jury. Inevitably, when divorce and tort claims are joined in a single proceeding, problems will arise as to who the finder of fact should be and in what order the overlapping issues should be decided. Additionally, lawyers for plaintiffs in tort actions are generally allowed to charge contingent fees;[20] lawyers in divorce actions are generally not.[21]

Finally, overlaying tort litigation on divorce claims may make divorce litigation unmanageable. Some fear that requiring litigation of interspousal torts in a divorce action may undermine the policy premises of no-fault divorce.[22] Fear of res judicata may encourage divorce litigants to scrape the "bottom of the barrel" and assert every conceivable tort claim that arose during the marriage.[23] Divorce litigation will thus become more bitter and hostile than it already is.[24] Others fear that divorce litigation will become unmanageable as tort claims and third parties are added to joined tort/divorce litigation.[25]

The thesis of this article is that, despite these concerns, as a general rule, spouses should be required to litigate tort claims against each other

---

17. Note, *Interspousal Torts and Divorce: Problems, Policies, Procedures*, 27 J. FAM. L. 489 (1988–89).

18. *Id.* at 498.

19. *See, e.g.*, Abbott v. Williams, 888 F.2d 1550, 1554 (11th Cir. 1989) (interpreting Alabama law); Stuart v. Stuart, 143 Wis. 2d 377, 421 N.W.2d 505, 508 (1988).

20. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(c) (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2–20 (1979).

21. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(d)(1) (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2–20 (1979).

22. Simmons v. Simmons, 773 P.2d 602 (Colo. Ct. App. 1988); Goldman v. Wexler, 122 Mich. App. 744, 333 N.W.2d 121, 122 (1983).

23. *Cf.* JAMES & HAZARD, *supra* note 4, § 11.2 at 600 (discussing the problem in the context of the application of res judicata to all civil litigation).

24. *Cf.* Nash v. Overholser, 114 Idaho 461, 757 P.2d 1180, 1184–85 (Sup. Ct. Utah 1988) (concurring opinion) (almost never a convenient trial unit to combine tort and divorce action because joining them compounds bitterness and hostility of divorce and custody proceedings). *But cf.* Stuart v. Stuart, 143 Wis. 2d 377, 421 N.W.2d 505, 510 (1988) (concurring opinion) ("If at all possible, the parties in a divorce should best be able to terminate their relationships [in a single action]. They will have enough problems with the care, custody and support of children without having wounds reopened after the marriage is terminated regarding prior existing claims").

25. Stuart v. Stuart, 143 Wis. 2d 377, 421 N.W.2d 505, 507 (1988); Lord v. Shaw, 665 P.2d 1288, 1291 (Sup. Ct. Utah 1983).

that arose during the marriage relationship in the divorce action, or lose them. This proposed rule flows from the general thrust of both modern procedural and divorce reform, which encourage resolution of all grievances between a divorcing couple in a single proceeding. While claims for tort and divorce serve different social purposes, the facts establishing both claims and relief the plaintiff receives are inextricably intertwined. Modern rules of procedure generally compel parties to join such interconnected claims. The problems that the opponents of mandatory joinder foresee can be solved in a modern procedural system; careful judicial administration can prevent loss of jury trial rights and inequitable application or undue complication of the divorce action. Modern courts are capable of dealing with claims based on different legal theories arising out of a single factual base in one litigation.

III. Organization of This Article

This article first summarizes the historical evolution of res judicata and the divorce action. Both have broadened considerably in the modern era, as exemplified by the Federal Rules of Civil Procedure, the *Restatement (Second) of Judgments*, and no-fault divorce and equitable distribution laws.

This article will then apply the transactional analysis test of res judicata to the problem of an interspousal tort action filed after a divorce action. Using the test of the *Restatement (Second) of Judgments*[26] to determine whether a factual grouping constitutes a single claim, this article will analyze whether: (1) there is a common factual nucleus between the divorce and the interspousal tort; (2) the claims make a convenient trial unit; and (3) the parties and society expect both claims to be resolved in a single piece of litigation.

IV. Evolution of Res Judicata and the Divorce Action

A. *Definition of Terms*

Definitions borrowed from a standard civil procedure textbook suffice to begin the historical overview:

> "Res judicata" refers to the various ways in which a judgment in one action will have a binding effect in another. This includes the effect of the former judgment where the latter action proceeds on all or part of the very claim which was the subject of the former. In traditional terminology, this is called merger or bar; in modern terminology it is called claim preclusion. A second effect is traditionally known as collateral estoppel and now is called issue

26. RESTATEMENT (SECOND) OF JUDGMENTS § 24 comment b (1982).

> preclusion. It has to do with an issue determined in a first action when the same issue arises in a later action based on a different claim or demand.[27]

This article focuses on whether the "claim preclusion" branch of res judicata bars an interspousal tort action filed after a final divorce judgment. The terms "claim" and "issue" preclusion came into general usage after the author went to law school, and it is hard to teach an old dog new tricks. This article, therefore, somewhat inaccurately uses the broader term "res judicata" to mean claim, not issue preclusion. "Collateral estoppel" is used to refer to "issue preclusion."

B. *The Expansion of Res Judicata*

The scope of res judicata has expanded as a necessary complement to the modern expansion of the scope of pleading, joinder, and discovery, whose ultimate embodiment is the Federal Rules of Civil Procedure. The Federal Rules, in turn, have served as both a stimulus to and a reflection of state procedural reform.[28]

Before the Federal Rules, res judicata concepts were limited by the very nature of common law and Code pleading: (a) a focus on technical forms of action and pleading; and (b) the general absence of pretrial discovery. The scope of res judicata was limited to the opportunity that the rules of pleading and joinder gave the litigant to raise and discover claims and issues. It would have been unfair to bar a litigant from raising a claim in a subsequent action if he or she did not have the opportunity to litigate it in the first action.[29]

The common law pleading system, with its separation of law and equity, its multiple writs, and absence of discovery was "not a comprehensive investigation of responsibility for an alleged injury. And the basis for precluding relitigation of an issue was not that a party had already had an opportunity to litigate the issue but that it could not contradict a record to which it was a party. More fundamentally, inasmuch as common law procedure required narrow formulation of issues and limited opportunity for development of proofs, it accorded a judgment correspondingly limited effects in precluding further litigation."[30]

Code pleading, while formulated in more modern language than the common law pleading it replaced in some states, was similarly constricted in scope. For example, the claims which a plaintiff could join under the Field Code were defined in terms that parallel the common law forms of action. Joinder was permitted, furthermore, only if the "causes of action . . . belong[ed] to only one of these classes, and must equally affect

27. JAMES & HAZARD, *supra* note 4, § 11.3 at 590.

28. *See* FRIEDENTHAL, KANE & MILLER, *supra* note 8, § 5.1 at 238–39 (discussing the intertwined history of state and federal pleading reform).

29. Hazard, *Forms of Action Under the Federal Rules of Civil Procedure*, 63 NOTRE DAME L. REV. 628, 638 (1988) [hereinafter Hazard].

30. JAMES & HAZARD, *supra* note 4, § 11.2 at 589.

all the parties to the action, and not require different places of trial."[31]

"The structure of the Field Code, following the pattern of the common law, created what amounted to jurisdictional differentiations between types of wrongs. . . . These jurisdictional boundaries compressed litigation into narrowly defined substantive categories. . . . [I]n principle, every case stood on a single substantive bottom."[32] Litigation was simple. The rules of procedure required the plaintiff to fragment her claims into separate segments based on different legal theories and prevented her from discovering facts in the possession of the other side that might have expanded her claim.

