Ontario Family Law Monthly

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A monthly review and discussion of family law in Ontario

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General

The editors-in-chief of the Ontario Family Law Monthly (OFLM) are David Frenkel and David Tobin.

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The articles in the OFLM are offered to educate, engage and inspire.

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Why the Court of Appeal in *Ahluwalia v. Ahluwalia* did not do enough for victims of family violence

David Frenkel

Overview

In the last 12 months there appears to be only one reported family law decision in Canada that awarded a family law litigant damages for violence inflicted on them during their relationship. In the last 30 years, there has been a paucity of successful Canadian cases. And in the hundred years or so prior to that, there appears to have been none or close to none.

Ahluwalia v. Ahluwalia (2023 ONCA 476) is that sole reported decision in the last year where damages were awarded to a victim of abuse in an intimate partner relationship.

The Court of Appeal rejected the tort of family violence and, in effect, lost an opportunity to remove some of the overwhelming barriers that have prevented victims of that violence from obtaining compensation for their abuses.

Introduction

In the July 2023 *Ahluwalia* decision, the Court of Appeal held that the trial judge erred by creating a new tort of family violence. They found that the creation of a new tort was not required and that the facts of the case did not fall into any "gap in the law."

The Court reasoned, in part, that "the existing tort of intentional infliction of emotional distress provides an adequate remedy."

However, what the Court did not address was the striking contrast between the current statistics of intimate partner violence and the extremely low number of cases where victims were awarded damages for that violence.

For example, in the last 30 years of reported family law decisions in Canada, there appears to be only a handful of cases where a spouse was awarded damages for a tort of assault or battery.

More specifically, when a search of "tort", "violence" and "damages" is entered into Westlaw (as of August 10, 2023), *Ahluwalia v. Ahluwalia* (2022 ONCA 476) is the only reported case where a victim of family violence was awarded any damages in the last 12 months.

Using the same search terms and limiting the results to the "family" subject area, the results came back with only a handful of successful family violence damage awards.

Let us contrast the above results with the latest statistics.

According to Statistics Canada, 2021 marked the seventh consecutive year of a gradual increase in police-reported intimate partner violence. In 2021 alone, police reported 114,132 victims where violence was committed by current and former legally married spouses, common-law partners, dating partners and other intimate partners. Moreover, according to the 2019 General Social Survey on Canadians' Safety, only one in five victims of self-reported spousal violence reported the violence to police.

If the 2019 statistic is found to be consistent in 2021, then that could mean that the number of actual intimate partner violence victims is approximately 500,000 in Canada in one single year.

And since the last 12 months only produced one decision where a spouse was awarded damages for violence inflicted on them, perhaps the existing structure of torts may not be enough to help these victims, and the Court of Appeal could have done more.

A brief discussion on the Law of Torts and Damages

Before we look at historic and present-day jurisprudence relating to family violence, let us first define what a tort is and what damages are available when a tort is claimed.

Justice Himel in *Segal v. Qu* (2001 CarswellOnt 2304) provided a helpful summary with respect to the interplay between the law of tort and damages in the context of family law. She noted that "**the essence of an action for tort is that there is an act committed by the defendant without just cause or excuse which has resulted in harm to the plaintiff**":

> …The law of tort exists for the purpose of preventing men from hurting one another, whether in respect of their property, their persons, their reputations, or anything else which is theirs…. **The purpose of damages is to provide compensation for the losses which have occurred**.
>
> To be successful in any civil action for an intentional tort, the plaintiff must demonstrate on a balance of probabilities that the defendant committed a civil wrong, that he intended to inflict such harm on the plaintiff and that he is responsible for the consequences which have flowed from the wrongful act. Linden, Canadian Tort Law, 6th ed. (emphasis added)

The categories of damages awarded in family law cases include general, special, aggravated and punitive. The lines between these categories at times overlap as shown in the case law below.

Damages are initially categorized as either special or general. **Special damages** generally compensate a plaintiff for pre-trial pecuniary (i.e. money) out-of-pocket or "positive" losses. In contrast, **general damages** compensate for "negative" losses, which can include both pecuniary and non-pecuniary losses (*McIntyre v. Docherty*, 2009 ONCA 448).

Aggravated damages are awarded due to the nature of the defendant's conduct. They are designed to compensate the plaintiff specifically for the "additional harm caused to the plaintiff's feelings by reprehensible or outrageous conduct on the part of the defendant" (*McIntyre v. Grigg*, 2006 CarswellOnt 6815).

Punitive damages are awarded to meet the objective of punishment, deterrence and denunciation of the defendant's conduct, and not to compensate the plaintiff (*McIntyre v. Grigg*, 2006 CarswellOnt 6815).

In the context of family law, Justice Pazaratz in *Costantini v. Constantini* (2013 ONSC 1626) summarized the principles of general and aggravated damages by listing a number of source cases:

- Aggravated damages are not awarded in addition to general damages, but general damages are assessed by "taking into account any aggravating features of the case and to that extent increasing the amount awarded" (*Norberg v. Wynrib*, [1992] 2 S.C.R. 226 (S.C.C.)).

