

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

HEDDA NUSSBAUM,

Plaintiff,

-against-

JOEL STEINBERG

Defendant,

Index No. 23416/88

Special Referee
Steven Liebman

MEMORANDUM OF LAW OF AMICI CURIAE
IN SUPPORT OF PLAINTIFF

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PRELIMINARY STATEMENT

Amici Curiae submit this post-hearing memorandum of law in support of plaintiff, Hedda Nussbaum, who seeks money damages from defendant Joel Steinberg for the extensive physical and psychological injuries he inflicted upon her from 1978 through 1987. Defendant moved for summary judgment, averring that plaintiff's causes of action for assault, the intentional infliction of emotional distress, and prima facie tort are time-barred pursuant to CPLR 3211(a)(5) because almost all of the events alleged in the complaint, which was served in October, 1988, occurred more than one year before the action was commenced. Plaintiff opposes defendant's motion on the grounds afforded by CPLR 208, which permits a tolling of the one-year tort statute of limitations upon a plaintiff's qualifying incapacity.

The facts adduced at the evidentiary hearing on the motion, as presented at length in plaintiff's post-hearing memorandum of law, unequivocally demonstrate that from early 1978 until the autumn of 1988, plaintiff experienced severe and extreme violence at the hands of defendant, violence which rendered her incapable of effectively functioning in

society and which precluded her from protecting her legal rights. The unrebutted testimonial evidence and documentary proof of plaintiff's condition, as elaborated by her treating psychiatrist and a psychiatric expert in the area of psychological trauma, show that plaintiff is entitled to the statutory period of grace and should be allowed to pursue her tort claims.

INTEREST OF AMICI CURIAE

Amici Curiae—National Center on Women and Family Law, NOW Legal Defense and Education Fund, National Coalition Against Domestic Violence, Domestic Abuse Awareness Project, New York State Coalition Against Domestic Violence, Inc., New York State League of Women Voters, Coalition of Battered Women's Advocates, B'nai B'rith Women (Northeast Regional Office), STEPS to End Family Violence, People Against Domestic Violence, Women's Resource Center of Northern Westchester and Putnam, My Sister's Place, Sanctuary for Families' Center for Battered Women's Legal Services, Family Violence Litigation Clinic of Albany Law School, Rockland Family Shelter, and Men's

Domestic Violence Program--are a diverse group of national and New York organizations and advocates that engage in a wide variety of activities seeking legal redress for battered women. These organizations seek to educate the public, court personnel, judges and legislators, in order to heighten awareness about domestic violence, provide services for victims and abusers, and offer legal assistance and representation to victims. They also train and provide technical assistance to lawyers and social service professionals, and advocate for public policy and legislative reforms to assist battered women. Amici Curiae submit this brief in support of Hedda Nussbaum because they believe this case presents important issues concerning a battered woman's right to civil redress.

I.

BATTERED WOMENS' LEGAL CLAIMS MUST BE EVALUATED WITHIN THE CONTEXT OF IMPORTANT LEGAL AND POLICY REFORMS WHICH REFLECT PUBLIC CONCERN WITH THE PROBLEM OF DOMESTIC VIOLENCE.

American society has historically treated domestic violence as a family problem that is confined to, and should be dealt with in the home.¹ The law was viewed as an inappropriate vehicle for dealing with conduct which was perceived to be a private matter. Thus, the law provided no remedy for abuses that society considered to belong exclusively to the "private sphere." This perspective arose partly from the notion that women and children were the property of their parents or husbands, and had no legal standing of their

¹ See Nadine Taub & Elizabeth M. Schneider, *Perspectives on Women's Subordination and the Role of Law*, in *POLITICS OF LAW: A PROGRESSIVE CRITIQUE 1A* (D. Kairys, ed. 1982); Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973 (1991); Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 COLUM. HUM. RTS. L. REV. 291 (1994); Terry Davidson, *Wifebeating: A Recurring Phenomenon Throughout History*, in *BATTERED WOMEN: A PSYCHOLOGICAL STUDY OF DOMESTIC VIOLENCE* 2-21 (1977); *Developments in the Law: Legal Responses to Domestic Violence: Introduction*, 106 HARV. L. REV. 1501, 1502 (1993); Linda Kerber, *Separate Spheres, Female Worlds, Women's Place: The Rhetoric of Women's History*, 755 AM. HIST. 9 (1988); Daniel B. Saunders & Phillips Kindy, Jr., *Predictors of Physician's Responses to Woman Abuse: The Role of Gender, Background, and Brief Training*, 8 J. GEN. INTERN. MED. 606-09 (1993); Violence Against Women Act of 1991, SENATE REPORT 102-97, 102nd Congress, Oct. 29, 1991, Discussion, *Violence Against Women: Underestimating the Problem*.

own on which to base any cause of action.² In addition, a deeply ingrained patriarchal tradition viewed the man as "king of his castle", and the home as his exclusive province to rule as he saw fit, without any intrusions from the outside world. The law supported societal neglect of domestic violence and denied appropriate protection to its victims. The law concealed this insidious and severe social problem and contributed to its perpetuation.³

Over the past 25 years, the law and societal views of domestic violence have changed dramatically.⁴ Today, there is broad recognition that it is unacceptable to relegate violence in the home to the private domain. There has been widespread public policy and legal reform, and abusers are no longer immune from external sanctions and restrictions for violent behavior directed at their wives, girlfriends and lovers. Society is increasingly aware that when the law appears to sanction or tolerate domestic violence, it contributes to the perpetuation of a public problem of immense proportions.