As in the common law, under Code pleading the scope of res judicata was limited to the litigant's opportunity to present claims under the governing rules of pleading and joinder. Res judicata was defined in terms of the "cause of action" that a plaintiff raised in the first litigation. "The definitions of res judicata under the Field Code were cast in such terms as 'same evidence,' 'same basic right,' etc. Collectively these responses constituted a body of res judicata law almost as arcane as common law pleading. These complications ultimately derived from the same fundamental source, i.e., the fact that the procedural system was predicated on differentiation of substantive claims."[33]

Thus, under common law and Code pleading res judicata ultimately focused on semantics rather than substance:

> All these definitions were in a sense question-begging. They did not specify what the remedial right, substantive right, or primary right was, and those terms could be given a wider or narrower meaning in any given case . . . The "same evidence" test similarly left unanswered the question, "Evidence of what—evidence of liability, of all losses, or of particular losses?"[34]

The narrow focus of res judicata pleading thus encouraged additional litigation because of uncertainty over the scope of what was decided in previous actions. Res judicata was a minimalist doctrine, "permit[ting] relitigation of any question except the narrow one of whether the prior action correctly decided the issues necessarily involved in awarding the judgment that was actually awarded."[35]

The Federal Rules embodied a revolutionary change in the way courts and lawyers thought about the basic unit of litigation. They abolished the distinction between law and equity,[36] and created the unified civil action.[37] They focused pleading on substance, not form.[38] Even more sig-

31. HAZARD, *supra* note 29, at 630 *quoting* FIRST REPORT OF THE COMMISSIONERS ON PRACTICE AND PLEADING § 143, at 157 (1848).
32. *Id.* at 632.
33. *Id.* at 638.
34. JAMES & HAZARD, *supra* note 4, § 11.8 at 599.
35. *Id.* § 11.2 at 588.
36. FED. R. CIV. P. 1.
37. FED. R. CIV. P. 2.
38. FED. R. CIV. P. 8(a).

nificantly for present purposes, the Rules adopted the concept of the compulsory counterclaim "aris[ing] out of the same transaction or occurrence that is the subject matter of the opposing party's claim."[39] The Rules also considerably broadened the rules of joinder of parties and claims from common law and Code pleading. As to joinder of claims, the Federal Rules provided that all claims between two opposing parties may be asserted in a single action.[40] They also move toward the proposition that all persons who are significant participants in an out-of-court transaction should be parties to any litigation that results from it.[41] As the Supreme Court stated in the famous *Gibbs* case: "[u]nder the Rules, the impulse is towards the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged."[42] Finally, the Rules broadened pretrial discovery, requiring, in essence, that each party make most of the facts underlying its case available to the other side before trial begins.[43]

The concept of res judicata was transformed by the increase in the initial opportunity to litigate created by modern procedure. The focus of res judicata analysis shifted from the legal form of what was litigated to the underlying factual base that was the subject of the previous case. Transactional analysis generally superseded the "primary right" or "same evidence" analysis. "A transaction or a series of closely connected transactions is the basic unit of litigation, regardless of the variations in legal theories, primary rights, grounds, evidence, or requested remedies."[44] While the Federal Rules *permitted* broad joinder of claims, the correlative rule of claim preclusion they engendered *requires*, absent extenuating circumstances, that all theories of claim and remedy arising from a single transaction be asserted in a single action.[45]

There is little doubt that a state procedural system that follows the transactional philosophy of the Federal Rules and the *Restatement (Second) of Judgments* would create a strong presumption that Wendy should bring her tort claim against Hal in the initial divorce action. Indeed, if Hal sued Wendy for divorce instead of vice versa, and the state had a compulsory counterclaim rule applicable to all civil actions identical to Federal Rule 13(a),[46] Wendy would likely have to file her tort claim or

39. FED. R. CIV. P. 13(a). *See* Conley v. Gibson, 355 U.S. 41 (1957).
40. FED. R. CIV. P. 18(a).
41. FED. R. CIV. P. 20(a). *See* Hazard, *supra* note 29, at 628–29.
42. United Mine Workers v. Gibbs, 383 U.S. 715, 724 (1966).
43. FED. R. CIV. P. 26–37.
44. FRIEDENTHAL, KANE & MILLER, *supra* note 8, § 14.4 at 627.
45. RESTATEMENT (SECOND) OF JUDGMENTS § 24 comment c (1982).
46. Over thirty states have a compulsory counterclaim rule identical or similar to FED. R. CIV. P. 13(a). Comparator, Compulsory Counterclaims, Fed. Proc. Rules Service, FED. R. CIV. P. 13(a) (1989–90). States which take a limited view of the effect of res judicata in divorce actions, however, treat interspousal tort claims as exceptions to the general compulsory counterclaim rule. *See* Nelson v. Jones, 787 P.2d 1031 (Sup. Ct. Alaska 1990); Simmons v. Simmons, 773 P.2d 602 (Colo. App. 1988). *Cf.* Slansky v. Slansky, 556 A.2d 94,

lose it. She knew of the tort claim at the time of the divorce action. At least superficially, her tort claim seems to "aris[e] out of the transaction or occurrence that is the subject matter of the opposing party's claim." The thrust of modern procedure puts the burden on Wendy to explain why she should or could not litigate her tort claim in the divorce action.

C. *The Expansion of the Modern Divorce Action*

The question then arises whether there is something unique about the combination of a divorce action and an interspousal tort that should exempt Wendy's tort claim from compulsory joinder with her divorce action. The recent history of the action for divorce, however, suggests quite the contrary: its scope has dramatically expanded, both substantively and procedurally.

England was largely a divorceless society until 1857, with Parliament legislatively granting a few absolute divorces (*divorce a vinculo matrimonii*, freeing the parties to remarry) to a few wealthy people on the basis of adultery. The common people had to be satisfied with a divorce from bed and board (*divorce a mensa et thoro*), a form of legal separation administered by the ecclesiastical courts, which did not allow remarriage.[47]

The American colonies did not have ecclesiastical courts. They did, however, initially adopt the English view that "[a]bsolute divorce was unknown, divorce from bed and board very rare."[48] Some divorces in the colonies were granted by legislatures or the executive, but they were the exception rather than the rule.

After independence, the states began to liberalize the availability of divorce, and transferred responsibility for administering it from the legislature to the judiciary.[49] When state legislatures began to allow divorce, and transfer the business of granting it to judges, they generally permitted only a spouse who could show she was virtuous, and the other spouse a sinner, to get a divorce. Proof of marital fault—adultery, cruel and inhuman treatment, abandonment—became the key to access to divorce.[50]

During this period, hypocrisy generally pervaded divorce law. Most divorces occurred because both spouses ultimately wanted them. Under the fault system, they and their lawyers had to manufacture facts at perfunctory hearings to satisfy the fault grounds specified in the statute. Few spouses who contested fault actually wanted to remain married to their

---

n.1 (Vt. Sup. Ct. 1988) *quoting* VT. R. CIV. P. 80(f) ("[f]ailure of the defendant in an action for divorce to counterclaim for divorce or nullity of the marriage or any other claim shall not bar a subsequent action therefor").