- General non-pecuniary damage should be assessed after taking into account any aggravating features of the defendant's conduct. The court may separately identify the aggravated damages, however, in principle, they are not to be assessed separately.

- The purpose of aggravated damages, in cases of intentional torts, is to compensate the plaintiff for humiliating, oppressive and malicious aspects of the defendant's conduct which aggravate the plaintiff's suffering.

- The following are **aggravating factors** which should be taken into account to determine whether the non-pecuniary damages should be increased: **humiliation, degradation, violence, oppression, inability to complain, reckless conduct which displays a disregard of the victim, and post-incident conduct which aggravates the harm to the victim** (*Weingerl v. Seo,* 2005 CarswellOnt 2474 (Ont. C.A.) at paras. 69-70) (emphasis added).

- The monetary evaluation of non-pecuniary losses is a philosophical and policy exercise more than a legal or logical one. The award must be fair and reasonable, fairness being gauged by earlier decisions; but the award must also of necessity be arbitrary or conventional. No money can provide true restitution (*Shaw v. Shaw*, 2012 ONSC 590).

With respect to punitive damages, there are differing opinions in Canada on whether a prior criminal conviction limits the family court's ability to also award damages which are punitive in nature.

For example, in *Kooner v. Kooner* (1989 CarswellBC 384 (BC County Court)), the wife was severely assaulted by the husband. Still, the court held that a defendant who has been prosecuted for an offence under criminal law should not have punitive damages awarded against him in a civil action arising from the criminal conduct. Even though the court's hands were tied in not awarding punitive damages, they increased the general damages from $5,000 to $7,500, as aggravated damages were warranted.

In *Graham v. Graham* (1999 CarswellOnt 1653), Justice MacKenzie dealt with claims of domestic assault and had the following comments with respect to the punitive damages:

> … Because the fundamental nature of punitive or exemplary damages is to punish, **punitive or exemplary damages are not available where the defendant has been the subject of criminal proceedings and has been convicted therein**. The punishment component is regarded as having been discharged by the operation of the conviction in a criminal proceeding. (emphasis added)

In contrast, Justice O'Connell wrote in *Surgeoner v. Surgeoner* (1993 CarswellOnt 4419) that

> ... I think it is necessary in this age of enlightenment in dealing with claims of this nature which are, in essence, abuse claims that an exception should be made allowing for an award of punitive damages just as it could be made if R.S. had not been convicted because the effect of such will be to deter this anti-social behaviour.

And, in *S. (L.N.) v. K. (W.M.)* (1999 ABQB 478), Perras J. noted that "a line of cases has developed where it has been held that domestic violence cases, at least, are an exception to the general rule." Justice Perras referred to the Ontario Law Reform Commission Report, which recommended that awards for punitive damages should not be limited because the defendant had been convicted of the same acts which founded the civil claim.

Finally, in the Ontario Superior Court decision of *Wandich v. Viele* (2002 CarswellOnt 6 (ONSC)), Justice Paisley wrote that it is open to the court to impose punitive damages in a civil proceeding on a party who has already been convicted and sentenced in a criminal proceeding for the same wrongdoing, just as it is open to the offender to protest his innocence in a civil proceeding after having pleaded guilty to that offence.

Legislative barriers to tort claims for family violence

Having reviewed the categories of damages that are potentially available to victims of domestic violence, let us now see how the courts actually awarded those damages in a historic context.

Unfortunately, the courts have not made it easy for victims (mainly women) to make successful claims for family violence.

The following are some noteworthy examples of reported cases in Canada over the last century where courts made findings of abuse. But, in each case, the courts did not award any monetary compensation to the victims for various reasons.

1947

> In *Perkins v. Perkins* (1947 CarswellSask 21), the Saskatchewan Court of King's Bench found that the husband assaulted and beat his wife until her face was bloody. Since "cruelty" was established, the "award" was that the wife was able to separate from the husband.

1963

> In *Davis v. Davis* (1963 CarswellSask 29), the Saskatchewan Court of Queen's Bench determined that the husband assaulted his wife from time to time throughout the marriage. But the court also found that having sexual intercourse after the date of the last assault constituted, on the wife's part, forgiveness of the offences.
>
> The court used these established facts of assault only to find that there was "cruelty" for the purpose of granting the wife separation. Still, the court did not award any damages.

1970

> In *Getson v. Getson* (1970 CarswellNS 33), the Nova Scotia Supreme Court made the following findings:

> … husband threatened the wife with guns several times during cohabitation… On one occasion … the husband asked the wife to get a gun, when she brought it he asked for the bullets and when he received them he loaded the gun and said to his wife "Now I'm going to blow your guts all over the place just to see you scream. I want to see you suffer before you die." …
>
> … On one occasion the husband took a knife from the kitchen counter, said to his wife that he was going to cut her throat, and as she protected herself, she was cut upon the arm. During the same incident the husband took the wife by the hair and some hair was removed by the roots. Following this incident she was not allowed out of the house for three weeks and was refused medical attention.
>
> …The evidence establishes, also, several assaults by the husband upon the person of the wife. These were by choking, slapping, grabbing her by the throat, striking and knocking her down, or by pushing her against a wall. As a result of these attacks the wife bore bruises and marks attested to by other witnesses.

