

TRADITION, DISTORTION, AND CREATION:
THREE APPROACHES TO “BATTERED WOMAN’S
SYNDROME” IN TORT

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I. INTRODUCTION

Because of the tragic incidence of spousal abuse,¹ the plight of the battered woman is increasingly debated in courthouses across the country. While spousal abuse arises most frequently as an affirmative defense by women facing criminal prosecution for killing their abusive partners,² some women have raised the issue while suing their husbands or boyfriends in tort for personal injuries suffered during the relationship.³

Battered women who sue their abusive partners in tort have traditionally faced three substantial legal obstacles.⁴ First, such lawsuits were barred outright by the common law doctrine of interspousal tort immunity.⁵ Second, if the woman was already divorced from her abusive husband, a subsequent lawsuit for torts committed during the marriage could be barred by *res judicata*.⁶ Finally, and most relevant to this discussion, such lawsuits were frequently barred by the statute of limitations.⁷

Courts and state legislatures have taken deliberate steps to eliminate these obstacles. The vast majority of states have abolished interspousal tort immunity.⁸ Many states do not permit joinder of divorce and tort actions, making it less likely that a subsequent tort lawsuit between former spouses will be barred by claim or issue

1. In the United States, a woman is beaten by her husband or boyfriend every nine seconds. *Too Much of it Around: Domestic Violence*, THE ECONOMIST, July 16, 1994, at A25.

2. See, e.g., *Bechtel v. State*, 840 P.2d 1 (Okla. Crim. App. 1992).

3. See, e.g., *Simmons v. Simmons*, 773 P.2d 602 (Colo. Ct. App. 1989); *Courtney v. Courtney*, 437 S.E.2d 436 (W. Va. 1993); *Criss v. Criss*, 356 S.E.2d 620 (W. Va. 1987).

4. Rhonda L. Kohler, *The Battered Woman and Tort Law: A New Approach to Fighting Domestic Violence*, 25 LOY. L.A. L. REV. 1025, 1029-30 (1992).

5. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 122, at 901-02 (5th ed. 1984).

6. See, e.g., *Tevis v. Tevis*, 400 A.2d 1189 (N.J. 1979).

7. See, e.g., *Davis v. Bostick*, 580 P.2d 544 (Or. 1978); *Courtney*, 437 S.E.2d 436.

8. See, e.g., *Cramer v. Cramer*, 379 P.2d 95 (Alaska 1963); *Brown v. Gosser*, 262 S.W.2d 480 (Ky. 1953); *Noone v. Fink*, 721 P.2d 1275 (Mont. 1986); *Scotvold v. Scotvold*, 298 N.W. 266 (S.D. 1941).

preclusion.⁹ Until recently, the statute of limitations was the last great barrier to a battered woman's recovery against her abusing partner for torts committed during the relationship.

On August 11, 1995, a New Jersey court of appeals tore down this last wall. In *Giovine v. Giovine*,¹⁰ the court created a new cause of action in tort for "Battered Woman's Syndrome" (BWS), a psychological condition caused by physical and emotional injuries sustained by acts of battering throughout the marriage and manifested in the victim's inability to take any action to extricate herself from the dire situation.¹¹ The court held that BWS constituted a new tort¹² and also tolled the statute of limitations on assault, battery, and intentional infliction of emotional distress, thus permitting the victim to sue for otherwise expired instances of these traditional torts.¹³

Giovine has received attention within the legal community¹⁴ for two reasons. First, whereas two trial courts¹⁵ previously recognized the same new tort,¹⁶ *Giovine* is the first recognition by an appellate court, thus lending heightened credence to the claim and impetus to an emerging judicial trend. Indeed, although the trial court refused to recognize the new tort,¹⁷ the appellate court went out of its way to do so, in effect affirming¹⁸ the decision of another New Jersey trial judge who created the BWS tort one year earlier in a separate case which was never appealed.¹⁹ Second, *Giovine* is the first decision in the nation to adopt the novel argument that distinct acts of assault and

9. See, e.g., *McNevin v. McNevin*, 447 N.E.2d 611 (Ind. Ct. App. 1983); IOWA CODE ANN. § 598.3 (West 1996).

10. 663 A.2d 109 (N.J. Super. Ct. App. Div. 1995).

11. *Id.* at 114.

12. *Id.*

13. *Id.* at 117.

14. See Thom Weidlich, "Battered Woman" Tort Gains, NAT'L L.J., August 28, 1995, at A6; Russ Bleemer, *Court: Battering Syndrome is a Claim, Not a Tort*, N.J. L.J., August 21, 1995, at 3.

15. *Cusseaux v. Pickett*, 652 A.2d 789 (N.J. Super. Ct. Law Div. 1994); *Jewett v. Jewett*, No. 93-2-01846-5 (Super. Ct. Spokane Cty. Wash. 1994).

16. Courts alternatively name the tort "spousal abuse" or "Battered Woman's Syndrome."

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

18. *Id.* at 117 ("[W]e now subscribe to the concept articulated in *Cusseaux* . . .").

19. *Cusseaux*, 652 A.2d at 789.

battery constitute a continuing tort, thus tolling the statute of limitations until cessation of the last tortious act.²⁰

After defining BWS and analyzing the relevant cases, this comment will distill the legal questions raised into essentially two issues: whether distinct intentional torts, specifically assault and battery, constitute "continuous" conduct; and whether the court should create a new tort of BWS. This comment will categorize each case as adopting one of three approaches: the traditional approach, wherein assault and battery are not continuous, and the invitation to create a new tort is declined; the distortive approach, wherein separate instances of assault and battery are found to comprise one continuous act, thus tolling the statute of limitations and permitting recovery for all acts of abuse; and the creative approach, whereby the court rejects the continuous theory but creates a new tort of BWS encompassing all the abusive acts. After analyzing the common law concept of continuous tort, this comment will argue that intentional torts cannot reasonably be found to be continuous. Finally, due to separation of powers, deference to settled legal concepts, and absence of compelling considerations which in the past have justified creation of new causes of action, this comment will conclude that courts should not create a new tort of BWS.

II. BATTERED WOMAN'S SYNDROME

Battered Woman's Syndrome, a form of post-traumatic stress disorder,²¹ is a psychological condition suffered by a woman "who is repeatedly subjected to any forceful physical or psychological behavior by a man in order to coerce her to do something he wants her to do without concern for her rights. Battered women include wives or women in any form of intimate relationships with men."²² Battered women generally exhibit strikingly similar characteristics, including traditional views about the female role in the family, guilt over their

20. *Giovine*, 663 A.2d at 117.

21. LENORE WALKER, *TERRIFYING LOVE* 48-49 (1989).

22. LENORE WALKER, *THE BATTERED WOMAN* xv (1979).

failing marriage, low self-esteem, and self-blame for the man's violent actions.²³

In an abusive relationship, the victim tends to develop BWS in three stages: tension building, acute battering, and loving contrition.²⁴ In the initial phase, the man expresses hostility through minor verbal and, sometimes, physical abuse; the woman attempts to prevent escalation of the violence any way she can.²⁵ During the second phase, when tension between the two becomes unbearable, the male "unleashes a barrage of verbal and physical aggression that can leave the woman severely shaken and injured."²⁶ During the final phase, the batterer apologizes profusely and promises to refrain from further violence.²⁷ The woman, encouraged by the love and kindness the man shows her during this stage, remains in the relationship.²⁸

While the period of calm during phase three may last several months, in a battering relationship, the abuse recurs. Phase one reappears, and the cycle repeats itself.²⁹

[I]n order to be classified as a battered woman, the couple must go through the battering cycle at least twice. Any woman may find herself in an abusive relationship with a man once. If it occurs a second time, and she remains in the situation, she is defined as a battered woman.³⁰

The cyclical nature of the abuse explains why so many battered women cannot leave their abusive relationships. As women suffer abuse in phases one and two, they hope that their abusers will change during phase three. Yet when the cycle repeats itself and they suffer more abuse, the women develop "learned helplessness": they become

23. *Id.* at 35-36.

24. LENORE WALKER, *THE BATTERED WOMAN SYNDROME* 95 (1984).

25. *Id.*

26. *Id.* at 96.

27. *Id.*

28. R. LANGLEY & R. LEVY, *WIFE BEATING: THE SILENT CRISIS* 112-114 (1977).

29. WALKER, *supra* note 22, at 70.

30. *Id.* at xv.

depressed, pessimistic, and unable to take any action to improve or alter their situation.

The combination of all these symptoms -- resulting from sustained psychological and physical trauma compounded by aggravating social and economic factors -- constitutes the battered-woman's syndrome. Only by understanding these unique pressures that force battered women to remain with their mates, despite their long-standing and reasonable fear of severe bodily harm and the isolation that being a battered woman creates, can a battered woman's state of mind be accurately and fairly understood.³¹

Therein lies what, to date, has been the primary legal importance of BWS: "to explain a complainant's actions, such as prolonged endurance of physical abuse accompanied by attempts at hiding or minimizing the abuse, delays in reporting the abuse, or recanting allegations of abuse."³² Many people wrongly believe that battered women enjoy or provoke their own abuse.³³ Accordingly, "[e]xpert testimony on the battered woman syndrome would help dispel the ordinary lay person's perception that a woman in a battering relationship is free to leave at any time."³⁴ Moreover, a majority of states recognize BWS as an accepted scientific theory.³⁵

"In most cases, the battered woman syndrome is offered by the defendant in a case of homicide in which the defendant is claiming self-defense."³⁶ Yet as more states gradually recognize the psychological validity of BWS,³⁷ victims have sought to expand its applicability into tort law as well. Legal advocates of BWS victims note that "[m]onetary judgments in personal injury actions may therefore be an

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

32. *People v. Christel*, 537 N.W.2d 194, 196 (Mich. 1995).