47. *See* Mueller, *Inquiry into the State of a Divorceless Society: Domestic Relations Law and Morals in England from 1660 to 1857*, 18 U. PITT. L. REV. 545 (1957).

48. L. FRIEDMAN, A HISTORY OF AMERICAN LAW 204 (2d ed. 1985).

49. *See generally id.* at 202, 204–08.

50. *See id.* at 498–504.

errant spouse. Instead, they used fault as a bargaining wedge to increase the errant spouse's purchase price for the freedom to remarry. In those few cases in which the grounds for divorce were actually litigated, the trial began from the premise that the breakdown of a marriage can be attributed to the wrongdoing of one spouse. This premise did not comport with the evolving social sense that the acts of marital fault were a symptom, not the cause, of deeper underlying problems in the marriage relationship.[51]

A sea change in the availability of absolute divorce began in the 1960s with California's famous "no-fault" divorce reform.[52] Many states abolished fault grounds for divorce altogether; others superimposed no-fault grounds such as "irreconcilable differences" on the traditional fault grounds.[53] The wisdom of such changes is still hotly debated, and the actual statutes of most states reflect continuing political tension on the availability of absolute divorce. Nonetheless, it is certainly a fair general observation that absolute divorce is today far more broadly available to most people in the United States than it was thirty years ago.

Economic relief required by divorce has similarly expanded. Under the fault divorce regime, the scope of marital property distributed in a divorce action was generally largely limited to tangibles. Nonmonetary contributions (such as homemaker services) and intangible property rights were generally excluded from the marital "pot." Formal title ownership was the key to the distribution.[54] A spouse at fault for the marital dissolution could be punished by a lesser distribution of marital assets.[55]

The principles governing economic distributions at divorce in recent years have broadened beyond formal title ownership and fault to include consideration of contributions to the marital enterprise and need.[56] Property in the marital pot for distribution now includes intangibles such as degrees, licenses, and pensions.[57] The importance of formal title owner-

51. *See* M. WHEELER, NO-FAULT DIVORCE 2–18 (1974).

52. *See* CALIFORNIA GOVERNOR'S COMMISSION ON THE FAMILY, REPORT (1966). For a history of the report and evaluation of its effects by one of its most distinguished members, see Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U. CINN. L. REV. 1 (1987). For a cross-cultural perspective, see M. GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 64–81 (1987).

53. *See* Freed & Walker, *Family Law in the Fifty States: An Overview*, 21 FAM. L.Q. 367, 383–84 ("[a]ll American jurisdictions now have some form of no-fault divorce") and 417, 441–42 (1988) ("twenty states retain fault grounds in addition to one or more no fault grounds").

54. *See* Younger, *Marital Regimes: A Story of Compromise and Demoralization, Together with Criticisms and Suggestions for Reform*, 67 CORNELL L. REV. 45 (1981).

55. J. AREEN, FAMILY LAW 593 (2d ed. 1985).

56. *See id.* 593–95.

57. *See, e.g.*, O'Brien v. O'Brien, 66 N.Y.2d 576, 489 N.E.2d 712, 498 N.Y.S.2d 743 (1985) (medical license); Majauskas v. Majauskas, 61 N.Y.2d 481, 474 N.Y.S.2d 699, 463 N.E.2d 15 (1984) (pensions). *See generally* Freed & Walker, *supra* note 53, at 408–09 (Table V) and 419 (Table VI).

ship of an asset in the marital pot is subordinated to equitable considerations.[58]

As the substance of the divorce action has expanded, so has its procedure. Today, a divorce action is generally conceived of as civil litigation like any other, with some special variations for the nature of the case. For example, before equitable distribution, pretrial disclosure in divorce actions was severely limited. With its advent, pretrial financial disclosure is now extremely broad, encompassing a searching examination of the parties' assets.[59] Today, spouses in many states have to file disclosure statements listing their assets, liabilities, and needs with each other and the courts.[60] The usual discovery tools of depositions and document demands are largely available in divorce actions.

D. *Divorce and Res Judicata: Current Status*

The expanded concepts of res judicata and the expanded divorce action have not, however, fully merged. Taken as a group, state courts are profoundly ambivalent about requiring Wendy to join her tort claim against Hal with her divorce action. That ambivalence is expressed in different definitions of the scope of the res judicata effect given to divorce judgments.

Some courts seem to believe that a divorce action is *sui generis*, a unique form of action with limited preclusive effect in future civil actions.[61] They give res judicata a minimal effect, roughly equivalent to that of a judgment under the common law forms of action. The "same transaction" test is essentially ignored by courts adhering to this line of analysis.

Other courts acknowledge the same transaction test to be the governing standard, yet treat interspousal torts filed after a judgment of divorce as an exception to an otherwise "liberal [transactional] approach to what

58. *See, e.g.*, N.Y. DOM. REL. LAW § 236B1c (McKinney 1988) (" 'marital property' shall mean all property acquired by either or both spouses during the marriage . . . regardless of the form in which title is held").

59. *See, e.g.*, N.Y. DOM. REL. LAW § 236B4 (McKinney 1988) (requiring compulsory disclosure of spouses' financial states); Lehman v. Lehman, 179 Cal. App. 3d 558, 224 Cal. Rptr. 572 (1986); Hamstead v. Hamstead, 357 S.E.2d 216 (W. Va. 1987), *rev'd on other grounds*, 364 S.E.2d 794 at 798 (W. Va. 1987).

60. *See, e.g.*, 22 N.Y. COMP. CODES R. & REGS. A-1 (McKinney 1989) (New York net worth statement); IOWA CODE ANN. § 598.13 (1981); W. VA. CODE § 48-2-33(a) (1986) (net worth statement authorization).

61. *E.g.*, Slansky v. Slansky, 150 Vt. 627, 556 A.2d 94 (1988) (tort claim arising out of marriage is not barred by the "stringent requirements for the application of the doctrine of res judicata"); Weil v. Lammon, 503 So. 2d 830, 832 (Sup. Ct. Ala. 1987) (concurring opinion) ("[A]ctions for divorce are sui generis"); Lord v. Shaw, 665 P.2d 1288, 1291 (Sup. Ct. Utah 1983) ("A divorce action is highly equitable in nature, whereas the trial of a tort claim is at law . . . the administration of justice will be better served by keeping the two proceedings separate").

constitutes a cause of action."[62] Finally, still other courts articulate the same transaction test and apply it broadly to divorce judgments, treating them essentially the same for purposes of res judicata as judgments in other modern civil actions.[63]

The trend of both modern procedure and modern divorce law supports the last view. The overwhelming advantage of the same transaction analysis is that it emphasizes function, not form. It looks behind labels and compels careful and pragmatic analysis of the reasons and policies why disputes should or should not be combined into a single litigation unit.[64] Applying it to divorce actions serves the basic purposes of modern divorce law and the policies of judicial economy and litigant repose.