Gillis J. found that since the wife returned to live with the husband, she condoned his cruelty.

This finding was disheartening, since the court also acknowledged that "…the economic situation of the parties was such as to make it difficult for the wife to withdraw from the matrimonial relationship as easily as some would do."

Regrettably, there was no award for damages.

1980

In the Ontario Supreme Court decision of *Harmon v. Harmon* (1980 CarswellOnt 2635), Master Cork held that the claim for general and special damages for personal injury should not be included in the divorce action.

Master Cork referred to the preamble of the *Family Law Reform Act* and reasoned that an

> …attempt is being made by the court under the divorce petition, and the *Family Law Reform Act* for "the orderly and equitable settlement of the affairs of the spouses upon the breakdown in the partnership and to provide for other major obligations and family relationships, including the equitable sharing by parents of the responsibility for their children". This surely does not encompassed the concept of general and special damages for assault.

1994

> In 1994, the New Brunswick Court of Queen's Bench dismissed a wife's claim for general damages and aggravated damages and/or punitive damages for assault and battery and the intentional infliction of mental suffering (*Khoury v. Khoury*, 1994 CarswellNB 224). The court reasoned that in New Brunswick, spousal immunity for torts committed during marriage was still the law of the province.

The above cases show how courts, throughout the years, were severely limited in their ability to help women abused during marriage. The limitation was not due to a lack of evidence of the abuse, but rather due to constraints within the legal frameworks at the time.

It is reasonable to conclude that since 1867 until around 1990 (over 100 years), Canadian women did not receive a single award of damages due to violence inflicted on them during marriage. There may have been exceptions, but those would have been a rare occurrence indeed.

Courts of Justice Act - Seeking Leave

Currently in Ontario, when adding torts such as assault, battery and infliction of mental suffering as part of a family law claim, leave must be sought pursuant to section 21.9 of the *Courts of Justice Act*.

The reason is that such torts are not part of the Schedule found in section 21.8 of the *Act* which includes proceedings under the usual statutory provisions such as the *Divorce Act*, *Family Law Act* and the *Children's Law Reform Act*, to name a few.

Also, leave "ought to be sought at the earliest possible date, so that the parties do not expend large sums of money preparing for trial of an issue that ultimately is not going to be considered in the proceeding at hand" (*High v. Green*, 2006 CarswellOnt 824, (Ont. S.C.)).

However, in *McLean v. Danicic* (2009 CarswellOnt 3289 (Ont. S.C.)), Justice Harvison Young appeared to have provided flexibility when leave was not sought at all:

> More generally, s. 21.9 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, grants a Family Court jurisdiction, with leave of the judge, to hear and adjudicate upon related matters. Thus, though not pleaded explicitly, I can award damages under the tort of intentional infliction of mental suffering and emotional distress as was done in *MacKay v. Buelow*, [1995] O.J. No. 867 (Ont. Gen. Div.). Because the allegations of fact in the statement of claim provide the

> basis for finding the necessary elements of the tort, I can consider whether the tort was in fact made out even though the tort itself was not pleaded.

Therefore, at a minimum, the facts pertaining to the alleged torts may be sufficient, but only if included in the pleadings.

However, in *G. (M.H.) v. B. (R.J.)*, (2021 ONSC 2467) MacLeod J. showed how victims of abuse will still have to walk a legislative tight rope even before being able to argue their substantive claims:

> … It will be for the judge sitting in the Family Court or exercising jurisdiction under the Family Law Rules to give leave or not and to determine what procedural rules will apply to the portion of the case that is a tort action. In that case, **it is not automatic that the civil rules will apply**.
>
> It is worth noting that a party with a legitimate tort claim against a spouse who fails to make such a claim at the time of the matrimonial litigation will likely be barred from doing so subsequently. The principles of res judicata, issue estoppel and finality operate to presume that parties coming to court with a dispute arising out of a particular set of facts have put all of the issues they intend to litigate before the court. **A judgment will normally operate as a bar to a subsequent action based on the same facts**. It is improper to launch a civil action over issues that have already been adjudicated in family court or which constitutes a collateral attack on the decision.
>
> It follows that an applicant for divorce seeking to also pursue independent tort claims has two options. The applicant could graft tort claims onto the divorce action and seek leave to have them determined in the Family Court under the Family Law Rules. The applicant could instead start a separate tort action as was done here. **In the former case, the applicant runs the risk that leave will not be granted. In the latter, the plaintiff runs the risk of two sets of costs if the action is unsuccessful and perhaps of being denied costs of one of the proceedings if the plaintiff is successful**. In either case the court will ultimately have to grapple with joinder and how best to achieve a just result. In making that choice, the court will have to apply the principles of fairness, proportionality, and judicial efficiency. (emphasis added)

It is worth mentioning that in *G. (M.H.) v. B. (R.J.)*, the wife had to defend a motion by the husband who was seeking to strike her separate tort claim related to the alleged abuse. Although the wife was ultimately successful in combining the claims, this extra step undoubtedly added procedural stress and complexity as well as diminished her financial resources due to the legal fees necessary for her to move her case forward.