² *New State and Federal Responses to Domestic Violence*, 106 HARV. L. REV. 1528, 1529 (1993).

³ Martha Minow, *Words and the Door to the Land of Change: Law, Language, and Family Violence*, 43 VAND. L. REV. 1665, 1672 (1990).

⁴ See *Developments in the Law: Legal Responses to Domestic Violence: Introduction*, *supra* note 1, at 1502.

As a result of our contemporary understanding of both the source and impact of domestic violence, legislatures have increasingly used the law as a vehicle for reform.⁵ State legislatures around the country have interpreted existing law to embrace domestic violence victims, and have enacted new laws and policies to protect victims of domestic violence. Many states have enacted stringent civil and criminal remedies to counter domestic violence, recognizing that the onus for response to domestic violence should be on law enforcement and the justice system, rather than on the victim. The trend toward social and legal recognition of domestic violence has helped some battered women escape violent relationships. However, far too many others, like Hedda Nussbaum, continue to fall through the cracks which remain in the system: battered women's shelters have insufficient resources to house every woman requesting help; orders of protection are not effective in every case; arrest policies have their limitations; and many battered women who have

⁵ See generally, *Report on Domestic Violence: A Commitment to Action*, 28 N. ENG. L. REV. 313 (1993); Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Caselaw*, 21 HOFSTRA L. REV. 801 (1993); Andrea Brenneke, *Civil Rights for Battered Women: Axiomatic & Ignored*, 11 LAW & INEQ. 1 (1992); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991); Elizabeth M. Schneider, *Particularity & Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U. L. REV. 520 (1992).

obtained legal protection are still murdered by their assailants. For these reasons, legal claims of battered women must be seriously considered in order to send the message that society will no longer tolerate domestic violence.

Legal remedies currently available to address the problem of domestic violence include temporary restraining orders, general orders of protection, and other forms of injunctive relief. See N.Y. DOM. REL. L. § 240 (McKinney's 1986) (orders of protection); N.J. STAT. ANN. § C:25-28 (West 1988) (TROs, emergency relief); CAL. CIV. PRO. CODE § 527.6 (West 1979) (TROs, injunctive relief), CAL. CIV. PRO. CODE § 6218 (West 1979) (protective orders); MASS. GEN. L., Ch. 208, § 34D (1992). Some states, including New York, have codified mandatory arrest policies. N.Y. CRIM. PRO. L. § 140.10 (McKinneys 1994); CONN. GEN. STAT. ANN. § 46b-38b (West 1986); NEV. REV. STAT. § 171.1225 (1989)⁶. Mandatory arrest statutes require police officers responding to domestic disputes

⁶ New York's new CPL § 140.10 (effective July 1, 1995) states in part: "... a police officer shall arrest a person, and shall not attempt to reconcile the parties or mediate, where such officer has cause to believe...." that an order of protection has been issued and/or violated, or a felony or misdemeanor "constituting a family offense" has been committed. Furthermore, when making such mandatory arrests, "the officer shall not inquire as to whether the victim seeks an arrest of such person." § 140.10(4)(a-c).

Connecticut's statute, CGSA § 46b-38b, states in relevant part that wherever an
(continued...)

to arrest the perpetrator. Other statutes mandate that police officers who decline to make arrests must file a detailed report justifying this inaction. WISC. STAT. ANN. § 968.075 (West 1993).⁷ This requirement encourages officers to make arrests because district attorneys will critically review their judgments. Many states require special training for police officers, judges, lawyers and other court personnel to help them better understand and respond to domestic violence. See N.Y. EXEC. L. § 214-b (McKinneys 1994) (Family Offense Intervention: setting forth provisions for Domestic Violence Training for Judges, Prosecutors and State and Municipal Police). See also, CAL. PENAL CODE § 5075.5, ch.3 (West 1982) (training on domestic violence and battered woman syndrome in the correctional system); CAL. PENAL CODE § 13519 (West 1992) (domestic violence training

⁶(...continued)
officer determines a family violence crime has been committed, she "shall arrest the person or persons suspected of its commission and charge [them] with the appropriate crime. The decision to arrest and charge shall not (1) be dependent upon the specific consent of the victim; (2) consider the relationship of the parties; or (3) be based solely on a request by the victim."

⁷ Wisconsin's W.S.A. § 968.075(4) requires an officer who does not make an arrest despite having "reasonable grounds" for believing that "a person is committing or has committed domestic abuse" to "prepare a written report stating why the person was not arrested." This report will then go to the district attorney's office where it will be reviewed to "determine whether the person involved in the incident should be charged with the commission of a crime."

course and guidelines); CONN. GEN. STAT. ANN. § 7-294g (West 1989) (police training on domestic violence); D.C. CODE ANN. § 16-1034, subch. III (1981) (domestic violence training program); FLA. STAT. ANN. § 943.171 (West 1985) (domestic violence training); N.J. STAT. ANN. § 2c:25-20 (West 1988) (domestic violence training); OHIO REV. CODE § 109.744 (1992) (domestic violence training); MASS. GEN. L. ch. 6, § 116A (1986). Additionally, Connecticut and New York provide for emergency shelter for women to escape domestic violence. CONN. GEN. STAT. ANN. § 17-273d (West 1983); N.Y. SOC. SERV. § 459-b (McKinneys 1992). *See also* CONN. GEN. STAT. ANN. § 17-580 (West 1992) (providing for a program for shelter services for victims of household abuse); N.J. STAT. ANN. § 37:1-12.2 (West 1983) (trust fund specifically for establishing and maintaining shelters for victims of domestic violence).