V. Transactional Analysis, Divorce, and Interspousal Torts

A. *The Governing Standards*

The *Restatement (Second) of Judgments*, the fullest expression of the transactional approach to res judicata, defines transaction as "a natural grouping or common nucleus of operative facts."[65] Determining whether a factual grouping constitutes a transaction is a pragmatic determination which considers factors such as: (1) whether the facts are closely connected in time, space, origin, or motivation; (2) whether they form a convenient litigation unit; and (3) whether treating them as a single transaction conforms with the parties' expectations.[66]

Under these tests, Wendy should be required to file her tort claim in her divorce action against Hal. In most cases, an interspousal tort action filed subsequent to a divorce judgment should be held to be part of the "same transaction" as the divorce judgment and barred by res judicata.

B. *Common Factual Grouping*

Wendy's divorce and interspousal tort claim share two common factual groupings. First, at least in fault divorce states, the grounds for both overlap.

More significantly, however, in both fault and no-fault states, both the

62. Aubert v. Aubert, 129 N.H. 422, 529 A.2d 909, 912 (1987) ("[N]arrow exception to [the] traditional interpretation of . . . res judicata"). *Accord*, Nelson v. Jones, 787 P.2d 1031 (Sup. Ct. Alaska 1990); Nash v. Overholser, 114 Idaho 461, 757 P.2d 1180, 1181 (1988).

63. *E.g.*, Simmons v. Simmons, 773 P.2d 602 (Col. App. 1988) (concurring and dissenting opinion); Weil v. Lammon, 503 So. 2d 830 (S. Ct. Ala. 1987); Tevis v. Tevis, 79 N.J. 422, 400 A.2d 1189, 1196 (1979); Partlow v. Kolupa, 122 A.D.2d 509, 504 N.Y.S.2d 870 (3d Dep't 1986), *aff'd mem.* 69 N.Y.2d 927, 509 N.E.2d 327, 516 N.Y.S.2d 632 (1987).

64. Comment, *The Entire Controversy Doctrine: A Novel Approach to Judicial Efficiency*, 12 SETON HALL 260, 289 (1982) (discussing New Jersey rule).

65. RESTATEMENT (SECOND) OF JUDGMENTS § 24 comment b (1982).

66. *Id.*

divorce and tort claims must be satisfied from a common pot of marital assets. Wendy's divorce and tort action, in effect, make two separate, but overlapping, claims for an extra share of the single pool of assets that she and Hal have accumulated during their marriage. Reflecting fairness and efficiency concerns, the rules of procedure generally require that all claims to a common pot of assets be asserted in the single distributional proceeding or be lost.[67] Wendy's tort and divorce claims should be treated similarly.

1. The Substantive Grounds for Divorce and Tort

(a) *Fault divorce*

The story of Wendy and Hal does not specify whether the jurisdiction in which they live has eliminated all fault grounds for divorce. In a state which retains the traditional fault divorce ground of "cruel and inhuman treatment," there is an obvious factual overlap between the action for divorce and an interspousal tort. Cruel and inhuman treatment is generally defined as "conduct of the defendant that . . . so endangers the physical or mental well-being of the plaintiff as renders it unsafe or improper to cohabit with the defendant."[68] The deliberate or negligent transmission of a sexual disease committed during the marriage seems to fit this definition; it can be both cruel and inhuman treatment and the basis of a tort action. If Hal and Wendy did not settle their divorce claim, in a fault divorce state Wendy's complaint for divorce surely would include allegations of cruel and inhuman treatment based on transmission of the herpes virus, as well as adultery.[69]

The factual overlap between grounds for divorce and the tort action in fault divorce states is ironically illustrated by cases which simultaneously hold that: (a) the res judicata effect of the divorce judgment does not preclude the plaintiff's subsequently filed interspousal tort; but (b) collateral estoppel does preclude the defendant's relitigation of liability and causation in the tort action because of a finding of a marital fault in the divorce action.[70] Preclusion principles in these cases are available as a sword, but not as a shield. The result is some unfairness to the tortfeasor, who is deprived of his right to a jury trial on the tort claim, should he want one.

---

67. *See, e.g.*, Fed. R. Civ. P. 22 (interpleader); Bankruptcy Act, 11 U.S.C. § 501(c) (1983) and Bankruptcy R. 3001 & 3002 (generally requiring filing of proof of claim in bankruptcy or its loss).

68. N.Y. Dom. Rel. Law § 170(1) (McKinney 1988).

69. Wendy might also seek to use her infection with the herpes virus as proof of Hal's adultery. *Cf.* Schepard, *AIDS and Divorce*, 23 Fam. L.Q. 1, 18–19 (1989) (discussing whether a spouse's infection with the AIDS virus is proof of adultery in a divorce).

70. McCoy v. Cooke, 165 Mich. App. 662, 419 N.W.2d 44, 46 (1988); Noble v. Noble, 761 P.2d 1369, 1375 (Sup. Ct. Utah 1988).

(b) *No-fault divorce*

The factual overlap between the grounds for the divorce action and the tort action in pure no-fault divorce states is far less evident. Some courts, in effect, treat no-fault divorce as divorce on the demand of one spouse, without inquiring into the reasons why the spouse wants a divorce.[71] In those states, since grounds for divorce are not required, there is little factual overlap between the grounds for divorce and the interspousal tort. There is some danger that compulsory joinder of a tort claim in a divorce action will raise the level of acrimony between the spouses in the divorce proceeding.[72] Indeed, the increase in availability of remedies for interspousal torts is a very strong argument for complete elimination of fault grounds altogether.[73]

No-fault jurisdictions thus have a difficult policy choice to make about whether Wendy should be required to join her tort action with her claim for divorce. Joinder may defeat the very purpose of no-fault divorce reform. On the other hand, as will be discussed subsequently, the economic relief available to Wendy in the divorce action significantly overlaps with the economic relief that can be awarded in the tort judgment, and both are likely to come from a single marital pot. It is thus both fair and efficient to coordinate Wendy's tort and divorce awards in a single proceeding.

Probably the most practical solution is to join the tort and divorce claims even in a no-fault state. The court could, however, grant the no-fault divorce, but stay the entry of judgment, before hearing the facts underlying the tort action, the tort damage claim and the divorce-related claims for economic relief.[74] That way, the purposes of the no-fault divorce law are preserved, and the economic relief in the tort and divorce action coordinated as well.

2. ECONOMIC AWARDS

In fault states, then, there will be a considerable factual overlap between the substantive grounds on which Wendy makes her divorce and tort claims. The factual overlap between her actions is dramatically amplified when possible economic relief on both claims is factored into the equation. Indeed, one commentator states that "[t]he propriety of treating a tort award as part of the benefited spouse's financial resources is the

71. Few judges deny divorce requests in no-fault jurisdictions. Generally, if one party requests a divorce in such states it is granted. J. AREEN, *supra* note 55, at 272–73.

72. *Cf.* Chiles v. Chiles, 779 S.W2d 127 (Tex. Sup. Ct. 1989) (action for intentional infliction of emotional distress cannot be joined with a divorce action because to do so "would bring fault back to divorce, undermining years of reform").