A paucity of successful family law claims

Once we move past the legislative hurdles (of the past and the present), we then have a number of reported cases starting in and around the 1990s where judges awarded damages to victims of family violence.

However, after an extensive review of the jurisprudence over the last 30 years, it appears that the number of successful family law claims are quite minuscule.

We can safely deduce that there are many individuals that are being abused by their partners on a yearly basis with only a fraction of them claiming those abuses in family law pleadings and even less of those receiving any sort of damage awards.

And of the following reported cases, it is interesting to note how many of them represent a decision where an award to the victim was actually commensurate with the level of abuse that was inflicted.

1. *Surgeoner v. Surgeoner*, 1993 CarswellOnt 4419 (Ont. Gen. Div.)
    a. Family violence
        i. The husband struck the wife in her groin after an argument.
        ii. The husband also commented that the wife was lucky his back was sore otherwise he would have done a better job.
        iii. The husband was convicted of the assault but was given a suspended sentence with one year of probation.
    b. Damages awarded
        i. $4,000 (general)
        ii. $4,000 (punitive)

2. *Johal v. Johal*,1996 CarswellOnt 397 (Ont. Gen. Div.)
    a. Family violence
        i. The wife's life with her husband was fraught with continuous physical assaults of one kind or another on her. Especially in later years, this was accompanied by physical and emotional harassment which appears to reflect the authoritarian exercise of control by her husband and to a certain extent, by her husband's mother.
        ii. On a number of occasions, the plaintiff hit the defendant with his fists, pulled her hair and banged her head against the wall.
    b. Damages awarded
        i. $4,000 (general damages for pain and suffering)
        ii. $10,000 (punitive or exemplary damages)

3. *Valenti v. Valenti,* 1996 CarswellOnt 514 (Ont. Gen. Div.)

a. Family violence
    i. The husband punched his wife in the face and head area and forced her head into the walls of the hallway.
    ii. The wife was kicked and forced to sit on the couch with instructions not to move.
    iii. The husband struck his wife in the face as well as hitting her with the car phone. At one point she became terrified and attempted to leave the vehicle. At this point, the accused assumed control of the truck and, after driving around for a short period of time, returned to the residence.
    iv. The wife's face was bruised and swollen. Both of her eyes were swollen shut for a few days.
    v. She had a sore nose and a big bruise on the left, lower back near her hip.
    vi. At the time of trial, the wife suffered from symptoms of post-traumatic stress disorder which were mild to moderate.
b. Damages awarded
    i. $10,000 (general)
    ii. $2,500 (aggravated)
    iii. $2,500 (punitive)

4. *Kovacic v. Kovacic,* 1998 CarswellBC 1603 (B.C S.C.)
    a. Family violence
        i. The husband struck wife in the face with his hand (several times as claimed by the wife).
        ii. An x-ray disclosed "fractures crossing the nasal bones with moderate depression on the left side, and moderate displacement towards the midline."
        iii. The wife claimed at the trial that she was still suffering the effects of the assault: that is, a periodic blockage in one nostril which interfered with her breathing, causing her headaches and depression or anxiety.
        iv. The husband admitted to the offence and agreed to a six month no contact order and peace bond.
    b. Damages awarded
        i. $2,000 (general)
        ii. $1,000 (aggravated)

5. *White v. White*, 2003 BCSC 522 (B.C. S.C.)
    a. Family violence

i. On two occasions the husband assaulted his wife, causing injuries.
ii. The second beating involved the husband dragging the wife by hair (bruising her legs and abdomen) and tearing loose two strands of hair. This left her with a bloody, exposed scalp in at least two places.
iii. The assault was described as savage and out of proportion to behaviour that preceded it.
iv. The wife claimed that she had emotional disorder as a result.

b. Damages awarded
i. $10,000 (Non-pecuniary general)

6. *Rezel v. Rezel*, 2007 CarswellOnt 2313 (Ont. S.C.)
a. Family violence
i. Early in their marriage, the husband would lose his temper, chase the wife, pull her hair, and slap or kick her.
ii. In one incident, the husband "socked" the wife in the mouth and left her with a black eye, with her having to miss work for several days.
iii. The second incident occurred in the presence of their pastor, who was at their home to provide marriage counselling. On that occasion the husband became enraged and threw a chair. As a result of the second incident the locks on the house were changed and the husband did not live in the home again.

b. Damages awarded
i. $7,500 (general)

7. *McLean v. Danicic*, 2009 CarswellOnt 3289 (Ont. S.C.)
a. Family violence
i. The husband sent or caused to be sent a letter to the wife purportedly written by a girlfriend reporting his threat to personally put a bullet in her head.
ii. The husband sent or caused to be sent two packages containing intimate sexual photographs of the couple to the addresses of friends and relatives.
iii. The husband's actions caused the wife much distress and suffering, resulting in her seeking medical attention and taking medication for anxiety related issues.
iv. The court found that the husband caused the wife to suffer acute anxiety, fearfulness and great distress.

v. The wife continues to be fearful for herself and others, including her legal counsel, and her family.