New York has begun to address the problem of domestic violence. In 1984, then-New York Chief Judge Lawrence Cook established the New York Task Force on Women in the Courts, in order to "locate and document bias in the treatment of women [in New

York's court system] and to make recommendations for reform."⁸ The Task Force Report, issued in April 1986, set forth findings and recommendations in many substantive areas, including domestic violence.⁹ It emphasized the serious obstacles that prevented battered women from getting justice in the courts, and stressed the need to train police, judges and other court professionals to better understand domestic violence issues and to increase sensitivity toward domestic violence victims.¹⁰

Currently, New York is developing legal and policy initiatives concerning domestic violence. In 1994, Chief Judge Judith Kaye initiated a multi-faceted program to help ensure compliance with the recently enacted "Family Protection and Domestic Violence Act of 1994". N.Y. FAM. CT. ACT § 812 (McKinneys 1994).¹¹ Judge Kaye's plan creates a Family

⁸ See *Report of the New York Task Force on Women in the Courts*, 15 FORDHAM URB. L.J. 1 (1986-1987). See also Sarah Eaton and Ariella Hyman, *The Domestic Violence Component of the New York Task Force Report on Women in the Courts: An Evaluation and Assessment of New York City Courts*, 19 FORDHAM URB. L.J. 391 (1992).

⁹ Eaton & Hyman, *The Domestic Violence Component*, *supra* note 8, at 391.

¹⁰ *Id.* at 413.

¹¹ The 1994 Act is composed of numerous, detailed amendments to Article 8 of the Family Court Act. It is the result of heightened public concern with domestic violence as well as awareness that "what was once considered largely a private matter," should be "more correctly regarded as criminal behavior." Historical and Statutory Notes to § 812. Two significant changes are mandatory arrest of offenders in compliance with Penal Law § 140.10 (continued...)

Violence Task Force composed of a 14-judge panel. This Task Force will be devoted to both practical training and educational work involving the handling of domestic violence cases as well as the development of procedural and policy reforms. Along with ensuring compliance with the Domestic Violence Act, judges and court personnel will develop programs educating the judiciary on domestic violence and will present symposiums and seminars emphasizing the new requirements of the Act. The Task Force plans to "investigate breakdowns in the family protection system, streamline and expedite court proceedings, [and] expand the scope of family services delivered through the court."¹²

On the national level, Congress recently enacted the comprehensive "Violence Against Women Act".¹³ The Act, which includes increased federal funding for battered

¹¹(...continued)
and a requirement that officers give detailed notice to victims, in English or Spanish, of resources and options available to them. See N.Y. FAM. CT. ACT § 812(2)(f) and § 912(5).

¹² Gary Spencer, *Statewide Programs on Domestic Violence Unveiled*, N.Y.L.J., Oct. 14, 1994, at 1.

¹³ The Violence Against Women Act, 42 USCA § 13701 (1994), is comprised of five subtitles encompassing all aspects of life where gender-bias has directly and indirectly harmed women. Subtitle B, "Safe Homes for Women" specifically addresses domestic violence. VAWA, § 40156, 108 Stat 1796 at 1798. Among other things, this section encourages arrest policies, provides grants for shelters and youth education, establishes community programs, and provides criminal and civil sanctions for interstate enforcement.

women's shelters and programs, and civil and criminal sanctions for all types of woman-abuse, is intended to send "a powerful message that domestic violence is a national problem that will no longer be tolerated."¹⁴ The Senate Report emphasizes that the public health threat of violence against women has been grossly underappreciated, and notes that our country has historically had "an unfortunate blind spot" when it comes to certain crimes against women.¹⁵ On the international front, human rights organizations have condemned global violence against women. In 1993, the U.N. passed its Declaration on the Elimination of Violence Against Women.¹⁶

This growing state, federal and international response to the needs of victims of domestic violence has enabled more and more women to emerge from hiding. It has

¹⁴ *Id.*

¹⁵ Senate Report, *supra* note 1.

¹⁶ *U.N. Declaration on the Elimination of Violence Against Women*, G.A. Res. 104, U.N. GAOR, 48th Sess., Supp. No.49, U.N. Doc. A/48/49 (1993). See generally, Rhonda Copelon, *Recognizing the Egregiousness in the Everyday: Domestic Violence as Torture*, 25 COLUMB. HUM. RTS. L. REV. 291 (1994). The Organization of American States also adopted a Convention specifically addressing violence against women at its General Assembly on June 9, 1994, which condemns all forms of violence against women and commits the signatories to pursue policies for prevention, punishment, and eradication of such violence. See *Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women*, G.A. of the Organization of American States on June 9, 1994.

contributed to removing the stigma and shame that many victims experience, as well as helped to lift the deeply entrenched taboos which have prevented lawyers, health professionals and social workers from identifying and ameliorating domestic violence.¹⁷ It has also contributed to a new understanding of the plight of the diverse victims of domestic violence.¹⁸ Because of this growing recognition of domestic violence issues, social science and legal researchers and scholars have been able to incorporate newly available information into their studies. This research has in turn led to the repudiation of myths and stereotypes concerning the "typical" victim of domestic violence, such as that women provoke the violence.