33. *Kelly*, 478 A.2d at 370 (citing *WALKER*, *supra* note 22, at 19-31).

34. *State v. Hodges*, 716 P.2d 563, 567 (Kan. 1986).

35. *Bechtel v. State*, 840 P.2d 1, 7 (Okla. Ct. Crim. App. 1992).

36. *Christel*, 537 N.W.2d at 200.

37. See Amicus Brief of the American Psychological Association, *Hawthorne v. State*, 408 So.2d 801 (Fla. Dist. Ct. App. 1982).

effective tool in the fight against violence toward women.”³⁸ This comment will analyze six principal cases in which the plaintiff asked the court to use BWS to classify all of the defendant’s abusive conduct as “continuous” to toll the statute of limitations and permit plaintiff to recover for otherwise expired intentional torts, or to create a new tort of spousal abuse, known as BWS. The decisions in such cases generally adopt one of three approaches.³⁹

III. THE TRADITIONAL APPROACH: BWS IS NOT A SEPARATE TORT AND CANNOT TOLL THE STATUTE OF LIMITATIONS

A. *Laughlin v. Breaux*:⁴⁰ *Assault and Battery are Separate Acts, Not Continuous Conduct*

On March 28, 1985, plaintiff Laughlin sued Breaux, her former boyfriend, for 13 instances of assault and battery⁴¹ occurring between

38. Rhonda L. Kohler, *The Battered Woman and Tort Law: A New Approach to Fighting Domestic Violence*, 25 LOY. L.A. L. REV. 1025, 1028-29 (1992). Ms. Kohler proved especially prescient and influential in proclaiming that “in a claim for spousal abuse, the Battered Woman Syndrome should be used to show that the tort is of a continuous nature” and that “the courts and legislatures should recognize a new tort of spousal abuse which would facilitate compensating women for mental and physical injuries inflicted by battering domestic partners.” *Id.* at 1030-31. Barely two years later, courts took the latter step in both *Jewett v. Jewett* and *Cusseaux v. Pickett*, and another court took both steps in *Giovine v. Giovine*. See discussion of these cases *infra*.

39. For more information on the nature, development, and legal status of BWS, see CHARLES PATRICK EWING, *BATTERED WOMEN WHO KILL* (1987); ANGELA BROWNE, *WHEN BATTERED WOMEN KILL* (1987); ROSEN, *BATTERED WIVES: A COMPREHENSIVE ANNOTATED BIBLIOGRAPHY OF ARTICLES, BOOKS AND STATUTES IN THE UNITED STATES OF AMERICA* (1988); D. MARTIN, *BATTERED WIVES* (1981); Rhonda L. Kohler, *The Battered Woman and Tort Law: A New Approach to Fighting Domestic Violence*, 25 LOY. L.A. L. REV. 1025 (1992); Lenore E. A. Walker, *Battered Women's Syndrome and Self-Defense*, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 321 (1992); Victoria Mikesell Mather, *The Skeleton in the Closet: The Battered Woman Syndrome, Self-Defense, and Expert Testimony*, 39 MERCER L. REV. 545 (1988); Douglas D. Scherer, *Tort Remedies for Victims of Domestic Abuse*, 43 S.C. L. REV. 543 (1992).

40. 515 So.2d 480 (La. Ct. App. 1987).

41. Defendant’s acts against plaintiff allegedly included verbal abuse, grabbing her arm, rape, refusing to leave her house, kicking her while she was lying on the ground, threats, pushes, twisting her arm behind her back, and hard open-handed slaps. *Id.* at 483-4.

December 23, 1982, and February 27, 1985. Citing Louisiana's one-year statute of limitations on such torts, the trial judge denied recovery for acts committed before March 28, 1984,⁴² but nevertheless permitted the jury to hear testimony about them.⁴³

On appeal, plaintiff argued that the defendant's actions before March 28, 1984, were not barred by the statute of limitations.⁴⁴ She contended that defendant's actions over the entire 26 month period constituted one continuing tort. Accordingly, she claimed, the statute of limitations for even the first act on December 23, 1982, did not begin to run until cessation of the last act on February 27, 1985, thus permitting her to recover for all suffered.

The appellate court rejected the applicability of continuing tort theory to this case because "[t]he principle of a continuing tort only applies when continuous conduct causes continuing damages."⁴⁵ Under Louisiana case law, each incident of assault and battery is separate, giving rise to a separate cause of action.⁴⁶ Since this case involved 13 acts of assault and battery, sometimes separated by several months, over the course of more than two years, defendant's conduct was not continuous. Moreover, prescription begins to run when the injury is apparent to the victim, "even though the extent of the damages may not be known."⁴⁷ Since plaintiff testified that each abusive act left her bruised, sore, or emotionally upset, the damage from each act was immediately apparent, and the prescription period began to run at that time, notwithstanding the possibility that several incidents combined to cause plaintiff's BWS.

Thus, *Laughlin* is emblematic of the traditional approach to BWS in tort: BWS is not a continuing tort and thus cannot toll the statute of limitations on distinct acts of assault and battery.

42. *Id.* at 482.

43. *Id.* at 483. The jury awarded plaintiff \$150,000, but the judge reduced the amount to \$57,297. *Id.* at 481.

44. *Id.* at 481.

45. *Laughlin v. Breaux*, 515 So.2d 480, 482 (La. Ct. App. 1987) (citing *South Central Bell Telephone Co. v. Texaco, Inc.*, 418 So.2d 531, 533 (La. 1982)).

46. *Laughlin*, 515 So.2d at 482 (citing *Bouton v. Allstate Insurance Co.*, 491 So.2d 56 (La. Ct. App. 1986)).

47. *Laughlin*, 515 So.2d at 482 (citing *Home Insurance Co. v. Highway Insurance Underwriters*, 52 So.2d 449 (La. Ct. App. 1951)).

*B. Lord v. Shaw:⁴⁸ Assault and Battery By Any Other Names
Remain Separate Acts, Not Continuous Conduct*

Plaintiff Lord sued Shaw, her former husband, for six torts⁴⁹ he allegedly committed against her during their 20-year marriage. Plaintiff's first five causes of action were specific instances of assault, battery, or false imprisonment from June, 1976, through November, 1977. The court held that, since plaintiff did not file suit until September, 1980, each claim was barred by Utah's one-year statute of limitations.⁵⁰ Plaintiff apparently attempted to invoke continuing tort theory by arguing that defendant's willful pattern of behavior united his five previous intentional torts into one single course of conduct.⁵¹ The court rejected this argument because it could find no "circumstances which would stop the statutes of limitations from running[.]"⁵² such as disability,⁵³ interspousal tort immunity,⁵⁴ or continuing tort.

In her sixth cause of action, plaintiff asked the court to recognize a new tort encompassing all of defendant's abusive acts during the marriage, including the first five torts.⁵⁵ The court declined to create a new tort because it was unnecessary and duplicative of the traditional torts plaintiff otherwise alleged. The first five causes of action, based on specific, legitimate torts, effectively precluded the sixth claim. "Specific averments in pleading are usually given precedence over general ones regarding the same matter. The specific averments are

48. 665 P.2d 1288 (Utah 1983).

49. Plaintiff alleged that defendant seized, choked, pushed, strangled, beat, and raped her. *Id.* at 1289.

50. UTAH CODE ANN. § 78-12-29 (1996).

51. *Lord*, 665 P.2d at 1289.

52. *Id.* at 1289 (citing the trial judge's oral statement).

53. See *infra* notes 201-202 and accompanying text.

54. *Lord*, 665 P.2d at 1290. Plaintiff argued that the statute of limitations should have been tolled because the doctrine of interspousal tort immunity prevented her from suing until August 8, 1980, when the Utah Supreme Court abolished that doctrine in *Stoker v. Stoker*, 616 P.2d 590 (Utah 1980).

55. *Lord*, 665 P.2d at 1289.

deemed to supplant, limit and control the general allegations.”⁵⁶ Since the sixth cause of action, like each of the first five, was rooted in assault and battery, it too was barred by the one-year statute of limitations.⁵⁷

Thus, *Lord*, like *Laughlin*, employed traditional tort analysis in refusing to toll the statute of limitations on separate acts of assault and battery and in declining to create a new tort encompassing the entire course of abusive conduct that causes BWS.

C. *de la Croix de Lafayette v. de la Croix de Lafayette*:⁵⁸
More of the Same

Plaintiff sued her former husband for torts he committed against her during their marriage: conversion, assault, battery, intentional infliction of emotional distress, and “spouse abuse -- a new tort that treats individual acts of violence as part of an ongoing pattern.”⁵⁹ As *amicus* for plaintiff, the National Organization for Victims’ Assistance asked the court to recognize spousal abuse as a separate, identifiable tort of a continuing nature that would toll the statute of limitations⁶⁰ to permit the victim to recover for all abusive acts during the marriage.⁶¹

Again, as in *Laughlin* and *Lord*, the court employed traditional analysis in disposing of plaintiff’s claims. The court rejected applicability of continuing tort theory, recognizing that each distinct intentional tort gives rise to a separate claim and is subject to its own statute of limitations.⁶² Accordingly, it dismissed all causes of action that accrued beyond the one-year prescription period.⁶³ Citing *Lord*, and noting the complete lack of precedent supporting plaintiff’s request, the court likewise refused to create a new tort of spouse abuse. The court found nothing to justify such a step, especially since

56. *Id.* at 1289 (citing *Hall v. Delvat*, 389 P.2d 692, 695 (Ariz. 1964)).