73. Note, *supra* note 17, at 510.

74. *See* N.Y. CIV. PRAC. LAW § 3212(e)(2) (McKinney 1989) (allowing court to enter summary judgment but withhold entry of the judgment "pending the determination of any remaining cause of action"). *Cf.* FED. R. CIV. P. 56(d) (describing procedures for cases in which partial summary judgment is rendered but trial is still required on other issues).

strongest justification for the . . . position that the tort and the divorce must be litigated together."[75]

(a) *Punishment*

The economic relief granted in both tort and divorce actions is based on a mixture of principles of punishment and compensation for injury based on projections of past loss and future need. Punitive damages may be available in a tort action to punish the wrongdoer and deter others. Punitive damages can be awarded by a jury in a tort action in many states if the tortfeasor acted with express or implied malice. In setting the punishment, the jury considers the tortfeasor's ability to pay damages. The amounts of punitive and compensatory damages awarded by the jury need not be proportional.[76]

The role of fault in divorce-related economic distributions is analogous to the standard for awards of punitive damages in tort actions. In many states, a spouse's fault can be considered in either marital property distribution or maintenance awards, or both.[77] For example, in New York, whose equitable distribution statute is silent on the role of fault in property and maintenance awards, courts can consider conduct which "shocks the conscience" in distributing property.[78] Serious batteries and other tortious conduct could presumably be taken into account under this standard.[79] The intermediate courts of appeal in New York are divided on the question whether less egregious levels of marital fault (such as adultery) can be considered in setting maintenance awards.[80]

Thus, there is an element of possible punishment in both divorce-related economic distributions and an award of punitive damages in the tort action. It simply would not be fair to Hal to be doubly punished in

75. Note, *supra* note 17, at 514.

76. *See* Browing-Ferris Industries v. Kelco Disposal, Inc., 109 S. Ct. 2909, 2922, n.24 (1989) (describing law of punitive damages in Vermont and stating it is "typical of the law in most American jurisdictions").

77. Freed & Walker, *supra* note 53, at 408–09 (Table V).

78. *E.g.*, O'Brien v. O'Brien, 66 N.Y.2d 576, 589, 489 N.E.2d 712, 719, 498 N.Y.S.2d 743, 750 (1985); Blickstein v. Blickstein, 99 A.D.2d 287, 472 N.Y.S.2d 110 (1984).

79. A New York trial court recently held, for example, that a husband's rape of his stepdaughter was "especially repugnant or horrific conduct" that could be taken into account in equitable distribution because it inflicted psychological damage and resulted in economic loss on the wife from inability to work. Thompson v. Thompson, 16 Fam. L. Rep. (BNA) 1125 (Sup. Ct. Nassau Cty. Jan. 5, 1990).

80. *Compare* Stevens v. Stevens, 107 A.D.2d 987, 484 N.Y.S.2d 708 (3d Dep't 1985) *and* Nolan v. Nolan, 107 A.D.2d 190, 486 N.Y.S.2d 415 (3d Dep't 1985) (egregious marital fault can be taken into account in maintenance awards) *with* Wilson v. Wilson, 101 A.D.2d 536, 476 N.Y.S.2d 120 (1st Dep't 1984), *appeal denied*, 67 N.Y.2d 667, 476 N.E.2d 1006, 487 N.Y.S.2d 1027 (1985) *and* Maloney v. Maloney, 114 A.D.2d 440, 494 N.Y.S.2d 356 (2d Dep't 1985) (generally excluding marital fault from consideration in fashioning maintenance awards).

two separate, uncoordinated civil actions for his egregious fault.[81] If a choice has to be made between the two actions, no-fault divorce and associated economic relief, combined with a tort action based on fault, seems to be the more sensible course to follow.

(b) *Compensation*

Tort awards of compensatory damages generally consist of three components: (1) compensation for pain, suffering, and actual physical harm; (2) compensation for lost income and for medical expenses; and (3) compensation for loss of consortium.[82] There are two possible overlaps between the compensatory damages award and economic relief in the divorce action. In some states, a portion of the recovery for personal injuries may belong to the marital estate. Second, principles guiding jury awards of compensatory damages overlap with principles used by divorce courts to distribute marital property and award maintenance to the injured spouse, raising the potential for double recovery.

In a majority of equitable distribution states personal injury awards are marital property. Other states, by statute, define personal injury awards as separate property. Indeed, some jurisdictions conceive of the tort action as an "asset" of the injured spouse that should be disclosed on the financial disclosure statements generally required in a divorce action.[83] Finally, some states separate compensatory damages into components and hold that compensation for pain and suffering is separate property of the injured spouse, compensation for lost earnings is marital property, and compensation for loss of consortium is separate property of the uninjured spouse.[84]

Depending on the law of the state, Hal might thus claim that some portion of Wendy's tort recovery belongs to the marital estate, or to him. The idea that Hal is entitled to share in Wendy's recovery when: (a) he caused the injuries; and (b) he would not share in the recovery if Wendy

81. Texas apparently solves this problem by allowing fault to be considered in the divorce distribution, or the tort claim, but not both. Note, *supra* note 17, at 508. This solution, of course, deprives one party or the other of a jury trial right on the punitive damages claim, if the divorce action is decided first.

82. Note, *Johnson v. Johnson: Personal Injury Awards In Divorce Actions*, 65 N.C.L. REV. 1332, 1335 (1987).

83. Heacock v. Heacock, 402 Mass. 21, 25 n.3 520 N.E.2d 151, 154 n.3 (1988). New York's financial disclosure form requires disclosure of a spouse's "causes of action." Statement of Net Worth, N.Y. COMP. CODES R. & REGS. Appendix A-1 ¶ IV M (McKinney 1989). Other courts have, however, held that the tort claim is too speculative to require disclosure. Stuart v. Stuart, 143 Wis. 2d 377, 421 N.W. d 505, 509 (1988); McNevin v. McNevin, 447 N.E.2d 611, 617 (Ind. Ct. App. 1983). This holding is obviously in tension with the notion that intangible assets should be included in the marital "pot" for distribution.

84. *See* Note, *supra* note 82, at 1334 n.21.

and he were not married, is, however, highly objectionable.[85] It sounds much like the argument of the child who murders his father, and then pleads for mercy because he is an orphan. It might be possible to dismiss Hal's claim on the principle that a tortfeasor should not profit from his own wrong.[86] Wendy's personal injury award should thus be classified as her separate property, and Hal should have no claim for loss of consortium.

Realistically, Hal's payment of the tort award comes in the form of a higher percentage of the marital estate being awarded to Wendy or from Hal's separate property, if he has any. The size of the tort award to Wendy is, however, potentially much greater than her share of the marital estate, since the tort award is not conceptually limited by the amount of assets available for distribution, or Hal's income.[87]

The danger of double recovery by Wendy arises, however, because economic awards in divorce judgments incorporate principles of compensation similar to those considered by juries in making personal injury awards. For example, New York's equitable distribution statute requires the divorce court to consider the following factors in determining how to distribute marital property: "the probable future financial circumstances of each party,"[88] the "age and health of both parties,"[89] and "any award of maintenance."[90] The potential overlap between tort compensatory damages and divorce economic awards is even more evident when the factors a New York court must consider in setting a maintenance award to Wendy are listed: the "age and health of both parties";[91] "the present and future earning capacity of both parties";[92] "the ability of the party seeking maintenance to become self-supporting";[93] and "any other factor which the court shall expressly find to be just and proper."[94] Applying these need-based principles, courts have increased maintenance awards to spouses because of medical necessity and lost income.[95]

---

85. Indeed, the argument that the husband "owned" the wife's recovery even though he was the tortfeasor was one of the conceptual arguments that supported the now discredited rule of interspousal tort immunity. *See* W. PROSSER, LAW OF TORTS § 116 at 880 (3d ed. 1964). Presumably, courts would not want to revive this concept in more modern garb.