Legal educators have also responded to--and initiated recognition of--the urgent need

¹⁷ See Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 1041 (1991); Andrea Brenneke, *Civil Rights for Battered Women*, *supra* note 5. See also, BATTERED WOMEN 23, 24 (D. Moore ed. 1979); Kathleen Waits, *The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV. 267, 282 (1985).

¹⁸ Victims of domestic violence are not only children, or women involved in heterosexual relationships, but include women and men in lesbian and gay relationships as well. See K. Lobel, ed., *NAMING THE VIOLENCE, SPEAKING OUT ABOUT LESBIAN BATTERING* (Seal Press 1986).

to confront domestic violence.¹⁹ A growing number of law schools offer courses and clinical programs specifically devoted to the issue of domestic violence and woman-abuse, and more are being added every semester. As of 1993, 16 law schools offered such special programs, providing students with valuable practical and theoretical experience in the area of family violence,²⁰ and many have been added since then. In addition, many traditional law school courses now integrate domestic violence issues into the curriculum.²¹

These reforms recognize that domestic violence is more insidious and complex than other crimes involving assault, because the abuser and victim are intimately related and, usually, live together.²² Because of this close proximity of victim and abuser, the battered

¹⁹ Elizabeth M. Schneider, *Violence Against Women and Legal Education: An Essay for Mary Joe Frug*, 16 NEW ENG. L. REV. 843 (1992); Mithra Merryman, *A Survey of Domestic Violence Programs in Legal Education*, 28 N. ENG. L. REV. 383, 384 (1994). Other professionals, such as doctors and social workers are also expanding their own professional education. In 1992, the American Medical Association published its *Guidelines on Domestic Violence*, to help clinical practitioners deal with intimate violence in a "sensitive and nonjudgmental manner". AMA (Sep. 1992). See, e.g., *Health and Justice: Professionals Set Goals to Lessen Domestic Violence* 15 JAMA 1147 (1994).

²⁰ Merryman, *supra* note 19.

²¹ Schneider, *supra* note 19.

²² Susan Bernstein, *Do Stalking Laws Protect Domestic Violence Victims?*, 15 CARD. L. REV. 525 (1993); Copelon, *Recognizing the Egregious in the Everyday*, *supra* note 1; Mahoney, *Legal Images of Battered Women*, *supra* note 17; Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973 (1991); Schneider, *Particularity and Generality*, *supra* note 5.

woman or child is often less able than other victims to obtain legal protection or recourse after being assaulted. Their inability to come forward also stems from disabling injuries, emotional commitment to the abuser, and intense feelings of personal shame and self-blame which may prevent them from seeking any kind of help, even if the abuser does not appear to be actively restraining them from seeking aid. In addition, intimate violence necessarily involves a close relationship, in which the abuse can be continuing or long-term, unlike the "typical" assault and battery case. In various combinations, these factors may prevent a victim from seeking help while the relationship continues. For these reasons, consideration of battered womens' tort claims must take the public policy concerns, reflected in ongoing reform concerning domestic violence, into account.

II.

THE PHYSICAL VIOLENCE AND PSYCHOLOGICAL ABUSE WHICH HEDDA NUSSBAUM SUFFERED FOR A DECADE RENDERED HER INCAPACITATED WITHIN THE MEANING OF NEW YORK CPLR 208.

As a result of her exposure to an extreme course of battering and psychological abuse over a ten year period, Hedda Nussbaum was incapable of recognizing or asserting her legal rights. While the particular facts of her experience demonstrate that she was incapacitated, the psychological impact of violence is not unique to her case. As the facts of Ms. Nussbaum's case illustrate, extreme and prolonged psychological and physical abuse can have a devastating effect on its victims.

The impacts of battering on women have been documented by extensive multidisciplinary research. This vast body of research makes clear that domestic violence has a profound psychological impact on its victims, the intensity of which depends on a host of circumstances specific to each case. The destructive impact of violence in the intimate relationship may be so complete that the victim is rendered incapable of independent judgment, even to save her own life. Ms. Nussbaum's story, detailed at the hearing through her own testimony and the testimony of Drs. Van der Kolk and Klagsbrun, demonstrates the

psychological and emotional erosion which can result from extreme and prolonged violence.

Years of domination and abuse by Joel Steinberg dramatically impaired Ms. Nussbaum's ability to function, reducing her to an emotionally "vegetative" state. The psychological effects that she experienced form the basis for a showing of incapacity within the meaning of CPLR 208. Ms. Nussbaum, who was consistently unable to provide for her own physical well being, was utterly incapable of protecting her legal rights.

A. Extreme and Prolonged Domestic Violence Can Render a Battered Woman Incapable of Independent Functioning, and Unable to Recognize or Assert Her Legal Rights.

As documentation of the severity of the problem of domestic violence has increased, research has revealed the complexity of its psychological impact on the victim. Domestic violence can involve more than physical abuse; it can involve a complex synergy between physical and psychological domination. Such a dynamic both produces and depends on the abuser's control over the victim; and, particularly where the pattern of abuse and control is prolonged or severe, it can be accompanied by destruction of the victim's capacity to

function. Insights into the psychological impact of domestic violence on the victim drawn from this work indicate that a battered woman may be sufficiently incapacitated to toll the statute of limitations.

CPLR 208 requires a fact-based inquiry into the victim's particular claim. Not every victim of domestic violence becomes totally incapacitated by her experience in a battering relationship. However, in a situation of extreme and prolonged abuse, such as was involved here, the resulting incapacity is clear.