57. *Lord*, 665 P.2d at 1290.

58. 15 Fam. L. Rep. (BNA) 1501 (D.C. Super. Ct. Aug. 14, 1989).

59. *Id.* at 1502.

60. *Id.*

61. *Id.* at 1501.

62. *de la Croix de Lafayette*, 15 Fam. L. Rep. at 1502.

63. *Id.* at 1503.

the current state of the law -- separate limitations for separate acts -- was adequate to address the grievances between the two parties.

IV. THE DISTORTIVE APPROACH: SEPARATE ACTS OF ASSAULT AND BATTERY CONSTITUTE ONE CONTINUING TORT

A. *Giovine v. Giovine*⁶⁴

Plaintiff Christina Giovine sued her husband⁶⁵ for divorce⁶⁶ and damages resulting from domestic torts he committed against her over a period of more than 20 years. Specifically, plaintiff alleged assault and battery in March, 1972,⁶⁷ intentional infliction of emotional distress stemming from the same incident, and a claim for "continuous wrong [causing] severe emotional and physical damage" lasting from March, 1972, until May, 1993.⁶⁸ Because plaintiff filed her complaint on July 1, 1994, and the New Jersey statute of limitations on intentional torts is two years,⁶⁹ the trial judge granted defendant's motion to strike all claims that occurred prior to June 30, 1992.

On appeal, plaintiff requested that the appellate court toll the statute of limitations in two ways: by deeming defendant's distinct acts as "continuous" conduct and by creating a new tort for BWS.⁷⁰ Although the trial judge specifically found that no exceptions to the statute of limitations, including continuing tort theory, applied to this

64. 663 A.2d 109 (N.J. Super. Ct. App. Div. 1995).

65. Defendant, Peter J. Giovine, is a sitting Superior Court judge in New Jersey. Defendant's Brief at 1, *Giovine* (No. A-2134-94T5).

66. Where the circumstances of a marital tort are relevant to a divorce suit, New Jersey requires that the two actions be joined according to the "single controversy doctrine." *Tevis v. Tevis*, 400 A.2d 1189, 1196 (N.J. 1979).

67. In a 1980 divorce complaint, which the parties dismissed with prejudice in 1982, plaintiff alleged another act of assault and battery on December 28, 1978. Plaintiff did not include this incident in her later divorce complaint. *Giovine*, 663 A.2d at 112, 118 n.5.

68. *Id.* at 111-12.

69. N.J. STAT. ANN. § 2A:14-2 (West 1987).

70. Plaintiff's Brief at 58, *Giovine* (No. A-2134-94T5). This request needlessly combines two legal theories, either one of which alone would accomplish plaintiff's goal. See *infra* notes 174-177 and accompanying text.

case,⁷¹ the appellate court reversed and held that defendant's distinct acts were indeed continuous.⁷²

The court based its conclusion that defendant's conduct was continuous on the fact that BWS develops only after the woman suffers through the battering cycle at least twice.⁷³ "Because [BWS] is the product of at least two separate and discrete physical or psychological acts occurring at different times, it is imperative that the tortious conduct giving rise to the medical condition be considered a continuous tort."⁷⁴

The court apparently assumed that any two torts committed by the same tortfeasor against the same victim must constitute one continuing tort. The court never set out the elements that define a continuing tort, nor analyzed the facts of the case to determine whether defendant's conduct could reasonably be classified as such. Rather, the court simply declared "that a wife diagnosed with battered woman's syndrome should be permitted to sue her spouse in tort for the physical and emotional injuries sustained by continuous acts of battering during the course of the marriage"⁷⁵ Since the court found that defendant's conduct was continuous, on remand, the plaintiff need only prove that she suffered from BWS in order to toll the statute of limitations.⁷⁶

Whereas cases adopting the traditional approach to tort law hold that distinct acts cannot constitute continuous conduct, *Giovine* declares that defendant's several, separate, intentional torts over the course of 20 years constitute one continuing tort for purposes of the statute of limitations.⁷⁷ Although this issue of continuity "presents a difficult and close question of law,"⁷⁸ a thorough analysis of the traditional meaning of continuing tort, as well as leading cases from

71. Defendant's Brief at 12, *Giovine* (No. A-2134-94T5).

72. *Giovine*, 663 A.2d at 117.

73. See *supra* notes 29-30 and accompanying text.

74. *Giovine*, 663 A.2d at 115.

75. *Id.* at 114.

76. *Id.* at 117.

77. *Id.*

78. *Marshall v. Nelson Elec.*, 766 F. Supp. 1018, 1030 (N.D. Okla. 1991).

New Jersey and other jurisdictions applying that concept, reveals that *Giovine* distorts the settled meaning of continuing tort.

B. Spousal Abuse Is Not A Continuing Tort

According to the general rule of continuing⁷⁹ tort theory,

[w]here a continuing tort causes a single, indivisible injury, the cause of action accrues at, and limitations begin to run from, the time when the nature and extent of the damage are ascertainable, which may be at the inception of the tort or not until the last date of the tortious conduct.⁸⁰

Thus, a continuing tort requires two elements -- continuous conduct and a single, indivisible injury -- which, once met, have the effect of tolling the statute of limitations until the damage is ascertainable.

Under the facts of *Giovine* and the other BWS cases, the abuser's acts are not continuous, the victim's injury is not indivisible, and tolling the statute until damage is ascertainable would not, as some courts have apparently assumed,⁸¹ necessarily permit recovery for all abusive acts. Thus, BWS is not a continuing tort.

79. The cases and sources pertaining to continuing torts use "continuous" and "continuing" interchangeably. This comment uses "continuous" to modify conduct and "continuing" to modify tort.

80. 54 C.J.S. *Limitations of Actions* § 177 (1987).

81. See, e.g., *Giovine v. Giovine*, 663 A.2d 109, 114 (N.J. Super. Ct. App. Div. 1995) ("[A] wife diagnosed with battered woman's syndrome should be permitted to sue her spouse in tort for [all] the physical and emotional injuries sustained by continuous acts of battering during the course of the marriage" irrespective of when those injuries were ascertainable.).

1. Separate, Discrete Acts Cannot Constitute Continuous Conduct.

The first element of a continuing tort is continuous conduct. Continuous conduct must be uninterrupted, unbroken, or persistently repeated at short intervals without cessation.⁸² The abusive acts alleged in *Giovine*, however, were sporadic and unconnected. Mrs. Giovine alleged only two counts of battery -- one in March, 1972; the other in December, 1978 -- and claimed that they alone were sufficient to constitute a continuing tort lasting from 1972 until 1993.⁸³ Yet this conduct is plainly not incessant since these two batteries were interrupted by several years of nonactionable conduct between the husband and wife. For acts to be continuous, the tortious conduct must be perpetual; that is, Mr. Giovine would have had to batter his wife without even one day of cessation from 1972 until at least 1978. Even if it is possible for a tortfeasor to be in constant harmful bodily contact with another for six years, Mrs. Giovine's complaint contained no facts to support such an allegation. In fact, she could specify only two⁸⁴ acts of battery over the entire marriage of 21 years. Since continuing tort theory requires continuous conduct, and Mr. Giovine's abusive acts had specific points of cessation and were interrupted by long periods of nontortious conduct, continuing tort theory does not apply in that case.

The archetypal continuing tort involves a permanent physical invasion of land⁸⁵ which causes damage through its cumulative effect⁸⁶ over a long period of time, such as nuisance,⁸⁷ occupational disease,⁸⁸

82. BLACK'S LAW DICTIONARY 322 (6th ed. 1990).

83. *Giovine*, 663 A.2d at 111-12.

84. Actually, Mrs. Giovine's complaint alleged only the 1972 battery. She alleged the 1978 battery in her 1980 divorce suit, which the parties subsequently dismissed with prejudice, but she did not include it in her complaint for the instant action. *Giovine*, 663 A2d at 111-12, 118 n.5. See *supra* note 67. If it is difficult to understand how two batteries separated by six years could constitute a continuing tort, it is impossible to understand how one battery in 21 years could be considered a continuing tort.

85. *Davis v. Bostick*, 580 P.2d 544, 547 (Or. 1978).

86. *Id.* at 547 (citing *Landman v. Royster*, 354 F. Supp. 1302, 1315 (E.D. Va. 1973)).