b. Damages awarded
   i. $15,000 (general – compensatory and aggravated)

8. *Van Dusen v. Van Dusen*, 2010 ONSC 220
   a. Family violence
      i. The husband had tormented wife throughout the marriage (including in front of their children).
      ii. The assault caused physical injuries; bruising which resolved in approximately two weeks; and emotional upset.
      iii. The husband had demeaned the wife in front of their children, and he struck a child who tried to intervene.
      iv. The husband was charged.
   b. Damages awarded
      i. $15,000 (general)

9. *G. (D.) v. M. (R.)*, 2012 SKQB 296
   a. Family violence
      i. The husband called wife degrading names.
      ii. The husband told her that she had been a bad wife to him and had denied him the kind of sex that he had wanted for the last nine years of their relationship.
      iii. He then said words to the effect that he was going to get the sex that he had been denied and began choking her, forced her to take off her clothes, and began what turned out to be a two to three hour torture that included sexual and physical assaults and threats of violence against her, their child and members of the wife's family.
      iv. The husband repeatedly struck and hit her.
   b. Damages awarded
      i. $25,000 (general)

10. *Holden v. Gagne*, 2013 ONSC 1423
   a. Family violence
      i. There were a number of incidents of battery, being the slap on the wedding night in 1990, the 'head-butt' in 2001, and the assault in 2003.
      ii. For the 2003 assault, the wife had physical injury, namely bruising.
      iii. The wife incurred humiliating and oppressive conduct associated with all three incidents.

b. Damages awarded
    i. $1,000 (general)

11. *Costantini v. Constantini*, 2013 ONSC 1626
    a. Family violence
        i. After the parties separated, the husband engaged in a terrifying, aggressive application of force which included grabbing, squeezing by the neck, pulling away from a door, banging the wife's head against a wall, and then slamming her face against a ceramic floor.
        ii. The husband took advantage of his physical superiority. He took advantage of the wife's vulnerability. He violated her right to a sense of safety, while asleep in her own home, in the middle of the night.
        iii. The husband tormented the wife with threats and degrading insults.
        iv. The wife suffered painful injuries.
        v. The wife has suffered pervasive and continuing emotional upset as a result of the husband's intentionally hurtful behaviour.
        vi. The wife's stress has been compounded by dealing with the fallout on her teenage daughter, also a victim of the husband's abuse.
    b. Damages awarded
        i. $15,000 (general)

12. *Sorrenti v. Blair*, 2013 ONSC 2584
    a. Family violence
        i. The husband assaulted the wife, fracturing her right arm, leaving her with persisting physical limitations. The assault was the last in a history of physical and verbal abuse that spanned ten years.
        ii. The husband was charged and convicted of assault.
        iii. The husband was also in breach of his non-association court orders, causing the wife to fear for her safety.
    b. Damages awarded
        i. $75,000 (general)
    c. Additional notes
        i. The award took into account the serious orthopedic injury and the aggravating factors.
        ii. The court considered awarding punitive damages, but did not do so due to not knowing the details of the husband's sentencing and thereby not being able to "assess proportionality."

13. *Schuetze v. Pyper*, 2021 BCSC 2209
    a. Family violence
        i. The husband physically abused the wife on several occasions.
        ii. The wife suffered a concussion as a result of the husband's blows.
        iii. The wife suffered significant psychological injuries.
    b. Damages awarded
        i. $100,000 (non-pecuniary damages)
    c. Additional notes
        i. The wife also received $22k for the cost of future care, $239k for past loss of income, $425k for future loss of income and $8k in special damages.

Of the above examples, a fair number of them show that the monetary damages awarded do not appear to reflect the severity of the violence inflicted, especially taking into account the years of abuse. And if one also considers the abuser's ability to pay (e.g. someone with significant wealth), an award of a few thousand dollars may seem like a slap on the wrist rather than a meaningful deterrent.

Moreover, even if one argues that the amount of damages awarded in most cases is sufficient, the question still remains, why is there such a low number of reported cases in the first place?

Justice Pazaratz in *Constantini v. Constantini* (2013 ONSC 1626) offered an explanation. He noted that "only a tiny fraction of potential tort claims are ever advanced" and provided reasons why:

> a. Many litigants may be unaware the tort option exists.
>
> b. Family law lawyers tend to be more attuned to dealing with claims based on statute rather than tort.
>
> c. Some lawyers and clients may be reluctant to pursue such a claim fearing it will aggravate an already difficult situation.
>
> d. Family finances are often so limited, there's little point in adding yet another potential monetary claim to the mix.
>
> e. There may even be systemic discouragement. Over the years our family court system has worked hard to get away from blame and recrimination – by discouraging "inflammatory" affidavits in favour of case management; by telling conflicted parents to focus more on the future than the past; by promoting conciliation and collaborative dispute resolution; by granting "no

> fault" divorces. We may have promoted a misconception: that fault never matters.