1. Battered women who are subject to long-term and extreme abuse may be severely traumatized.

A wealth of research has been conducted on the psychological impacts of battering on the victim. While experts use different theoretical frameworks and terminology to describe the complex interpersonal and psychological dynamics of domestic violence, they agree that prolonged battering has profound and frequently debilitating effects on the victim. While each woman's response is unique, the professional literature offers a framework within which to understand her particular experience.

Clinicians and other researchers have found that domestic violence involves a combination of psychological and physical domination which may result in, and be perpetuated by, the complete erosion of the victim's ability to function.²³ There is no single "battered woman profile".²⁴ The "type and severity" of battered women's psychological reactions to and means of coping with the cycle of violence vary widely. A battered woman's psychological state and survival strategy can only be understood in the context of her particular situation. However, Hedda Nussbaum's particular reactions to the trauma she experienced included those which are common to many battered women, such

²³ See generally, Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Women Syndrome*, 21 HOFSTRA L. REV. 1191 (1993); Joan Meier, *Notes From the Underground: Integrating Psychological and Legal Perspectives on Domestic Violence in Theory and Practice*, 21 HOFSTRA L. REV. 1295 (1993). Abused women often "exhibit a paralyzing terror that is augmented by the stress of an ever-present threat of attack." Studies of sixty women referred to a psychiatric clinic in North Carolina found the women to be passive, unable to act on their own behalf, fatigued and numb, without energy to do more than minimal household chores or child care. *Violence Against Women in the Family*, United Nations Office at Vienna, Centre for Social Development and Humanitarian Affairs (UN; NY 1990), at 22 (citing E. Hilberman & F. Munson, *Sixty Battered Women*, VICTIMOLOGY, No. 2, 1978, at 460). Reports have also shown that battered women are twelve times more likely to attempt suicide than non-battered women. *Id.* (citing Nat'l Clearinghouse on Domestic Violence, WIFE ABUSE IN THE MEDICAL SETTING: AN INTRODUCTION FOR HEALTH PERSONNEL 20 [Washington, D.C. 1981]).

²⁴ See Dutton, *Understanding Women's Responses to Domestic Violence*, *supra* note 23, at 1225.

as emotional attachment to her abuser.²⁵ She, like many others, shut down her feelings, thought, initiative and judgment, and eventually gave up her will to live.²⁶ As is evident from Ms. Nussbaum's experience and that of many others, extreme coercion and control, with correlative loss of self and will in the victim, is central to many battering relationships.

"The methods of establishing control over another person are based upon systematic, repetitive infliction of psychological trauma. They are the organized techniques of disempowerment and disconnection."²⁷

One of the most compelling analogies drawn by mental health clinicians and other experts is how the process of coercion in domestic violence mirrors the interpersonal dynamic between hostage and captor. Indeed, the same tactics used against political prisoners, prisoners of war and concentration camp survivors are those often employed by

²⁵ In her article, Dutton discusses a list of other "specific contextual factors" that may impact upon battered women. The list, which is by no means exhaustive, includes: (1) her fear of retaliation; (2) the economic (and other tangible) resources available to her; (3) her emotional attachment to her partner; (4) her personal emotional strengths...; (5) her race, ethnicity and culture; (6) her emotional, mental and physical vulnerabilities; and (7) her perception of the availability of social support. *Id.* at 1232.

²⁶ JUDITH HERMAN, *TRAUMA AND RECOVERY: THE AFTERMATH OF VIOLENCE - FROM DOMESTIC ABUSE TO POLITICAL TERROR* 84, 85 (Basic Books 1992).

²⁷ *Id.* at 77.

the aggressor in battering relationships: isolation, monopolization of perception, induced debility and exhaustion, threats, occasional indulgences, demonstration of omnipotence, degradation, and enforcement of trivial demands. Such "total destruction of the will" can be accomplished with non-violent methods, although violence interspersed with occasional rewards is often employed.

The batterer's primary goal is often absolute control over every aspect of his victim's life.²⁸ Unlike the political scenario, in which the prisoner is taken by surprise, a violent relationship begins by any other, allowing the batterer to later capitalize on his partner's preexisting empathy and positive beliefs about him. Once her complete devotion and loyalty is established, the abuser is free to sever his partner's attachments with family, friends, and other sources of support in the outside world. Batterers frequently accomplish this by monitoring and dictating all of their partner's activities, including to whom she may or may not speak. This isolation typically intensifies over the course of the relationship, contributing to the erosion of a woman's ability to function independently.

²⁸ HERMAN, TRAUMA AND RECOVERY, *supra* note 26, at 75.

The failure of the medical profession to intervene in domestic violence as in this case, can deepen the victim's sense of isolation and may be psychologically damaging in and of itself. When medical practitioners do nothing, and the battered woman believes that they are aware of the source of her injuries, this experience "(magnifies) the victim's anxiety, hopelessness, fear and shame."

The violent man is characteristically concerned with maintaining power and control over the victim's life. In the most acute situations, his aim is to establish total domination, not only over the victim's mind, but over her body as well, including basic needs such as eating and sleeping.²⁹ Over time, the victim may literally lose touch with reality, giving up the ability to maintain independent thought, and coming to see the world only through the eyes of her abuser.³⁰ In these situations, "attachment between hostage and captor is the rule rather than the exception",³¹ for when a person is confronted with a traumatic event, her need for human contact and comfort is heightened. Within the isolation of a battering

²⁹ *Id.* at 78; ANGELA BROWNE, WHEN BATTERED WOMEN KILL 43 (Free Press 1987).