87. RESTATEMENT (SECOND) OF TORTS § 899 cmt. d (1977).

pollution,⁸⁹ removing lateral and subjacent support,⁹⁰ and obstructing waterways.⁹¹ Spousal abuse involves none of these elements traditionally associated with continuing torts. As in *Giovine*, acts of abuse during a marriage are necessarily discrete and separate, not permanent. Spousal abuse entails invasion of the body and mind, not land. Finally, each act of assault, battery, and emotional distress inflicts immediate injury, whereas damage from continuing tort accrues only from the cumulative effect of the uninterrupted invasion. For all these reasons, continuing tort theory generally does not apply to discrete intentional torts such as assault and battery.⁹²

In *Davis v. Bostick*,⁹³ the Oregon Supreme Court followed the general rule that continuing tort theory does not apply to discrete intentional torts.⁹⁴ Plaintiff Davis sued Bostick, her former husband, for ten incidents of assault, battery, and intentional infliction of emotional distress he allegedly committed against her from May, 1973, through 1975.⁹⁵ When plaintiff filed suit in August, 1976, defendant contended that all incidents occurring before August, 1974, were barred by Oregon's two-year statute of limitations.⁹⁶ The trial court ruled that defendant's conduct constituted one continuing tort, which permitted plaintiff to recover for all of defendant's acts.⁹⁷

The Oregon Supreme Court reversed, holding that the husband's discrete acts of assault, battery, and intentional infliction of emotional

88. See, e.g., *Urie v. Thompson*, 337 U.S. 163 (1949).

89. See, e.g., *Collis v. Ashland Oil & Ref. Co.*, 722 F.2d 625 (10th Cir. 1983).

90. See, e.g., *Veterans' Welfare Bd. v. City of Oakland*, 169 P.2d 1000 (Cal. Dist. Ct. App. 1946).

91. See, e.g., *Anderson v. Sutter*, 458 N.E.2d 39 (Ill. App. Ct. 1983).

92. See *Hertel v. Sullivan*, 633 N.E.2d 36, 40 (Ill. App. Ct. 1994) (There is no "authority which squarely holds the continuing tort rule should apply beyond nuisance or trespass cases, and we decline to apply such a rule as a matter of first impression in this case.").

93. 580 P.2d 544 (Or. 1978).

94. *Id.* at 548.

95. Plaintiff alleged defendant struck her, broke her nose, made abusive phone calls, choked her, threatened to kill her, destroyed and damaged personal property, accused her of having an abortion, told others she was mentally ill, and harassed her mother. *Id.* at 545-46.

96. OR. REV. STAT. § 12.110 (1) (1995).

97. *Bostick*, 580 P.2d at 547.

distress were not continuous.⁹⁸ The court enumerated four reasons for its conclusion.

The acts were discontinuous in the sense that [1] each had a beginning and end, [2] each was separated from the next by some period of relative quiescence, and [3] each was capable of producing compensable harm. . . . [4] A separate cause of action certainly could have been asserted after each of defendant's nefarious acts⁹⁹

Analyzed under this *Bostick* standard, the facts of *Giovine* reveal that defendant's abusive acts were not continuous. In fact, given the nature of assault and battery -- which are involved in every BWS case -- and the settled principles of law pertaining to them, no case of spousal abuse can reasonably be deemed to constitute a continuing tort according to the four-part *Bostick* test.

Under the first part of the *Bostick* test, acts are not continuous if they each have a separate beginning and end.¹⁰⁰ By definition, intentional torts such as assault and battery terminate at distinct points in time. "A battery is complete upon physical contact, even though there is no observable damage at the point of contact. An assault is complete when anticipation of harm occurs."¹⁰¹ Since each intentional tort ends at a specific point, it cannot be deemed continuous with any other subsequent act, whether of the same or different nature. Furthermore, since the statute of limitations begins to run as soon as the tort is complete,¹⁰² no later discontinuous acts can toll its running. Therefore, since spousal abuse involves assault and battery, the acts are not continuous, and the statute of limitations is not tolled.

Second, under *Bostick*, tortious acts are not continuous if they are separated by a period of relative quiescence.¹⁰³ As discussed above, Mrs. *Giovine* alleged only two acts of battery, occurring more than six

98. *Id.* at 548.

99. *Id.*

100. *Id.*

101. RESTATEMENT (SECOND) OF TORTS § 899 cmt. c (1977).

102. *Id.*

103. *Bostick*, 580 P.2d at 548.

years apart; during the intervening time, Mr. Giovine committed no other torts against her.¹⁰⁴ Moreover, Mrs. Giovine voluntarily dismissed with prejudice an earlier divorce complaint she filed against her husband, again suggesting an intervening period of reconciliation.¹⁰⁵ In fact, any case in which the victim develops BWS will, by definition, include at least one period of relative quiescence: during phase three of the battering cycle, the abuser temporarily refrains from violence and shows "loving contrition" toward the victim before the inevitable next battery.¹⁰⁶ Therefore, since continuing tort theory does not apply where torts are separated by a period of quiescence, and BWS only develops after such a period, continuing tort theory cannot apply to BWS cases.

Third, several acts are not continuous if each alone was capable of producing compensable harm.¹⁰⁷ The common law infers at least some minimal damage from benign intentional torts,¹⁰⁸ thus permitting recovery upon completion of the tortious act, even absent substantial harm. "If the defendant's conduct in itself invades the plaintiff's rights, so that the suit could be maintained regardless of damage -- as with . . . most intentional torts -- the statute [of limitations] commences upon completion of the conduct."¹⁰⁹ Thus, continuing tort theory is not available where intentional torts combine to produce BWS.

Under the final prong of the *Bostick* test, acts are not continuous if a separate cause of action could have been asserted after each individual act.¹¹⁰ A cause of action can be asserted as soon as the tort is complete,¹¹¹ and each intentional tort has a specific point of termination. "A cause of action will accrue only when the plaintiff has suffered a legal wrong, and a legal wrong will exist once the elements

104. See *supra* notes 83-84 and accompanying text.

105. *Giovine*, 663 A.2d at 112.

106. See *supra* notes 27-29 and accompanying text.

107. *Bostick*, 580 P.2d at 548.

108. CHARLES T. MCCORMICK, DAMAGES § 22 (1935). See also *Developments in the Law -- Statutes of Limitations*, 63 HARV. L. REV. 1177, 1201 (1950) ("[A]n intentional tort ordinarily gives rise to an immediate right to nominal recovery without proof of damage.").

109. *Developments in the Law--Statutes of Limitations*, *supra* note 108, at 1200-01.

110. *Bostick*, 580 P.2d at 548.

111. RESTATEMENT (SECOND) OF TORTS § 899 cmt. c (1977).

of a tortious act or omission and a legal injury coalesce.”¹¹² In *Tevis v. Tevis*,¹¹³ the New Jersey Supreme Court followed this rule by refusing to toll the statute of limitations on a woman’s barred battery claim against her former husband. The court noted that “a cause of action in tort accrues at the time when a right first arises to institute and maintain an action against a wrongdoer. . . . This is usually at the time of commission of the wrong”¹¹⁴ Therefore, a BWS victim can assert a cause of action immediately after each individual abusive act but, *Giovine* to the contrary, she cannot avoid the statute of limitations by later claiming that the separate acts constitute continuous conduct.

For all these reasons, separate acts of assault and battery cannot constitute continuous conduct, and so spousal abuse is not a continuing tort.

2. Spousal Abuse Does Not Cause A Single, Indivisible Injury

The second element necessary for a continuing tort is a single, indivisible injury. A single, indivisible injury results from “the cumulative effect of wrongful behavior, not from discrete elements of that conduct.”¹¹⁵ For example, where a prisoner suffered from six years of perpetual, unconstitutional punishment in jail, his resulting traumatic neurosis was a single, indivisible injury because it arose “from the cumulative impact of his isolated confinement rather than from individual episodes thereof.”¹¹⁶ Likewise, an employee’s disease of pneumoconiosis was a single, indivisible injury because it developed over 18 years of continued inhalation of poisonous dust particles on the job.¹¹⁷ In such situations, the statute of limitations is tolled until discovery of injury because, at the time of cessation of the tortious act, the victim may not know when, or if, actual injury will develop. Moreover, if injury does develop, it may be impossible to

112. 1 STUART M. SPEISER ET AL., *THE AMERICAN LAW OF TORTS* § 5:27, at 881 (1983).

113. 400 A.2d 1189 (N.J. 1979).

114. *Id.* at 1194-95.

115. *Bostick*, 580 P.2d at 547.

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

117. *Hughes v. Eureka Flint & Spar Co.*, 26 A.2d 567 (N.J. Circ. Ct. 1939).

pinpoint which precise moment of the extended tortious conduct produced it.¹¹⁸

Spousal abuse does not produce a single, indivisible injury. Spousal abuse is comprised of independently cognizable torts, such as assault, battery, and intentional infliction of emotional distress, each of which immediately causes its own unique harm and gives rise to its own cause of action.¹¹⁹ Continuing tort theory “does not apply where the alleged tortious acts . . . caused direct damages that occurred at a certain point in time”¹²⁰

Indeed, many BWS plaintiffs implicitly admit that their injuries are separate, not indivisible. For example, in *Lord v. Shaw*,¹²¹ plaintiff asserted a separate claim for each tort defendant allegedly committed against her. Yet she also asserted a final cause of action for a continuing tort encompassing all of those previously enumerated abusive acts. On the one hand, plaintiff claimed the abuse caused separate, recurrent injuries; on the other hand, she maintained her damage was single and indivisible. As in *Bostick*, “[p]laintiff’s theory is that she ought to recover now for a series of wrongs, but her evidence is that she was harmed by each act in the series. We do not think she was entitled to ride out the storm and lump sum her grievances.”¹²²

3. Injuries From Spousal Abuse Are Immediately Ascertainable

Where defendant commits a continuing tort, the effect is to toll the statute of limitations on plaintiff’s claim until the damage is

118. W.W. Allen, Annotation, *When Limitation Period Begins to Run Against Cause of Action or Claim for Contracting of Disease*, 11 A.L.R. 2d 277, 289 (1950).

119. See *supra* notes 107-114 and accompanying text.

120. SPEISER ET AL., *supra* note 112, § 5:27 at 890. See also 54 C.J.S. *Limitations of Actions* § 177 (1987) (“If a continuing tort causes a series of separate and recurrent injuries, limitations run as to each from the date thereof.”).