Even if a victim perseveres through the above psychological, practical and financial barriers, they still need to successfully argue their claims before a judge. But judges have their own limitations, as was explained by Justice Zarzeczny in *G. (D.) v. M. (R.)* (2012 SKQB 296). In that decision, Zarzeczny J. wrote that determining the appropriate level of damages "is very much complicated when the case involves domestic violence between spouses or physical and sexual assaults by persons in a fiduciary relationship to the victim." In such cases "the emotional and psychological impact are exacerbated by the nature, and often loss, of the relationship."

In other words, legitimate victims of family violence have had and continue to have challenge after challenge in receiving an award that compensates for the pain, humiliation and suffering that they endured.

Are the existing civil torts enough to help victims of family violence?

Based on the historic backdrop and insignificant number of successful damage claims, it is hard to see how the Canadian legal system is showing their abhorrence to family violence. Victims are not receiving justice, especially when one combines the troubling statistics on family violence with the underrepresentation of family law decisions vis-à-vis those statistics.

Still, the Court of Appeal in *Ahluwalia* held that family courts should continue using the existing torts to address their claimed damages.

However, these torts have been around for over thirty years and yet, despite the law's increased acknowledgement of the impact of family violence, the level of successful claims in family courts does not appear to be increasing. If anything, the numbers are flatlining near zero.

The following are some reasons why the existing civil torts may not be enough.

1) Intimate partners have many ties that bind them

The existing civil tort cases are not exclusive to intimate partner relationships and thus do not make the best examples to be used as precedent.

Unlike a relationship with strangers, intimate partners can find it very difficult to leave their spouse. The parties are often connected financially and emotionally, and even

more so with the birth of children. Leaving the marriage may not even be a viable option for many spouses, especially if they are vulnerable and financially dependent.

As Justice Fleming took judicial notice of in *Schuetze v. Pyper* (2021 BCSC 2209), "..victims of intimate partner violence often leave and return to the relationship many times."

In *Schuetze*, the court inferred many factors which likely contributed to the wife's willingness to remain in her marriage, among them the psychological and emotional impact of an abusive and controlling relationship, isolation, her view that an intact family was best for the children and the absence of immediate family support.

Arguably, having to parachute in the existing civil torts and their related precedents would detract from being able to adequately focus on the unique nature and the plethora of factors specific to family violence claims.

2) Evidence from intimate partners is unique and requires a sensitive lens

Family law professionals may need to treat the evidence from victims of intimate partner violence differently from evidence from victims of regular violence and with a more sensitive lens.

For example, Justice Chappel in *S.V.G. v. V.G.* (2023 ONSC 3206) pointed out that assessing credibility in family violence allegations is challenging as it requires an appreciation of the overall context within which the violence occurs.

Chappel J. noted:

> …This context includes the typical dynamics of violent relationships between family members, the impact of violence on the victims and their ability to disclose the violence, and other social, spiritual, economic and cultural considerations that may be preventing the victim from talking about the violence. Having regard for the complex social dynamics around family violence, the courts must resist assessing a claimant's credibility against stereotypical notions of what a victim should have done in similar circumstances. **The reason for this is that trauma can significantly affect a victim's cognitive functioning and physiology in many ways, and therefore victims of family violence may not react or interact in ways that one may generally expect them to**…
>
> The social context considerations around family violence are such that the typical indicators of credibility in the litigation arena are unhelpful in some situations and may in fact lead to distorted and dangerous outcomes. **For**

> **example, one traditional yardstick for assessing credibility is whether the witness can provide a clear, detailed and consistent version of the events in question, with a solid recollection of the chronology of those events. However, victims of family violence often suffer from significant trauma associated with the abuse, which may affect their ability to provide a detailed, consistent and accurate recollection and timeline of the events in question** … In addition, as the Supreme Court of Canada emphasized in *Barendregt* , "family violence often takes place behind closed doors, and may lack corroborating evidence" … Furthermore, there may not be evidence of prior consistent disclosures of family violence to rebut claims of recent fabrication, **as there are many reasons why victims of family violence may not disclose the violence** … (emphasis added)

Consequently, using the existing torts would inevitably retract back to the use of the usual rules of evidence for those types of cases.

Instead, family violence cases may require the evidence to be viewed more carefully using a more sensitive lens while taking into account circumstances unique to the relationship itself.

3) Aggravating factors may be insufficient

In *Ahluwalia*, the Court of Appeal wrote that no jurisprudence was cited to support the trial judge's concern that existing torts are too narrowly focused to capture the dynamics in a relationship involving the pattern of tortious conduct inherent in intimate partner violence.

The Court of Appeal also noted that courts have "long recognized that patterns of physical and emotional abuse constitute tortious behaviour." To buttress that claim, the Court provided examples of cases in the past that have had aggravated damages added to reflect the unique nature of family violence.

In theory, aggravated damages may seem like a way to catch the remaining more subtle forms of abuse found family violence claims; but, in practice the cases do not appear to reflect that potential, both in form and content.

For example, from the 13 cases listed above, the aggravated component of the general damages was not clearly defined. In other words, it was not evident how much of the total award represented the aggravated portion and thus not making for very helpful precedents.