³⁰ HERMAN, TRAUMA AND RECOVERY, *supra* note 26, at 80-1.

³¹ *Id.*

relationship, the only person from whom the woman can seek this is her batterer.³²

A common response in a trauma victim is dissociation, or "psychic numbing",³³ which allows the victim to wall off pain. Dissociative states are common among all victims of abuse and trauma. The dissociative state is a mild form of self-hypnosis which helps the trauma victim separate mind from body in order to survive pain and humiliation.³⁴ Where a person has been exposed to chronic trauma of the kind many battered women experience, her ability to mentally endure any further stress can become so overwhelmed or "constricted," that an "atrophy" in psychological capacity occurs.³⁵ The response may persist even after the traumatic event has passed.³⁶

³² HERMAN, TRAUMA AND RECOVERY, *supra* note 26, at 56; Van der Kolk/R.611.

³³ HERMAN, TRAUMA AND RECOVERY, *supra* note 26; Van der Kolk/R.618.

³⁴ BROWNE, WHEN BATTERED WOMEN KILL, *supra* note 29, at 125 (victims' "effective, cognitive, and behavioral responses are likely to become distorted by their intense focus on survival").

³⁵ HERMAN, TRAUMA AND RECOVERY, *supra* note 26, at 87. Similarly, some researchers have described this type of response as "learned helplessness". Learned helplessness does not mean that the victim of domestic violence is passive. It means that she reasonably sees danger everywhere and is unable to take action because she believes, given her reinforced experiences with her abuser, that it will have terrifying consequences. This continues even after she is "released."

³⁶ *Id.* at 45.

Important principles emerge from these findings, which can support a tolling of the statute of limitation for victims of domestic violence. The impact of domestic violence on the victim is often marked by a profound erosion of her "self". Her emotions and thought processes are diminished and distorted by defense mechanisms typical of all trauma victims, like dissociation and constriction. All of these responses become encoded in her inner life, and remain intact even in the absence of overt violence. The combination of extensive control and violence may disable her independent judgment and functioning.

Due to misconceptions about the effects of battering, the sequelae of trauma that research reveals battered women suffer as a result of prolonged abuse challenge traditional social and legal definitions of functioning and incapacity. For centuries, women have survived battering in silence, or perished. It is easy to confuse a battered woman's mere physical survival with apparent well-being, and to overlook or minimize the harm she suffers. Survival, however, is no substitute for meaningful functioning. Even in the face of extreme trauma, a woman may continue to be able to dress and feed herself, or perhaps even work. This does not necessarily mean, however, that she is capable of taking action on her own

behalf beyond what is necessary to survive.

2. Common psychological responses to battering may qualify the victim under the CPLR 208 standard of incapacity, which is a flexible, fact-based test.

Under New York CPLR 208, the statute of limitations may be tolled when the plaintiff lacks capacity, by reason of insanity, to bring suit in a timely manner. "Insanity" is defined as an inability to protect one's legal rights because of an "over-all inability to function in society." *McCarthy v. Volkswagen of America*, 55 N.Y.2d 543 (1982). "What [208] clearly contemplates is a disability which prevents a plaintiff from recognizing a legal wrong and from engaging an attorney to rectify it." *Sanders v. Rosen*, 159 Misc. 2d 563, 577, 605 N.Y.S.2d 805, 814.

The definition of "insanity" is accordingly meant to be drawn from a flexible, fact-based inquiry. Thus, in *Barnes v. County of Onondaga*, 103 A.D.2d 624, 481 N.Y.S.2d 539 (4th Dep't 1984), *aff'd*, 65 N.Y.2d 664, 481 N.E.2d 245, 491 N.Y.S.2d 613 (1985), the court held that the statute of limitations should be tolled for a plaintiff whose testimony

established that she suffered a severe depressive disorder as a result of the loss of her child and her own disfigurement in an accident.

CPLR 208 has always required a fact-based test to ^edetermine whether a qualifying disability has occurred. This compels the conclusion that battered women can qualify for the tolling, and, moreover, that courts cannot disregard evidence of the effects of battering as a matter of law. Indeed, courts have recognized these effects in other legal contexts. For example, courts have held that expert testimony on "an identifiable group of symptoms that characterize the behavior and state of mind of abused women," may be admissible to a battered woman's claim of self-defense in a homicide prosecution. *People v. Torres*, 128 Misc. 2d 129, 488 N.Y.S.2d 358 (1985); see also *State v. Kelly*, 97 N.J. 178, 478 A.2d 364 (1984) (determining that expert testimony regarding battered women syndrome was relevant to show the "honesty and reasonableness of defendant's belief that she was in imminent danger of death or serious injury" when she killed her husband). A determination of incapacity requires a fact-based inquiry which focuses on the functioning of the particular plaintiff in each action. *Anonymous v. Anonymous*, 154 Misc. 2d 46, 584 N.Y.S.2d 713

(1992).

B. Hedda Nussbaum Was "Insane" Within the Meaning of CPLR 208 and is Entitled to a Toll of the Statute of Limitations.

As a result of Joel Steinberg's prolonged and extensive psychological and physical abuse, Hedda Nussbaum was unable to function independently of him, make routine judgments about her life, or protect her interests. Testimony by Dr. Klagsbrun, her treating psychiatrist, as well as by Dr. Van der Kolk, an internationally known expert in the field of psychological trauma, decisively demonstrated that her overall inability to function from 1978 to 1988 met the standard set forth in CPLR 208.