86. *See* J. OLDHAM, DIVORCE, SEPARATION AND THE DISTRIBUTION OF PROPERTY § 8.01[3] at 8-8–8-10 (1989).

87. Note, *supra* note 17, at 505.

88. N.Y. DOM. REL. LAW. § 236(B)(5)(d)(8) (McKinney 1988).

89. *Id.* § 236(B)(5)(d)(2).

90. *Id.* § 236(B)(5)(d)(5).

91. N.Y. DOM. REL. LAW § 236(B)(6)(2) (McKinney 1988).

92. *Id.* § 236(B)(6)(3).

93. *Id.* § 236(B)(6)(4).

94. *Id.* § 236(B)(6)(11).

95. *See* Kuhn v. Kuhn, 134 A.D.2d 900, 521 N.Y.S.2d 929 (1987) (court rejects claim duration of maintenance to wife should be limited to the length of the marriage because the wife is in poor health and is unlikely to find self-supporting employment); Antis v. Antis, 108 A.D.2d 889, 485 N.Y.S.2d 770, 771 (1985) (trial court maintenance award to wife raised in light of her mental illness and disfigurement due to burns); Rodgers v. Rodgers, 98 A.D.2d

In summary, Hal faces the prospect of Wendy's multiple economic claims because of her single injury from the following sources: (1) fault and need taken into account in property distribution; (2) punitive damages; (3) tort compensatory damages; and (4) fault and need taken into account in maintenance payments. Even courts which hold that a divorce judgment does not preclude a subsequent tort claim recognize this extensive overlap between divorce awards and tort damages and the danger of overcompensation it raises. For example, they increase maintenance to the injured spouse and allow the tortfeasor spouse to raise the increased payments as a setoff in the tort action.[96]

Thus, while it is formally correct to say that damages for personal injuries cannot be recovered in a maintenance award in a divorce action,[97] the principles and facts underlying the awards overlap. There are, however, significant practical differences between personal injury damages and maintenance awards. A maintenance award is, for example, taxable to the payee and deductible to the payor; tort compensation for pain and suffering is not taxable to the payee, though punitive damages can be.[98] Maintenance may be modifiable in the future;[99] tort judgments are not. Such considerations, however, only heighten the need for the parties, their lawyers, and the court to carefully coordinate and, if necessary, distinguish between the types of economic payments awarded to Wendy.

The divorce court oversees a highly discretionary distribution of Wendy and Hal's marital assets which can take many different forms. Wendy's tort recovery is a significant factor in the overall picture. The judgments that have to be made to coordinate the types and sizes of Hal's payments to Wendy because of his tortious conduct and their dissolved marriage relationship are complex and interrelated. It would thus be highly efficient for both the judicial system and the parties to determine the dissolved family's financial future in a single judgment rather than seriatim.[100]

386, 389, 470 N.Y.S.2d 401, 404 (1983) (increased maintenance award to wife in poor health to assist her in maintaining standard of living and to make health insurance payments). *See also* McBane v. McBane 553 S.W.2d 521 (Mo. Ct. App. 1977) (court retains jurisdiction to increase maintenance award if wife's physical condition deteriorates further).

96. McCoy v. Cooke, 165 Mich. App. 662, 419 N.W.2d 44, 46 (1988); Noble v. Noble, 761 P.2d 1369, 1373–74 (Sup. Ct. Utah 1988). *Cf.* Hill v. Hill, 415 So. 2d 20 (Sup. Ct. Fla. 1982) (decision to keep interspousal tort immunity in marital tort actions combined with divorce claim and ordering trial courts to consider scope of injury and need for compensation in maintenance award).

97. Aubert v. Aubert, 129 N.H. 422, 529 A.2d 909, 912 (Sup. Ct. N.H. 1987); Heacock v. Heacock, 402 Mass. 21, 24, 520 N.E.2d 151, 153 (1988).

98. Note, *supra* note 17, at 506.

99. Note, *supra* note 82, at 1349, n.131 (describing North Carolina law on modification of maintenance).

100. An interesting example of a complex combined tort and divorce action is Carmichael v. Carmichael, 15 Fam. L. Rep. (BNA) 1617 (Super. Ct. D.C. Oct. 20, 1989). The parties stipulated to a joint court trial of a combined malpractice and divorce action brought by the wife against her psychologist-husband who, the wife claimed, took advantage of her vulnerability and wealth. The court awarded the wife $1 million for the malpractice but did not

C. *Convenient Trial Unit*

1. The Advantages of Combination: *Simmons v. Simmons*

The factual overlap between the grounds and remedies in the divorce and tort actions alone makes Wendy and Hal's marriage and Wendy's tort claim a "convenient trial unit." Another way to consider this issue is to illustrate the procedural inefficiency that results when the tort and divorce actions are not combined.

In *Simmons v. Simmons*,[101] for example, it took seven years and two appeals to get back to ground zero because the tort and divorce proceedings were not treated as a single litigation unit. The husband won a partial summary judgment in the separate divorce action based on an antenuptial agreement. The wife then won a large tort award after a separate jury trial, during which her lawyers argued that she should be granted a large tort award because the antenuptial agreement limited her recovery in the divorce action. The wife won a reversal of the divorce court's decision on the antenuptial agreement; the husband then won a reversal of the tort decision on the grounds of unfair prejudice due to the references to the antenuptial agreement before the jury. Thus, despite the extensive proceedings in both the divorce and tort actions, the Simmonses are no closer to finalizing their economic rights against each other than they were when they began. The result is a wasteful allocation of their own and society's limited resources for resolving disputes. The only people who profited from keeping the divorce and tort actions separate were the Simmonses' lawyers.

2. The Problems of Jury Trial in a Combined Action

The principal barrier to the efficiencies of combination are fears that Wendy will lose her right to a jury trial in a combined proceeding.

The Seventh Amendment to the United States Constitution preserves the right to jury trial as it existed at common law in 1791, the date of the Amendment's ratification by the original states.[102] While the Seventh Amendment is not applicable to the states, almost all of them have similar state constitutional guarantees which are similarly interpreted.[103]

Modern divorce statutes and practice generally place the fact-finding

---

consider that aspect of his misconduct again in the very complex equitable distribution award resulting from the divorce action.

101. 773 P.2d 602 (Colo. App. 1988).

102. Friedenthal, Kane & Miller, *supra* note 8, § 11.3 at 480.

103. *Id.* § 11.7 at 503.

power in divorce cases in a judge, rather than a jury.[104] This is in part a result of the history of granting divorce in ecclesiastical/equity courts. A divorce litigant had no right to a jury trial at English common law because there was no action for divorce. The action for separation from bed and board was administered by judges in ecclesiastical courts. Equity courts, however, had the power to compel a husband to maintain his wife. The separation of church and state generally prohibited ecclesiastical courts in this country. The American practice, however, relying on the closest English precedent, was to treat divorce actions as equitable.[105]

There are other reasons that most divorce practice takes place before judges, not juries. Distributing a marital estate often requires complex accounting of the parties' mutual claims against each other. Historically, such complex accounting was performed by equity, not law, courts, not juries.[106] Wardship proceedings too are classical proceedings in equity,[107] as are claims for breach of fiduciary duty.[108]

Tort claims, which usually involve a single lump sum award are, in contrast, classically "legal." A tort plaintiff is generally entitled to a jury trial.[109] The problem thus arises about how to arrange a jury trial for Wendy's tort claim, while keeping the fact-finding for and administration of the divorce in the judge's hands.