121. 665 P.2d 1288 (Utah 1983). This was not the only case where plaintiff asserted the alternative claims described in this paragraph. See also *de la Croix de Lafayette v. de la Croix de Lafayette*, 15 Fam. L. Rep. (BNA) 1501, 1502 (D.C. Super. Ct. Fam. Div. Aug. 14, 1989); *Giovine v. Giovine*, 663 A.2d 109, 111-112 (N.J. Super. Ct. App. Div. 1995).

122. *Davis v. Bostick*, 580 P.2d 544, 548 (Or. 1978).

ascertainable.¹²³ This is consistent with New Jersey's "discovery rule," which mandates that the statute begins to run when plaintiff was, or should have been, aware of his injury and its cause,¹²⁴ and which applies to continuing torts.¹²⁵

Mrs. Giovine was aware of her injuries immediately after they happened. In *Tevis v. Tevis*,¹²⁶ a plaintiff was found to have been aware of her claim where she (1) felt injured after an assault and battery, and (2) filed charges against her husband in response to it.¹²⁷ Both these factors were likewise present in *Giovine*. Mrs. Giovine felt pain after the battery, fear after the assault, and mental anguish after the intentional infliction of emotional distress. Like the plaintiff in *Tevis*,

[s]he knew of her injuries and was simultaneously aware of their cause in the person of her husband at the moment of the assault and battery. . . . [Her] cause of action accrued when she was battered and the running of the statute of limitations from that point in time was not postponed by the undiscoverability of any latent facts crucial to the existence of the cause of action.¹²⁸

Moreover, Mrs. Giovine, like Mrs. Tevis, later filed suit against her husband, indicating that she was aware of the existence of a claim against him. Not only was Mrs. Giovine aware of her injuries, but she actually took steps to remedy them: "She separated. She lived apart. She later retained counsel. She sued."¹²⁹

Indeed, any BWS victim legally should have been aware of an injury after each abusive act. By definition, the first two stages of the BWS cycle necessarily involve the torts of assault and battery in the

123. See, e.g., *Hamilton v. Smith*, 773 F.2d 461 (2d Cir. 1985).

124. *Lopez v. Swyer*, 279 A.2d 116, 122 (N.J. Super. Ct. App. Div. 1971).

125. *Erlich v. First National Bank of Princeton*, 505 A.2d 220, 239 (N.J. Super. Ct. Law Div. 1984).

126. 400 A.2d 1189 (N.J. 1979).

127. *Id.* at 1195.

128. *Id.*

129. Defendant's Brief at 38, *Giovine v. Giovine*, 663 A.2d 109 (N.J. Super. Ct. App. Div. 1995) (No. A-2134-94T5).

form of verbal intimidation, threats, and physical aggression.¹³⁰ In essence, every claim of BWS is comprised of assault and battery.¹³¹

Where the gist of a claim for relief is assault and battery, courts have applied the statute of limitations applicable to assault and battery despite allegations in the complaint that it was some other tort. This is particularly true where it appears the purpose in the use of a label different from assault and battery is to provide a different and longer statute of limitations. In such cases, courts have been particularly careful to use the statute of limitations applicable to the facts and not the label.¹³²

Finally, assuming plaintiff somehow failed to ascertain her injury until long after cessation of the tortious act, she could not automatically recover for all damage she suffered. “[E]ven where the concept of continuing wrong has been applied, recovery is ordinarily permitted only with respect to damages sustained during the period of limitations preceding the suit.”¹³³ Thus, even if Mrs. Giovine had suffered a continuing tort, she should only recover for damages suffered during the immediately preceding two years.

Continuing tort theory, therefore, should not apply to BWS cases. A series of separate intentional torts does not constitute continuous conduct, and the victim does not suffer a single, indivisible injury. Even if spousal abuse were a continuing tort, it would not toll the statute of limitations because the concomitant injuries are immediately ascertainable. “Designating a series of discrete acts, even if connected in design or intent, a ‘continuing tort’ ought not to be a rationale by which the statute of limitations policy can be avoided”¹³⁴

130. See *supra* notes 25-26 and accompanying text.

131. In each of the six primary BWS cases discussed in this comment, plaintiff claimed she developed BWS through suffering independent torts.

132. SPEISER ET AL., *supra* note 112, § 5:34 at 942.

133. Stanley Development Co. v. Milburn Township, 97 A.2d 743, 745 (N.J. Super. Ct. Ch. Div. 1953). *Accord* De Feo v. People's Gas Co., 142 A. 756 (N.J. 1928); Marshall v. Nelson Elec., 766 F. Supp. 1018 (N.D. Okla. 1991).

134. Davis v. Bostick, 580 P.2d 544, 548 (Or. 1978).

V. THE CREATIVE APPROACH

In the initial BWS cases, courts dismissed the plaintiffs' time-barred claims of abuse by employing traditional tort analysis, declining to toll the statute of limitations or to create a new tort. In subsequent cases, however, courts permitted BWS plaintiffs to sue for barred causes of action for two reasons. Cases adopting the distortive approach tolled the statutes of limitations on plaintiffs' claims by deeming defendants' discrete acts of abuse to be continuous conduct. Cases following the creative approach, on the other hand, have simply created a new tort of BWS -- comprised of assault, battery, and emotional distress -- to permit plaintiff to recover for all abusive acts she suffered.

A. Judicial Creation of the BWS Tort

1. *Jewett v. Jewett*:¹³⁵ The First Decision to Create A New Tort of BWS

Plaintiff sued her former husband¹³⁶ for six instances of assault, battery, intentional infliction of emotional distress, and BWS, allegedly committed from October, 1989, through December, 1992.¹³⁷ Defendant moved to dismiss the complaint for failure to state a claim upon which relief can be granted, offering two arguments.¹³⁸ First, given that plaintiff filed suit on April 21, 1993, defendant claimed that Washington's two-year statute of limitations¹³⁹ barred each claim of intentional tort except the very last.¹⁴⁰ Second, defendant noted that

135. No. 93-2-01846-5 (Spokane Cty. Super. Ct. filed April 21, 1993).

136. On August 27, 1993, a Washington trial court declared plaintiff's 1990 marriage to defendant invalid due to defendant's undissolved 1985 marriage to another woman. Findings of Fact and Conclusions of Law on Default Judgment (Draft) at 6, *Jewett v. Jewett*, No. 93-2-01846-5 (Spokane Cty. Super. Ct. filed April 21, 1993). All further citations to court documents in notes 137-51 are from *Jewett*.

137. Defendant's Memorandum in Support of Motion to Dismiss at 2.

138. *Id.* at 3.

139. WASH. REV. CODE ANN. § 4.16.100 (West 1988).

140. Defendant's Memorandum in Support of Motion to Dismiss at 3.

Washington courts admitted BWS testimony to explain a criminal defendant's behavior as self-defense, but that BWS was not recognized as a civil cause of action.¹⁴¹

The court denied the relevant portions of defendant's motion to dismiss. First, the court declared that the apparently time-barred acts of assault, battery, and emotional distress formed a legitimate cause of action "under recognized legal theories employing the concept of tolling of any applicable statutes of limitations, as well as the concept of a continuing tort"¹⁴²

Second, the court created a new tort of BWS.

The Court finds that strict application of existing [sic] tort theories and existing statutes of limitations to injuries sustained during the course of a dependant [sic] domestic relationship effectively denies domestic violence victims a meaningful civil remedy. The Court further finds that it is appropriate and necessary to recognize a separate civil cause of action for damages incurred during the pendency of a dependant [sic] domestic relationship which is marked by a pattern of domestic violence.¹⁴³

Without explanation or citation to authority, the court enumerated the elements of its new tort:

(1) a pattern of volitional acts, which include physical acts and gestures, as well as statements, threats, or verbal utterances; (2) which is reasonably calculated to create fear or anxiety or to establish perceptions of fear or anxiety for the victim's self or family; (3) that is continuous in nature, and, occurs over a period of time; (4) that could reasonably

141. *Id.* at 4.

142. Order on Defendant's CR 12(b)(6) Motion to Dismiss at 2. By tolling the statute of limitations and creating a new tort, the court's order needlessly combines two theories, either of which alone would accomplish plaintiff's goal. *See infra* notes 174-177 and accompanying text.

143. Order Denying Defendant's Motion to Dismiss Petition for Battered Women's Syndrome Pursuant to CR 12(b)(6) at 3.

have been foreseen to, and that in fact did cause; (5) physical injury, emotional distress, or a state of emotional dependency that renders a victim unable to effectively maintain an action against her abuser.¹⁴⁴

This new tort is a substantial departure from established legal precepts. The first element would make verbal utterances actionable, contradicting the long-standing rule that less than outrageous words are not tortious.¹⁴⁵ The second element requires merely that the abuser's conduct be "reasonably calculated," an arguably lower level of culpability than the "substantial certainty" required for other intentional torts.¹⁴⁶ The second element potentially vests the claim in the wrong party, by allowing a woman to recover for fear felt not by her, but by her family. The third element is both impossible and unnecessary, since discrete acts cannot constitute continuous conduct,¹⁴⁷ and since deeming separate acts to be continuous has exactly the same effect as does creating a new tort.¹⁴⁸ The final element makes "emotional dependency" between spouses a tortious injury, despite widespread historic recognition that a healthy marriage instills deep mutual dependence between partners.¹⁴⁹ Finally, although the psychological evidence suggests BWS is present no earlier than the second battering incident,¹⁵⁰ the court claims that it is present as soon as the relationship engenders dependence. "The tortious activity commences with the onset of the domestic dependant [sic] relationship . . . and continues until such time as the control . . . ceases."¹⁵¹

144. *Id.* The court adopted the new tort's elements verbatim as recommended in a generic amicus brief not specific to the facts of *Jewett*. See Brief Amicus Curiae of Spokane Legal Services at 19-20.