And of the seven cases that were listed in the *Ahluwalia* decision to show aggravated awards, six were before the year 2000. Of the six, (a) *MacKay v. Buelow* was not a case

of coercive control but rather dealt with harassment occurring after the parties separated; (b) in *Valenti v. Valenti*, the section which dealt with aggravated damages did not specifically refer to the historic violence, and only focused on the circumstances immediately preceding the assault; and (c) in *Dhaliwal v. Dhaliwal*, the court did not address the pattern of abuse as the specific reason in awarding the aggravated damages.

With respect to the other cases that were listed in *Ahluwalia*, (a) *Calin v. Calin* was a case about parent abusing a child; (b) *Jane Doe 72511 v. Morgan* involved a relationship of only six months and aggravated damages arose from the boyfriend posting nude videos of this girlfriend; (c) in *Farkas v. Kovac*, the aggravating factors were also specific to the incidents of abuse and not relating to coercive control or a pattern of abuse; (d) in *Van Dusen v. Van Dusen*, the court did not indicate how the specific pattern of abuse added to the aggravated component of the damages; and (e) in *McLean v. Danicic*, the court did refer to coercion, however it was not in relation to the marriage itself, but rather the husband's litigation behaviour that occurred after the parties separated.

Overall, the cases cited in *Ahluwalia* do not clearly show how the pattern of abuse and coercive control relate to the amount of aggravated damages awarded. This is not surprising, as coercive control has been referred to as a "serious harm that is not easily quantifiable and cannot be addressed by existing common law tort claims."

Further, a domestic violence victim's most significant harm "results from the effects of frequent and recurrent low-level violence inflicted on her as part of the abuser's efforts to maintain control" (*Domestic Violence Torts, Righting a Civil Wrong*, Camille Carey, 62 Kansas Law Review 695 (2014)).

The Court of Appeal also mentioned that existing torts are flexible enough to address the fact that abuse has many forms, and trial judges should be alive to the family violence dynamics.

And yet, the insignificant number of reported cases should not give us comfort that the legal system as a whole is exemplifying this flexibility and appreciation. Furthermore, being alive to the dynamics of violence does not necessarily equate to an adequate or even the correct judgment for the victim. Historic Canadian jurisprudence has shown that judges have been alive to the dynamics of violence for over a century but were also shackled in their ability to provide any meaningful compensation.

Conclusion

Arguably, victims of family violence need an easier way to achieve justice.

The proposal by the Court of Appeal in *Ahluwalia* does not appear to achieve that justice in light of the historic and current status quo vis-à-vis the paucity of successful tort claims in family courts.

Perhaps this is one of those times where the floodgates need to be opened. Otherwise, the dam of victims' pent-up pain and suffering will continue to swell while the perpetrators of those crimes are able to leave the relationship with relative impunity.

Perhaps it is time to worry less about possible litigants making illegitimate claims and worry more about the victims that are afraid to bring forth their claims due to overwhelming legal and practical barriers.

Proposing a perfect legal solution is not the immediate goal. Rather, any alternative that moves the status quo in a positive direction should be implemented without any further delay.

One proposal may in fact be to simplify the process with the introduction of the tort of family violence. Unlike what was proposed by the Respondent in *Ahluwalia*, such a tort should still maintain the necessity of having to prove the harm committed on a balance of probabilities. In fact, Justice Mandhane was able to accomplish the finding of the family violence without having to lower the necessity of proof.

Such a unified tort can still include the enumerated torts existing today, but with a more effective way to cumulatively assess the unique traits of violence claims in the context of intimate relationships.

Those unique traits include various forms and degrees of dependencies, breach of trust, vulnerability, coercive control (psychological, emotional, sexual), strategies of intimidation, isolation, humiliation, patterns of abuse, victims returning back to the abuser, the effects of violence on children, and trauma existing after the relationship.

For example, there do not appear to be any cases in Canada where family judges have considered violence occurring in front of a child as an aggravating factor to damages. The same applies to most of the other traits listed above with only minor exceptions.

Attempting to fit some of these factors into the existing tort of intentional infliction of emotional distress is also not the answer. In fact, it would be counterproductive. Victims would find it almost impossible to prove the more subtle incidents of abuse

and control as the threshold for that tort appears to be too blunt of an instrument. As Justice Perkins pointed out in *Fein v. Fein* (2001 CarswellOnt 4150 (Ont. S.C.),

> The requirement in the cases is not mere distress, but rather a recognized psychiatric disorder. Further, the defendants must have engaged in "extreme", "flagrant" or "outrageous" conduct calculated or intended to produce that kind of harm.

Limiting certain claims to such a narrow tort would also add further complexity to the claim process by adding yet another disjointed tort to satisfy and thus increasing the barriers for victims to achieve justice.

Most strikingly, the tort of intentional infliction of emotional distress was introduced in 1995 by the case of *MacKay v. Buelow* (1995 CarswellOnt 89 (Ont. Gen. Div.)). But other than the trial decision of *Ahluwalia,* there does not appear to be a single case, with possible exceptions, where a spouse was awarded damages for family violence using that tort.