The dynamic of Mr. Steinberg's devastating control over and manipulation of Ms. Nussbaum was established by the time he first struck her in April of 1978. He "enslaved" her before the brutality began. R. 133. By controlling all aspects of her life through constant criticism, "therapy" sessions, and manipulation of her natural vulnerabilities, Mr. Steinberg made Ms. Nussbaum feel that she was entirely dependent on him. R. 143, 623-25. As Mr. Steinberg gained control over Ms. Nussbaum, she gave up her executive functioning

in that she was no longer able to think independently or respond to her own needs. R. 627.

Not only did she not understand that she had been injured until someone at work urged her to get help, but the interest of her physical safety was clearly subjugated to Mr. Steinberg's interest, as seen in the fact that Ms. Nussbaum hid his identity from people at the hospital.

R. 627. Her response to his first beating and her injury are telling. This pattern continued throughout the relationship. She was consistently unable to protect herself, and eventually, Lisa, from Mr. Steinberg. R. 653. Even when he had brutally beaten her and ruptured her spleen, she covered up for him at the hospital. R. 654.

Mr. Steinberg gained control over Ms. Nussbaum, in part, by destroying her ties with other people and by isolating her in their relationship. Steinberg had control over every matter in her life, including how she dressed, walked, when and what she ate, and even if she got to sleep. R. 492, 493. She lost her job because of her repeated absences caused by the beatings, and Mr. Steinberg's insistence that she go to work late or not at all. Because of Steinberg's interference and control over her, she was unable to even work at home. R. 828. He convinced Ms. Nussbaum that her sister was part of a "cult" which was

brainwashing her, and he would not allow them to speak unless he was present. R. 510.

He would not let her mother call or visit. R. 514. Ms. Nussbaum's isolation was compounded by the repeated failure of people around her to intervene. Doctors and hospital workers treated her physical injuries, but either refused or failed to acknowledge their source. R. 627, 630. The same was true of the people she worked with. R. 627.

As the relationship progressed, Ms. Nussbaum's dissociation increased. R. 634. Dr. Van der Kolk testified that after repeated exposure to abuse, without any perceived route of escape, she "went dead". R. 636. In a manner similar to persons in concentration camps, she could focus only on the small details of the mere act of survival. R. 634. She also suffered from a physiological reaction to hyperarousal resulting from fear stimuli. With no escape from the source of danger, her body began to counteract natural "flight" responses, R. 636, resulting in "dampening" and loss of initiative. R. 636.

Ms. Nussbaum's normal emotional response mechanisms became disengaged in the self-protective process of dissociation, rendering her unable to feel fear, anger, or other responses which routinely help us orient reality. R. 641, 162. While battered women like

Ms. Nussbaum, who have suffered extreme abuse, are able to "regulate" their responses, the process generally requires removal from the abusive environment for a significant period of time. R. 645. Thus, in a manner typical of chronically abused women, it took her at least six months away from Steinberg with the help of intense in-patient psychiatric treatment before the "numbing" began to wear off. R. 645.

When Ms. Nussbaum was admitted to Columbia Presbyterian Hospital after Lisa's death, covered with bruises and debilitating injuries, R. 532, she was still devoted to Mr. Steinberg and believed in his "healing powers". R. 535, 536. When the idea of a civil suit was first raised in 1988, she refused because she still thought that Mr. Steinberg's reasons for beating her "made sense". R. 829. By the time Ms. Nussbaum was admitted to Four Winds Hospital, she was delusional and still suffering from a psychotic disorder. R. 104. Dr. Klagsbrun testified that she continued to display "robotic" impaired functioning and to talk about Mr. Steinberg in an adoring manner. R. 114, 158.

Based on the facts in the record, the statute of limitations should be tolled for Ms. Nussbaum's period of incapacity, and the court should allow her to proceed with her suit

against Mr. Steinberg.

III.

INTERESTS OF JUSTICE REQUIRE THAT THE STATUTE OF LIMITATIONS BE TOLLED HEREIN AND HEDDA NUSSBAUM BE PERMITTED TO PROCEED IN THIS ACTION.

- A. CPLR 208 Reflects a Balance Between the Need to Preserve Legal Claims When Plaintiffs are Incapable of Asserting Them, and Judicial Economy and Fairness to Defendants.

Statutes of limitations are designed to promote judicial economy, finality and certainty, *see Hernandez v. NYC Health & Hosps. Corp.*, 78 N.Y.2d 687, 693; 585 N.E.2d 822, 825; 578 N.Y.S.2d 510, 514 (1991), as well as to safeguard defendants from inadequate notice and stale or fraudulent claims. *See Duffy v. Horton Memorial Hosp.*, 66 N.Y.2d 473, 476; 788 N.E.2d 820, 823; 497 N.Y.S.2d 390, 392 (1985); *Anonymous v. Avery*, 71 A.D.2d 209, 213; 422 N.Y.S.2d 89, 91 (1979). Periods of limitation, however, are not absolute. To provide relief, where the strict application of the statute of limitations would inflict an inordinately harsh result, the New York legislature has enacted tolling statutes to avoid such an outcome.