145. See RESTATEMENT (SECOND) OF TORTS § 31 cmt. a, § 46 cmt. d (1965). See also W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 12, at 59-60 (5th ed. 1984).

146. RESTATEMENT (SECOND) OF TORTS § 8A at 15 (1965).

147. See *supra* notes 82-114 and accompanying text.

148. See *infra* notes 174-177 and accompanying text.

149. "Therefore shall a man leave his father and his mother, and shall cleave unto his wife: and they shall be one flesh." *Genesis* 2:24 (King James).

150. See *supra* note 30 and accompanying text.

151. Order Denying Defendant's Motion to Dismiss Petition for Battered Women's Syndrome Pursuant to CR 12(b)(6) at 3.

*Jewett*¹⁵² is thus emblematic of the creative approach to claims of BWS in tort: when the statute of limitations would bar the victim of spousal abuse from recovering under existing tort theories, the court created a new tort sufficiently broad to permit plaintiff to sue for all abusive acts she suffered at the hands of the defendant.

152. Resolution of this case involved numerous interesting developments. After the judge created the new BWS tort, defendant filed unfounded counterclaims against plaintiff for "battered spouse syndrome." Findings of Fact and Conclusion of Law (Draft, adopted November 29, 1995) at 11. Defendant failed to comply with discovery orders, failed to appear at a deposition, failed to appear in court, and refused to comply with a court order to relinquish control of stock he owned. Defendant relocated from the state of Washington and ceased communication with his attorney. Consequently, on June 16, 1994, the court granted plaintiff a default against defendant on all causes of action. *Id.* at 3. On June 23, 1994, defendant died of a heart attack in Costa Rica. While defendant's representatives considered certifying the court's BWS tort decision directly to the Washington Supreme Court, the case was set to go to trial on January 8, 1996, solely on the issue of damages. Four days before trial, the parties settled the dispute for \$125,000. Jim Lynch, *Woman wins abuse lawsuit*, THE SPOKESMAN - REVIEW (Spokane, WA), January 6, 1996, at B1.

2. *Cusseaux v. Pickett*:¹⁵³ The Second Instance Where a Court Creates a New Tort of BWS

Plaintiff Cusseaux sued defendant Pickett, her cohabitant of ten years, on one count of battered woman's syndrome.¹⁵⁴ Although defendant's abusive acts were "too numerous to detail with specificity,"¹⁵⁵ plaintiff described nine occasions in which defendant struck her with his fists, a heavy kitchen pot, and a gallon container of bleach, causing plaintiff to seek treatment in a hospital emergency room.¹⁵⁶ Plaintiff claimed these acts were part of a continuous course of violent conduct that caused her to suffer BWS.¹⁵⁷ Defendant moved to dismiss this count for failure to state a cause of action, arguing that BWS was not recognized as a valid civil claim in New Jersey.¹⁵⁸

The court declared BWS to constitute an affirmative cause of action in tort and thus denied defendant's motion.¹⁵⁹ After thoroughly reviewing the nature of BWS,¹⁶⁰ the court found that "the civil laws of assault and battery [are] insufficient to redress the harms suffered as a result of domestic violence."¹⁶¹ Claiming that the "underpinning of our common law and public policy demand that, where the Legislature has not gone far enough, the courts must fill the interstices,"¹⁶² the court enumerated the elements of the new tort:

- 1) involvement in a marital or marital-like intimate relationship; and
- 2) physical or psychological abuse perpetrated by the dominant partner to the relationship over an extended period of time; and
- 3) the aforesaid abuse has caused recurring physical or psychological injury over the

153. 652 A.2d 789 (N.J. Super. Ct. Law Div. 1994).

154. *Id.* at 790.

155. *Id.*

156. *Id.*

157. *Id.* at 789-90.

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

159. *Id.* at 794.

160. *Id.* at 791-92.

161. *Id.* at 793.

162. *Id.*

course of the relationship; and 4) a past or present inability to take any action to improve or alter the situation unilaterally.¹⁶³

The court failed to specify the minimum level of culpability with which the abuser must act in order to incur liability under this new tort. On the one hand, these four elements very closely correspond to those of negligence: the first element establishes a duty between abuser and victim, the second mandates a breach of that duty, the third is causation, and the final element specifies the requisite actionable injury. This parallelism suggests that an abuser is liable if he negligently inflicts BWS.

On the other hand, the second element requires physical or psychological abuse, which in BWS cases necessarily entails the independent torts of assault and battery.¹⁶⁴ However, assault and battery are themselves intentional torts which require that the tortfeasor "desire" the tortious result or be "substantially certain" that it would result from his actions.¹⁶⁵ Therefore, it would seem that an abuser is liable for this new tort only if he intentionally inflicts his victim with BWS.

Yet a third alternative is equally plausible. The actual text of the tort requires no culpability at all, suggesting strict liability; that is, a husband is liable any time his actions cause BWS in his wife, even if he took extraordinary care to avoid it. This ambiguity is a major shortcoming of the BWS tort announced in *Cusseaux*.

Moreover, the new tort departs from the psychological basis of BWS in two ways. First, BWS, by definition, occurs no earlier than the second time the abuser batters the victim.¹⁶⁶ Yet there is no requirement in this tort of at least two counts of battery, thus permitting a victim to recover for BWS where BWS cannot possibly exist.

163. *Cusseaux v. Pickett*, 652 A.2d 789, 793-94 (N.J. Super. Ct. Law Div. 1994).

164. See *infra* notes 183-184 and accompanying text.

165. RESTATEMENT (SECOND) OF TORTS § 8A at 15 (1965).

166. See *supra* note 30 and accompanying text.

Second, this new tort expands the set of possible BWS victims far beyond what is supported by psychological research. The *Cusseaux* court claimed that “in any domestic intimate partnership, the victim, whether female or male, whether the union is heterosexual or homosexual, may plead a battered-person syndrome so long as the aforementioned requirements are met.”¹⁶⁷ Yet the seminal research that first discovered and described BWS found that only women can suffer from BWS, and only heterosexual relationships can produce it.¹⁶⁸ Given this distortion, it seems that *Cusseaux* was more politically correct than scientifically accurate.

3. *Giovine v. Giovine*¹⁶⁹ Revisited: A New Tort on Top of the Continuing Tort

The *Giovine* court distorted the concept of continuing tort to toll the statute of limitations on all of defendant’s acts, thus permitting plaintiff to recover for all abuse suffered. Although deeming defendant’s conduct continuous allowed plaintiff to sue for all of the abuse, the court went out of its way to endorse the new tort in *Cusseaux*, which had exactly the same effect.¹⁷⁰ In this way, *Giovine* not only distorted the settled concept of continuing tort but also created a new tort of BWS.¹⁷¹

After quoting *Cusseaux*’s four elements of the new BWS tort, the *Giovine* court decided to “agree with the premise espoused in *Cusseaux* and conclude that a wife diagnosed with battered woman’s syndrome should be permitted to sue her spouse in tort”¹⁷² In effect, *Giovine* affirmed *Cusseaux*, with one additional requirement:

167. *Cusseaux*, 652 A.2d at 794 n.7.

168. See *supra* note 22 and accompanying text. See generally discussion of BWS and citations to the books of Lenore Walker.

169. 663 A.2d 109 (N.J. Super. Ct. App. Div. 1995).

170. *Id.* at 117.

171. Various sources have interpreted *Giovine* as creating a new tort. See *supra* note 14.

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

Giovine required plaintiff prove through expert testimony her inability to improve her situation.¹⁷³

By creating a new tort that encompassed all past abusive acts and incorrectly deeming those acts continuous, the court needlessly conflated two distinct legal theories, each of which alone would permit plaintiff to sue for all her injuries. As discussed, a continuing tort tolls the statute of limitations until damage is ascertainable, which may not be until the tortious conduct ceases.¹⁷⁴ Since the court found that defendant committed a continuing tort, it tolled the statute until the last act, thus permitting Mrs. *Giovine* to recover for all abuse.¹⁷⁵ Yet at the same time, the court found that Mr. *Giovine* committed the new tort of BWS, which by definition includes all his acts,¹⁷⁶ again permitting Mrs. *Giovine* to recover for all abuse. *Giovine's* redundant holding fails to recognize "that the elements that a plaintiff must prove to establish a cause of action should be analyzed separately from the question whether the plaintiff has made the kind of showing required to toll the statute of limitations."¹⁷⁷

The creative approach to claims of BWS in tort permit the plaintiff to sue for otherwise time-barred acts by creating a new tort that, by definition, encompasses all abuse plaintiff suffered. Courts that adopt this approach proclaim that society requires a new tort to eradicate domestic violence,¹⁷⁸ but they rarely consider whether it is the proper role of the courts to create it. Indeed, a thorough examination of existing remedies, the overlap between BWS and traditional torts, the function of the courts, and the integrity of the

173. *Id.* ("In the absence of expert proof, the wife cannot be deemed to be suffering from battered woman's syndrome . . .").

174. *See supra* note 80 and accompanying text. *See, e.g.,* *Starceвич v. City of Farmington*, 443 N.E.2d 737 (Ill. App. Ct. 1982).

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

176. *Cusseaux*, 652 A.2d at 794 ("The mate who is responsible for creating the condition suffered by the battered victim must be made to account for his actions -- all of his actions.")