No one, presumably, wants to add juries to divorce court in any major way. There are thus two realistic possibilities for managing the problems of jury trial in Wendy's combined tort and divorce action against Hal: (1) try the tort claim before a jury first, then incorporate its factual findings and damage award in the judge's divorce decree; (2) have both the tort and divorce claims decided by a judge.

Most states, like the federal system,[110] have merged law and equity into a trial court of general jurisdiction which is empowered to grant divorce and tort relief.[111] In a merged court system, jury trial can be preserved in a single presentation of evidence for legal and equitable claims by simply mandating the order in which the claims are decided. In federal practice,

---

104. *See* Kiser v. Kiser, 325 N.C. 502, 385 S.E.2d 487 (1989) (no right to jury trial under North Carolina Constitution in equitable distribution action). Some states, by statute, provide for jury trial for fault aspects of a divorce action. New York, for example, allows a litigant to request a jury trial on issues of grounds for fault divorce. N.Y. DOM. REL. LAW § 173 (McKinney 1988).

105. D. DOBBS, REMEDIES § 2.1 at 25, n.4 (1973) *citing* 4 J. POMEROY, EQUITY JURISPRUDENCE §§ 1119–20 (5th ed. 1941).

106. *Id* § 4.3 at 252–54.

107. *See* T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 164 (5th ed. 1956).

108. D. DOBBS, *supra* note 105, § 2.3 at 37.

109. *E.g.*, Curtis v. Loether, 415 U.S. 189, 195–96 (1974).

110. FED. R. CIV. P. 1–2.

111. This conclusion is based on a review of the Comparator which compares the Federal Rules of Civil Procedure with the civil procedural statutes and rules of states within each federal appellate circuit. Comparator, One Form of Action, Federal Procedure Rules Service, F.R.C.P. 1 and 2 (1989–90).

absent compelling necessity, legal issues must be decided before equitable issues when the two are combined.[112] A similar rule could be imposed in state practice for a combined divorce and tort action.[113] The judge would make his divorce decision and distribution taking into account the jury's verdict and award of damages in the tort action.

A diametrically opposed line of reasoning is followed in New Jersey, whose courts treat tort claims as "incidental" to the divorce action and allow the judge to decide it without a jury.[114] Unlike the Seventh Amendment federal guarantee,[115] New Jersey's state constitutional guarantee of jury trial is subject to the inherent jurisdiction of the courts of equity to adjudicate ancillary and incidental matters. It thus permits combined divorce and tort actions to be decided by a judge without a jury.[116] Similarly, in states which have not merged law and equity, the equity "clean-up" doctrine might give a court of equity the power to award tort damages in a combined divorce and tort action without a jury.[117]

Whether other states can adopt the New Jersey rule, or use the "clean-up" doctrine to eliminate jury trials in combined tort and divorce actions depends on their construction of their state constitutional guarantees of jury trial. A basic question of fairness is, however, raised by the problem. Wendy would be entitled to a jury trial on her tort claim if she and Hal were not married. There does seem to be something inherently unfair about denying her a jury trial for the same claim simply because she is married and seeking both a divorce and tort judgment. The jury is the conscience of the community in tort cases, articulating and imposing minimum standards of civilized behavior. Since we have made a policy decision to allow married people to sue each other for tort, the jury should perform the same function for married plaintiffs and defendants as for the unmarried. Wendy should get a jury trial on her tort claim, especially since it is entirely feasible for the legal system to provide it and still combine her divorce and tort actions.

3. Complication of the Divorce Action

(a) *Different retainer agreements*

It is also possible to manage the problem that contingent fee retainer agreements are permissible in tort actions but not in actions for divorce. The simplest solution is for Wendy's lawyer to enter into two separate

112. Dairy Queen v. Wood, 369 U.S. 469 (1962); Beacon Theaters, Inc. v. Westover, 359 U.S. 500 (1959).

113. The Utah Supreme Court recently imposed such a rule for divorce and tort actions arising out of the same marriage, though it ruled that the two claims should proceed in separate lawsuits. Noble v. Noble, 761 P.2d 1369, 1371 (1988).

114. Apollo v. Kim Anh Pham, 192 N.J. Super. 427, 470 A.2d 934 (1983); Davis v. Davis, 182 N.J. Super. 397, 442 A.2d 208 (1982).

115. *See* cases cited in note 112 *supra*.

116. Apollo v. Kim Anh Pham, 192 N.J. Super. 427, 470 A.2d 934, 936 (1983).

117. *See* Liles v. Liles, 289 Ark. 159, 711 S.W.2d 447 (1986).

retainer agreements with her, one for the divorce and the other for the tort claim. He can charge Wendy on an hourly basis for the divorce action, establish a contingent fee arrangement for the tort claim, and keep separate time records. While there will be, no doubt, some overlap between the divorce and the tort claim, Wendy's lawyer should be able to roughly estimate how much time he is spending on each without too much difficulty.

Whatever the retainer agreement, Wendy's attorney's fees are likely to be paid from Hal's share of the marital estate. The possibility of overlap and duplication between the attorney's fees awards for Wendy in the tort and the divorce action seems a strong argument that the size of each should be monitored by one judge, not two.

(b) *Additional claims and parties*

Another concern about a combined divorce and tort action is that vital interim determinations—particularly on custody issues—will be delayed while the complicated combined action proceeds to trial.[118] Divorce courts are, however, generally empowered to make interim determinations on such issues on motion pending final judgment.[119] Interim economic and custody judgments can be made rapidly without losing the administrative benefits of combining the divorce and tort action in a single proceeding for final judgment.

Furthermore, should the combined action prove too difficult to manage, either party could make a motion to sever claims for separate trial.[120] A court also has the power, in appropriate cases, to keep the combined divorce and tort action relatively simple by denying joinder of third parties and claims whose addition will complicate and delay the action because of the marginal issues they interject.[121] Discretionary judicial management of combined tort and divorce actions is a more useful method to deal with the problems that result from combining tort and divorce actions than absolute rules that treat them as different causes of action.

---

118. Stuart v. Stuart, 143 Wis. 2d 377, 421 N.W.2d 505, 507–09 (1988).

119. For a description of the possible requests for temporary orders in a divorce action see Ploetz, *Precommencement Strategy* in 1 FAMILY LAW AND PRACTICE § 2.03 at 12-15–2–93 (1988).

120. *E.g.*, N.Y. CIV. PRAC. L. & R. § 4011 (McKinney 1990) (giving court power to regulate sequence of issues tried); *Cf.* FED. R. CIV. P. 42(b) ("The court, in furtherance of convenience or to avoid prejudice, or where separate trials will be conducive to expedition and economy, may order a separate trial of any claim . . . or of any separate issue or any number of claims . . .").

121. *See* Chiacchio v. Chiacchio, 198 N.J. Super. 1, 486 A.2d 335 (1984) (denying joinder of insurance company that denied coverage of plaintiff wife's claim as third party defendant to a combined divorce and tort action on grounds that husband's claim of indemnification from the insurance company is contractual and does not arise out of the marriage relationship). *See also* J.Z.M. v. S.M.M., 226 N.J. Super. 642, 545 A.2d 249, 252 (1988) (despite general rule requiring consolidation of tort and divorce action, court declines to consolidate postdivorce marital tort action with ongoing custody modification proceeding because tort action "does not bear on a continuing family relationship").