The primary purpose of CPLR 208 is to safeguard the rights and remedies of persons suffering from certain disabilities during the period of limitation. See *Cohen v. Pearl River Union Free Sch. Dist.*, 70 A.D.2d 94, 98; 419 N.Y.S.2d 998, 1001 (1979). See also, *McCarthy v. Volkswagen*, 55 N.Y.2d 543, 548; 453 N.E.2d 1072, 1074; 450 N.Y.S.2d 457, 459 (1982); *Anonymous v. Anonymous*, 154 Misc. 2d 46, 55; 548 N.Y.S.2d 713, 721 (1992). This toll for disability extends to individuals who have been unable to protect their legal rights because of an overall inability to function in society. See *Dumas v. Agency for Child Development-New York City Head Start*, 569 F. Supp. 831, 832 (S.D.N.Y. 1983); *Smith v. Smith*, 830 F.2d 11 (2d Cir. 1987); *McCarthy v. Volkswagen*, 154 Misc. 2d 46, 51; 548 N.Y.S.2d 713, 719.

Some battered women are unable to protect themselves physically, emotionally, or to pursue their legal rights, as a result of physical and psychological battering and intimidation, as well as emotional and economic abuse. If they are not permitted to toll the statute of limitations, they will be deprived of the right to seek legal redress for their injuries. Indeed, Justice Nardelli's order in this case recognizes that, upon a proper showing, CPLR 208 can apply to victims of domestic violence. The factual circumstances adduced

at the evidentiary hearing in this case far more than adequately justify the granting of a toll.

B. Public Policy Requires the Victims of Domestic Violence to Have the Same Opportunity to Pursue Their Legal Rights as Victims of Other Crimes and Torts.

Victims of domestic violence are often justifiably hesitant and fearful about coming forward with their claims. For this reason, those battered women who seek civil legal redress in New York are already gravely disadvantaged by the state's short one year statute of limitations for assault. An overly restrictive reading of CPLR 208 thus deters and discourages New York domestic violence victims from seeking redress. Such a narrow reading allows abusers to escape sanction for their actions, thus benefitting those who have inflicted their victims' injuries.

Policy reasons for tolling the statute of limitations are particularly compelling where the claimed psychological incapacity is directly related to the acts which give rise to the legal claim. As previously demonstrated, it is widely recognized that repeated physical and emotional brutality can have a profound impact on the victim. Many victims can be

brutalized to the point that they are unable to bring legal suit against their abusers within the proscribed period of limitations. If the psychological impact of domestic violence is not recognized as within the reach of the tolling provision, courts will send a conflicting message: the more egregious and disabling the abuser's conduct has been, the less likely it may be that his victim will have civil recourse, and that he will ever face the legal consequences of his brutality. But when courts allow incapacitated battered women to toll the statute of limitations in order to pursue redress for their injuries, they send the appropriate message: that the justice system will not tolerate battering, and that it will provide incapacitated victims the same recourse that is available to the victims of other crimes and torts.

Concern with judicial economy, or fear that including victims of domestic violence within the scope of the CPLR 208 toll would result in a flood of litigation, are unfounded. Not all victims of domestic violence have the resources and/or the desire to bring a suit, regardless of available legal remedies. Some victims may be able to bring suit within the relevant statute of limitations period. The remainder, who may seek a toll of the limitations

period, will still have to meet the requirements of CPLR 208, as would any other tort claimant. These victims will not require any more detailed or different attention than other plaintiffs, because disability under CPLR 208 has always involved a fact-based inquiry. *Barnes v. County of Onondaga*, 103 A.D.2d 624, 628, 481 N.Y.S.2d 539 (4th Dep't 1984), *aff'd*, 65 N.Y.2d 664, 481 N.E.2d 245, 491 N.Y.S.2d 613 (Ct. App. 1985); *Anonymous v. Anonymous*, 154 Misc.2d 46, 584 N.Y.S.2d 713 (1992). The interests of justice, therefore, strongly favor granting Ms. Nussbaum a toll of the statute of limitations so that she may proceed with her tort claims.

Even if applying CPLR 208 to victims of domestic violence potentially enlarges the group of plaintiffs, thereby resulting in more evidentiary hearings to determine incapacity, public policy favors encouraging such victims to come forward so that violent behavior may be deterred and punished. Moreover, denying application of the tolling statute to domestic violence victims would frustrate New York's policy of encouraging domestic violence victims to seek legal remedies. This policy is embodied in orders of protection and other forms of injunctive relief available to battered women in this state, as well as its mandatory arrest

and professional training policies.³⁷ Arguments of judicial economy are simply not compelling in light of powerful policy concerns of deterrence and safety. The law cannot exclude domestic violence cases from the tolling provision merely because they require the same hearing that is available to all other plaintiffs who allege an overall inability to function under CPLR 208.

The record in this case clearly shows that the physical, emotional and economic abuse perpetrated on Ms. Nussbaum by Mr. Steinberg rendered her incapable of pursuing her legal rights until late in 1988. R. 653, 828. This entitles her to CPLR 208's tolling exception to the statute of limitations. The fact that Ms. Nussbaum is a victim of extreme domestic violence only underscores the need to accord her claim the relief it deserves.

³⁷ See statutes on pp. 7 - 12, *supra*.

CONCLUSION

For the reasons set forth above, *Amici Curiae* urge this court to deny defendant's motion for summary judgment and grant plaintiff a toll pursuant to CPLR 208, permitting her to proceed in her civil action against defendant.

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Respectfully submitted,

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