177. *Giovine*, 663 A.2d at 127 (Skillman, J., dissenting).

178. *See, e.g.,* Order Denying Defendant's Motion to Dismiss Petition for Battered Woman's Syndrome Pursuant to CR 12(b)(6) at 1-3, *Jewett v. Jewett*, No. 93-2-01846-5 (Spokane Cty. Super. Ct. filed April 21, 1993); *Cusseaux*, 652 A.2d at 791-93; *Giovine*, 663 A.2d at 113-115.

statute of limitations reveals that the creation of a new BWS tort is inappropriate.

B. Judicial Creation of a New Tort for BWS is Unwarranted and Illegitimate

1. BWS Is Fully Compensable Under Current Law

Courts traditionally have created a new tort only when necessary to allow a victim to recover for a legitimate injury not compensable under any existing legal theory. This principle is illustrated through the relatively recent judicial development of intentional infliction of emotional distress (IIED). At common law, courts refused to recognize claims based solely on emotional distress¹⁷⁹ because mental injury was deemed too intangible, remote, or trivial.¹⁸⁰ However, research soon revealed that mental disturbance caused measurable and harmful physical manifestations,¹⁸¹ so courts created IIED as a cause of action upon which victims could recover for emotional injury.¹⁸²

While the persuasive psychological research on BWS clearly demonstrates that it is a legitimate injury and a pervasive social problem, BWS is already compensable under the current state of the law, so a new tort is not needed. BWS is a psychological condition resulting from repeated physical or emotional abuse that renders the victim unable to extricate herself from the harmful relationship. As cases employing the traditional approach demonstrate and many BWS

179. Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1048 (1936). See, e.g., *State Rubbish Collectors Ass'n v. Siliznoff*, 240 P.2d 282, 286 (Cal. 1952); *Merrill v. Los Angeles Gas & Electric*, 111 P. 534, 540 (Cal. 1910).

180. William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874, 875-77 (1939).

181. Herbert F. Goodrich, *Emotional Disturbance as Legal Damage*, 20 MICH. L. REV. 497, 503 (1922) (“[T]he physical effect of strong emotional disturbance is a result that we can trace and can see . . .”).

182. *Papieves v. Lawrence*, 263 A.2d 118, 121 (Pa. 1970) (“There can be little doubt that mental or emotional disorders . . . may be every bit as real, every bit as debilitating as ailments which have more obviously physical causes. . . . We conclude that recovery may be had for serious mental or emotional distress . . .”).

plaintiffs implicitly admit, the physical injuries from spousal abuse are already compensable under such recognized torts as assault, battery, and false imprisonment.¹⁸³ The emotional injuries from spousal abuse are likewise already compensable under IIED, broadly defined to include "all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea."¹⁸⁴ BWS certainly qualifies as a highly unpleasant mental reaction, and BWS victims frequently experience all of these detrimental emotions. Therefore, BWS is currently compensable within the parameters of IIED,¹⁸⁵ and a new tort is not necessary.

2. Creating a New Tort of BWS to Avoid the Statute of Limitations Undermines the Rule of Law

The sole purpose for creating a new tort of BWS is to permit plaintiff to avoid the statute of limitations and sue defendant for otherwise expired tortious acts.¹⁸⁶ Given that tort law is meant to grant remedy for personal injury, and that the new BWS tort does not cover a new type of tortious harm or conduct, creation of a new tort solely to avoid the statute of limitations is inappropriate.

Statutes of limitations are themselves important rules of law worthy of respect. "Statutes of limitation are vital to the welfare of

183. See *supra* notes 41, 45-47, 55-57, 62, 67-68, and 95-97 and accompanying text.

184. RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (1965).

185. See, e.g., *Curtis v. Firth*, 850 P.2d 749 (Id. 1993); *Twyman v. Twyman*, 790 S.W.2d 819 (Tx. Ct. App. 1990).

186. See *Another State Recognizes Battered Woman Syndrome*, THE MATRIMONIAL STRATEGIST, March, 1996, at 8 ("The key advantage of this tort is that it allows the plaintiff to avoid the statute of limitations problem . . ."); Fredrica L. Lehrman, *Uncovering the Hidden Tort*, ABA JOURNAL, September, 1996, at 82 ("[T]he statute of limitations for tort actions arising from the abuse does not start to run until the abuse ends."); Brief Amicus Curiae of Spokane Legal Services at 21, *Jewett v. Jewett*, No. 93-2-01846-5 (Spokane Cty. Super. Ct. filed April 21, 1993) ("[T]o tame the beast of domestic violence which stalks women" the court should "either toll the statutes of limitations until the violence ceases to allow the victim full recovery, or recognize a separate tort of domestic violence to allow the victim full recovery for her injuries."). The new tort of BWS adds "essentially nothing" to plaintiff's case other than allowing her to avoid the statute of limitations. Telephone Interview with Lynn McKinney, attorney for plaintiff in *Jewett v. Jewett* (December, 1995).

society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence.”¹⁸⁷ They encourage prompt filing of legal claims, and “they protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence”¹⁸⁸ As such, statutes of limitations serve legitimate legal purposes and should be applied consistently, not selectively. “Legislatures enact a statute of limitations to apply to all cases covered by the statute. Since the legislature is the appropriate body to make such policy decisions, the only task for the courts is to determine whether the claim is within the coverage,”¹⁸⁹ not to look for ways to avoid its operation. Finally, statutes of limitation “are by definition arbitrary, and their operation does not discriminate between the just and unjust claim”¹⁹⁰ A court may not, therefore, ignore the statute merely because it would lead to a distasteful result.

3. Separation of Powers Prevents the Judiciary from Creating a New Tort

“The doctrine of separation of powers is fundamental in our system.”¹⁹¹ That principle recognizes three major departments of government, each with its own distinct function: the legislature, to pass the laws; the executive, to carry out the laws; and the judiciary, to enforce the laws.¹⁹² As the power to make laws is expressly granted to the legislature, the judiciary may not usurp that role by ignoring, expanding, or changing the laws, including statutes of limitation.

It is because the lawgiver does not know the particular cases to which his rules will apply, and it is because the judge who applies them has no choice in drawing the conclusions that

187. *Wood v. Carpenter*, 101 U.S. 135, 139 (1879).

188. *United States v. Kubrick*, 444 U.S. 111, 117 (1979).

189. *Marshall v. Nelson Electric*, 766 F. Supp. 1018, 1033 (N.D. Okla. 1991).

190. *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314 (1945).

191. *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 589 (1949).

192. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

follow from the existing body of rules and the particular facts of the case, that it can be said that laws and not men rule.¹⁹³

[T]he issue necessarily resolves itself into asking, who is to make the adjustment? -- who is to balance[?] . . . Full responsibility for the choice cannot be given to the courts. Courts are not representative bodies. Their judgment is best informed, and therefore most dependable, within narrow limits. Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures. Primary responsibility for adjusting the interests which compete in the situation before us of necessity belongs to the [legislature].¹⁹⁴

Judicial creation of a new tort is unwarranted and illegitimate. The proposed BWS tort does not make any new type of conduct actionable, nor any new type of injury compensable. The sole effect of the new tort is to circumvent the statute of limitations, which undermines the rule of law and violates separation of powers. "It is inadvisable to create new causes of action in tort in advance of any necessity for doing so in order to achieve a just result."¹⁹⁵

VI. ALTERNATIVE SOLUTIONS FOR THE BWS PLAINTIFF

Under traditional analysis, there is no remedy for the BWS plaintiff. While this result may appear to foreclose the legal option of battered women, there are several viable alternatives for the BWS plaintiff to proceed against her abuser for all his abusive acts.

193. F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* 153 (Phoenix ed., Univ. of Chicago Press 1978).

194. *Dennis v. United States*, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring).

195. *Neelthak Development Corp. v. Township of Gloucester*, 639 A.2d 1141, 1143 (N.J. Super. Ct. App. Div. 1994).

A. *Alternative Legal Doctrines to Toll the Statute of Limitations*

Although, to date, most BWS plaintiffs have attempted to toll the statute of limitations through continuing tort theory, several other well-established legal doctrines could accomplish the same goal.

1. Duress

New Jersey, like many other states, tolls the statute of limitations while “the victim plaintiff was placed under physical and psychological duress by the defendant” so long as such duress “is either an element of or inherent in the underlying cause of action.”¹⁹⁶ Duress is certainly inherent in BWS, since the perpetrator’s actions cause the victim to “sink into a state of psychological paralysis and become unable to take any action at all to improve or alter the situation.”¹⁹⁷ The *Giovine* court explicitly noted the applicability of this duress doctrine to the facts of the case¹⁹⁸ and apparently could have reached the same result on that basis, yet it nevertheless decided to base its holding on continuing tort theory and its judicially created new tort.

2. Insanity

Many states toll the statute of limitations while plaintiff is mentally incompetent or insane, as defined in the state statute. In New Jersey, for example, insanity is “such a condition of mental derangement as actually prevents the sufferer from understanding his legal rights or instituting legal action.”¹⁹⁹ A BWS victim, who may become unable to take any action to improve or alter her situation, arguably qualifies as insane. Again, as with duress, the *Giovine* court recognized the

196. *Giovine*, 663 A.2d at 116.

197. *Id.* (citation omitted).

198. *Id.* (“We are able to draw an analogy between the status of the plaintiff in [a New Jersey duress case] to the status of a victim of repeated violence within the marital setting . . .”).