D. *Expectations of the Parties and Social Practice*

The most difficult question to answer in applying the same transaction test to interspousal tort actions filed after a divorce judgment is whether doing so best serves public policy, as measured by the expectations of the parties.

Certainly, there are an unknown number of spouses, mostly wives, who will not file a tort claim with a divorce action for fear of further enraging their already abusive spouse. If encouraging the victim of domestic violence to file a tort claim is the primary value to be maximized in designing a procedural system for combined tort and divorce actions, the post-divorce tort claim should generally be allowed.[122] One would hope, however, that better ways can be found to provide victims of domestic violence with physical and psychological security[123] without distorting the transactional thrust of modern civil procedural and divorce reform to do so.

Furthermore, an explicit exception could be made to transactional analysis if a spouse can meet the burden of showing "excusable neglect" in not filing her tort claim in the divorce action.[124] Excusable neglect could be defined to include a credible and documented fear of retaliation if the claim were filed with the divorce action. A history of previous physical abuse by the tortfeasor would go a long way toward establishing the necessary excusable neglect. The burden of persuasion, however, should be on the spouse who seeks to utilize the exception.

The problem with allowing Wendy to file her tort claim after the divorce is concluded without good cause is that there may be less sympathetic reasons for her decision than fear of what Hal would have done to her if she filed the claim earlier. Wendy may, for example, have become dissatisfied with the economic settlement achieved in the divorce and use the subsequently filed interspousal tort action as a back-door method of reopening negotiations.

While there is nothing inherently evil in using the threat of a tort claim to increase a spouse's share of a marital settlement, allowing the threat to be made after the divorce has seemingly concluded is far more troublesome. However distasteful Hal may be, he may rightly perceive that he has been "sandbagged" when Wendy files her tort action.[125] After all, he had no warning of what Wendy and her lawyer had in store for him.

---

122. Stuart v. Stuart, 143 Wis. 2d 377, 421 N.W.2d 505, 507–08 (1988).

123. For a recent effort, *see* Finn, *Statutory Authority in the Use and Enforcement of Civil Protection Orders Against Domestic Abuse*, 23 FAM. L.Q. 43 (1989).

124. *See* Brown v. Brown, 208 N.J. Super. 372, 506 A.2d 29, 34 (1986) (while "entire controversy" doctrine generally bars subsequently filed marital tort, wife's claim in particular case is not barred from filing claim because lawyer in divorce action was advised of tort claim and refused to raise it).

125. Nash v. Overholser, 114 Idaho 461, 757 P.2d 1180, 1185 (1988) (Bistline, J. concurring). *Cf.* Boronow v. Boronow, 71 N.Y.2d 284, 290, 519 N.E.2d 1375, 1379, 525 N.Y.S.2d 179, 183 (1988) ("The courts and the parties should ordinarily be able to plan for the resolution of all issues relating to the marriage relationship in the single action").

The clause in the separation agreement that states Wendy and Hal have made full disclosure to each other reinforces Hal's belief that his relationship with Wendy has been fairly terminated. Hal's expectation that he can move on with his postdivorce life has proven to be sadly mistaken.[126] One can only speculate whether Hal's rage will be greater at being deceived by a false sense of security and stability than it would have been had the tort claim been dealt with during the divorce negotiations.

VI. Conclusion

The scope of res judicata applied to interspousal tort claims filed after divorce should ultimately reflect a vision of what society wants the divorcing process to look like. One vision, furthered by issue and claim-based analysis of res judicata and its limited application, is that the spouses are adversaries. They have the right to engage in strategic behavior that maximizes their economic welfare, even if a touch of deception is involved.[127] An alternate vision, promoted by transactional analysis, is that while the spouses are adversaries, they—and society—have an important interest in encouraging candor in their settlement negotiations[128] and com-

126. It might, of course, be argued that Hal can protect himself against Wendy's subsequent tort action by insisting on a general release in the divorce settlement negotiations. Hal—or more accurately, his lawyer—probably should have done so. Such broad general releases seem to be standard operating procedure in sophisticated matrimonial settlement agreements, at least in New York. *See* S. SCHLISSEL, SEPARATION AGREEMENTS AND MARITAL CONTRACTS § 9.02 at 260 (1986) (sample clause). At least one court has interpreted a general release in a separation agreement of "all . . . claims arising or growing out of [the] marital relationship. . . ." to bar a spouse who knew she had a tort claim identical to Wendy's, but failed to inform her divorce lawyer of the claim, from asserting it in subsequent litigation. Overberg v. Lusby, 727 F. Supp. 1091 (E.D. Ky. 1990). Other courts, however, might not reach the same result. *See* Abbott v. Williams, 888 F.2d 1550, 1555–56 (11th Cir. 1989) (narrowly interpreting separation agreement which did not contain a general release under Alabama law to permit assertion of subsequently filed interspousal tort). Some treat marital tort claims as too speculative to be included as assets for purposes of pretrial financial disclosure. *See* cases cited in note 83 *supra*. These courts might well interpret a general release clause as not including a "speculative" asset. Other courts interpret general release clauses narrowly, holding that for the release to be effective, the particular property released must be specifically described in the separation agreement or divorce decree. *E.g.*, Yeo v. Yeo, 581 S.W.2d 734, 738–39 (1979); Lebeau v. Lebeau, 258 Pa. Super. 519, 393 A.2d 480, 483 (1978).

127. In Stuart v. Stuart, 143 Wis. 2d 377, 421 N.W.2d 505, 509 (1988), the Wisconsin Supreme Court vacated the intermediate Court of Appeals holding that a tort claim was an asset that had to be disclosed during divorce negotiations. The Supreme Court reasoned that an asset was not forfeited if not disclosed, as perjury and constructive trusts are available as remedies. The intermediate Court of Appeals reasoned that the tort action had to be disclosed, and that "[f]ailing to disclose a known asset is a serious matter." It held, however, that the husband had not been prejudiced by nondisclosure, as any damages he would have to pay would come from his separate property or his interest in marital property. Stuart v. Stuart, 140 Wis. 2d 455, 410 N.W.2d 632, 637 (1987).

128. "Agreements between spouses, unlike ordinary business contracts, involve a fiduciary relationship requiring the utmost of good faith. There is a strict surveillance of all transactions

plete resolution of all issues between them in a single negotiation or proceeding.[129] This second vision is supported by the general direction of both modern procedure and divorce law. It also is more workable, and ultimately more morally compelling and socially useful than its competitor.

between married persons, especially separation agreements. Equity is so zealous in this respect that a separation agreement may be set aside on grounds that would be insufficient to vitiate an ordinary contract." Christian v. Christian, 42 N.Y.2d 63, 72, 365 N.E.2d 849, 855, 396 N.Y.S.2d 817, 822–23 (1977).

129. *See* Stuart v. Stuart, 143 Wis. 2d 377, 421 N.W.2d 505, 510 (1988) (Steinmetz, J. concurring) (rules of procedure should encourage divorce attorneys to put claims on table during settlement negotiations).