199. *Kyle v. Green Acres at Verma, Inc.*, 207 A.2d 513, 521 (N.J. 1965).

apparent applicability of this doctrine but based its holding on other, less convincing grounds.²⁰⁰

3. Obstruction

Some jurisdictions will toll the statute of limitations if the defendant obstructs, hinders, or prevents plaintiff from taking some step necessary to file suit.²⁰¹ This doctrine fits well within BWS cases, where defendant instills in plaintiff an "inability to take any action to improve or alter the situation unilaterally."²⁰²

4. Disability

The statute of limitations tolls during the period of plaintiff's disability. "If a person under a disability is without a 'legal representative,' statues of limitation do not run against him."²⁰³ What qualifies as a disability is usually determined by state statute.²⁰⁴ State legislatures that wish to accommodate the BWS plaintiff could simply amend their disability statutes.

5. Coverture

A type of disability specially relevant to BWS cases is the common law doctrine of coverture. In many states, the statute of limitations does not run while the husband and wife are married.²⁰⁵ The rationale for coverture is "to refrain from fostering domestic discords which would be sure to follow from litigation between the spouses instituted for fear that the bar of the statute would attach by lapse of time."²⁰⁶ This would allow divorced BWS victims to sue their

200. *Giovine*, 663 A.2d at 115-16.

201. *See, e.g.*, *Wheeler v. Missouri Pac. Rwy. Co.*, 42 S.W.2d 579, 583 (Mo. 1931).

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

203. *Price v. Sommermeyer*, 584 P.2d 1220, 1223 (Colo. Ct. App. 1978).

204. *See, e.g.*, COLO. REV. STAT. § 13-81-101 (1987); KANS. STAT. ANN. § 60-515(a) (1994).

205. *Linker v. Linker*, 470 P.2d 921, 923 (Colo. Ct. App. 1970).

206. *Id.* (citation omitted).

former husbands for all acts of abuse suffered during the marriage. However, some states have recently modified or abolished this doctrine.²⁰⁷

All these theories offer alternative ways in which a BWS plaintiff might successfully toll the statute of limitations. While their applicability to BWS cases would have to be closely considered by the court, several are arguably more suitable to tolling the statute of limitations for spousal abuse than is the continuing tort doctrine.

B. A BWS Plaintiff May Partially Recover for Past Acts of Abuse According to the "Eggshell Skull" Rule

Even where the statute of limitations prevents a plaintiff from suing for an expired tort, she may be able to recover damages for its lingering effects by suing the same tortfeasor for a more recent tort. According to the "eggshell skull" principle,²⁰⁸ defendant's liability for an intentional tort includes unforeseeable and unintended damages attributable to the plaintiff's preexisting fragile condition.²⁰⁹

One who is liable for . . . inflicting personal injuries on another is responsible for all the ill effects, which, considering the condition of health in which the plaintiff was when he received the injury, naturally and necessarily follow such injury. . . . As stated in an old maxim, "Tortfeasors take their victims as they come."²¹⁰

For example, if a boyfriend commits two batteries against his girlfriend, the first of which is barred by the statute of limitations, she will not be able to recover for injuries resulting from the first battery. In suing for the second battery, however, the "eggshell skull" rule will

207. See, e.g., *Kirkpatrick v. Hurst*, 484 S.W.2d 587, 588 (Tex. 1972) (coverture does not toll the statute of limitations).

208. VINCENT R. JOHNSON & ALAN GUNN, *STUDIES IN AMERICAN TORT LAW* 56 (1994).

209. PROSSER AND KEETON ON TORTS §9 at 40 (5th ed. 1984).

210. *Landman v. Royster*, 354 F. Supp. 1302, 1315 (E.D. Va. 1973) (citations omitted).

permit her to recover for injuries from the first battery to the extent they weakened her mental or physical condition and exacerbated the injuries she suffered from the second battery.

C. A BWS Plaintiff May Introduce Evidence of Barred Acts of Abuse to Prove She Has BWS, Explain Her Behavior, Rebut the Defense of Consent, or Prove Her Claim of IIED

In general, a BWS plaintiff may not introduce evidence of barred batteries defendant committed against her for the purpose of proving that he did in fact perpetrate the battery at issue in the instant case.²¹¹ She may, however, offer evidence of barred batteries for some other purpose.²¹² For example, evidence of past abusive acts otherwise barred by the statute of limitations can be relevant to prove that plaintiff actually was suffering from BWS.²¹³ Moreover, prior abuse suffered at defendant's hands can be relevant to explain the victim's actions to the jury or to rebut defendant's allegation that she consented to the tortious conduct.²¹⁴ Finally, where plaintiff asserts an alternative claim of IIED, such evidence is relevant to proving the "extreme and outrageous"²¹⁵ character of defendant's actions.²¹⁶ For any of these purposes, plaintiff may introduce evidence of defendant's barred torts, which can only increase her chances of prevailing against her abuser.

211. FED. R. EVID. 404(b).

212. *Id.*

213. *See, e.g., Laughlin*, 515 So.2d at 483-84; *Giovine*, 663 A.2d at 119.

214. *See, e.g., Laughlin*, 515 So.2d at 484.

215. RESTATEMENT (SECOND) OF TORTS §46 at 71 (1965).

216. *See, e.g., Giovine*, 663 A.2d at 119.

D. The BWS Plaintiff Can Recover For Emotional Distress Resulting From the Barred Acts of Abuse By Suing For IIED

Continuing tort theory generally does not apply to discrete intentional acts such as assault and battery.²¹⁷ A recent line of cases treats IIED differently, however. Three courts have allowed a plaintiff, suing for IIED, to recover for emotional distress suffered as a result of defendant's torts committed beyond the prescriptive period.²¹⁸

These cases recognize the important distinction "between separate acts which may be assault, defamation, or battery, and a continuing course of wrongful conduct which constitutes intentional infliction of emotional distress."²¹⁹ Whereas most torts, by definition, are complete at a particular point, the elements of IIED might not coalesce for some time, and the statute of limitations is delayed until then.

The definition of IIED requires "severe emotional distress."²²⁰ "By its very nature this tort will often involve a series of acts over a period of time, rather than one single act causing severe emotional distress."²²¹ In *Curtis*, for example, the court found that defendant's abusive acts took ten years to produce severe emotional distress in plaintiff,²²² hence, the statute of limitations did not begin to run until then. Although some courts claim this fact makes IIED a continuing tort,²²³ it is, in actuality, traditional tort analysis: the statute of limitations begins to run when the tort is complete.

By suing for IIED in this way, a BWS plaintiff could recover for mental anguish caused by torts that are otherwise barred by the statute of limitations. Plaintiff would have to show that her distress from those barred torts was real but not severe enough to start the statute of

217. See *supra* notes 82-114 and accompanying text.

218. See *Curtis v. Firth*, 850 P.2d 749 (Id. 1993); *Bustamento v. Tucker*, 607 So.2d 532 (La. 1992); *Twyman v. Twyman*, 790 S.W.2d 819 (Tx. Ct. App. 1990).

219. *Curtis*, 850 P.2d at 754.

220. RESTATEMENT (SECOND) OF TORTS §46 at 71 (1965).

221. *Curtis*, 850 P.2d at 755.

222. *Id.*

223. *Id.*

limitations for IIED running. Of course, by suing for IIED, plaintiff will recover for emotional injuries only.

E. The Legislature Could Create a New Tort

Finally, and perhaps most effectively, the state legislature could allow BWS plaintiffs to sue for all abusive acts by writing a new tort. This avenue is preferable to judicial creation of a new tort. A statutory tort would be consistent with separation of powers. The legislature's deliberative process and expertise in prospective functions of law would presumably yield a well crafted tort that would not suffer from the defects of the judicially created torts.²²⁴ Finally, whereas the defendants in *Laughlin* and *Giovine* could claim that they had no notice of the new tort created in those cases, a statutory tort would obviate this position.

In all these ways, then, a BWS plaintiff could take action against a defendant for his torts which are otherwise barred by the statute of limitations. It is not necessary to distort the doctrine of continuing tort or to violate separation of powers in order to give battered women relief.

VII. CONCLUSION

Due to the tragic nature and increasing incidence of spousal abuse, battered women have attempted to avoid the statute of limitation and sue their abusers in tort. Under traditional tort analysis, each abusive act has its own prescriptive period which begins to run immediately, and so plaintiff is denied recovery for those acts whose statutes have run. Continuing tort theory is inapplicable because discrete acts of assault and battery cannot reasonably be deemed continuous, BWS is not a single, indivisible injury, and the statute of limitations runs as soon as plaintiff discover her injuries, which typically happens immediately after the first battery. While three courts created a new tort for BWS, such pronouncement is illegitimate

224. See *supra* notes 145-151 and 163-168 and accompanying text.

because it needlessly duplicates existing torts and usurps the legislative function by making new law.

Yet traditional tort law does not preclude a BWS plaintiff from recovery. There are several alternative legal theories upon which such a plaintiff could proceed against her abuser for torts otherwise barred by the statute of limitations; each of these alternatives has greater legal merit than do continuing tort theory or the new, court-created tort. BWS tort cases are still relatively few and recent, and a future plaintiff who employs one of these alternative theories may find the success she seeks. In that way, courts could reach their desired results without distorting settled legal concepts or violating separation of powers in order to accommodate a sympathetic plaintiff on shaky legal grounds.

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* This comment is dedicated to the glory of God in loving memory of the author's grandfathers, Carl T. Henry and James E. Stuchell, Sr., who lived to see the genesis of this endeavor but not the revelation. Special thanks to Professor Michael P. Schutt and Mary Bunch for indispensable assistance.