In contrast, some states in the U.S. have recognized domestic violence as a unified tort. California is one example. In the California Civil Code, Section 1708.6 states:

> (a) A person is liable for the tort of domestic violence if the plaintiff proves both of the following elements:
>
> > (1) The infliction of injury upon the plaintiff resulting from abuse, as defined in subdivision (a) of Section 13700 of the Penal Code.
> >
> > (2) The abuse was committed by the defendant, a person having a relationship with the plaintiff as defined in subdivision (b) of Section 13700 of the Penal Code.
>
> (b) A person who commits an act of domestic violence upon another is liable to that person for damages, including, but not limited to, general damages, special damages, and punitive damages pursuant to Section 3294.
>
> (c) The court, in an action pursuant to this section, may grant to a prevailing plaintiff equitable relief, an injunction, costs, and any other relief that the court deems proper, including reasonable attorney's fees.
>
> (d) The rights and remedies provided in this section are in addition to any other rights and remedies provided by law.
>
> (e) The time for commencement of an action under this section is governed by Section 340.15 of the Code of Civil Procedure.

With the California legislature's attempt to enhance the civil remedies available to them, it recognized that acts of domestic violence "merit special consideration as torts, because the elements of trust, physical proximity, and emotional intimacy necessary to domestic relationship in a healthy society makes participants in those relationships particularly vulnerable to physical attack by their partners" (*Domestic Violence Torts, Righting a Civil Wrong*, Camille Carey, 62 Kansas Law Review 695 (2014)).

Therefore, it does not seem to be that much of a stretch to amalgamate the existing torts into one comprehensive family violence tort, whether through legislation or by courts themselves.

Such a direction by the courts would provide credence to family law victims of violence in a way that has not been shown before.

Such a tort would better combine the seemingly disjointed factors that exemplify the victim's unique relationship with their abuser along with the abuses themselves. The existing torts do not appear to accomplish this unification.

Combining these abuse factors into a unified tort would then indicate to Canadian society that family courts are treating family violence tort claims with the severity, consistency and immediacy that they deserve.

Introducing a family violence tort may not be the complete answer, but it could add clarity and predictability and at least move the needle of justice forward in a meaningful way. Victims of family violence deserve at least that much.

Limitation period? Not today!

David Tobin

Overview

When it comes to torts specific to family violence in an intimate relationship, the 2-year limitation period does not apply to assault and battery. However, pursuant to the *Limitation Act*, there likely would be a 2-year limitation period in bringing the tort of intentional infliction of emotional distress.

Therefore, in light of the *Ahluwalia* decision, family lawyers should now not only be mindful of possible torts to advise their clients of, they also need to consider their correct limitation period.

Introduction

The *Ahluwalia v. Ahluwalia* decision is receiving a lot of press and attention both at the trial and appellate level (2022 ONSC 1303; 2023 ONCA 476). As a result, it is likely that family lawyers are thinking a lot more about possible tort claims that their clients can bring, or that may have to defend against. And if they are not thinking about this, then they should.

Some thoughts that previously may have kept a lawyer up at night included,

- *Oh boy, did my client miss the period in which they can advance a claim for damages for an assault or battery*?
- *Does the limitation period begin running at the time of the assault or at the end of the relationship?*
- *Is it a two-year limitation period?*

It will be of some comfort to lawyers to remember that in the context of family violence and damages for (sexual) assaults and batteries arising from family violence, there is **no** limitation period in which a proceeding must be initiated.

The *Limitations Act*, 2002, SO 2002, specifically section 16(1)(h.2)(i), states:

16 (1) There is no limitation period in respect of,

> (h) a proceeding based on a sexual assault;
>
> (h.2) a proceeding based on an assault if, at the time of the assault, the person with the claim was a minor or any of the following applied with respect to the

> relationship between the person with the claim and the person who committed the assault:
>
> > (i) they had an intimate relationship,
> >
> > (ii) the person with the claim was financially, emotionally, physically or otherwise dependent on the other person;

A marriage or common law spousal relationship is considered an "intimate relationship."

Justice Mandhane in her trial decision briefly referred to this section at paragraph 30:

> At the outset of trial, as a preliminary matter, the Father argued that the Mother's tort claim was statute barred. I ruled that it was not because it was based on an alleged assault while the parties were in an "intimate relationship" and/or in a relationship of dependency.

Given that a spousal relationship will be an "intimate relationship," the next question is, which torts are covered by this section?

What is Assault for the purposes of this section?

For 16(1)(h.2) to be triggered, the proceeding must be based on an assault. The *Limitations Act* specifically includes "battery" in the definition of "assault" for the purposes of the interpretation of the *Act*.

The Ontario Court of Appeal's decision in *Barker v. Barker*, 2022 ONCA 567 addressed what "assault" means in the context of section 16(1)(h.2). At paragraphs 137-138, the court wrote as follows:

> In common parlance, the terms "battery" and "assault" are often used interchangeably. Indeed, the case law demonstrates that the two torts are often "blurred together and called 'assault'"…
>
> That said, while related, battery and assault are distinct concepts in tort law, both being examples of trespass to the person…a battery involves actual physical contact by the tortfeasor or bringing about harmful or offensive contact with another person, whereas a tortious assault involves intentionally causing another to fear imminent contact of a harmful or offensive nature.

As between spouses, battery will likely involve violent contact, whether it is hitting, choking, slapping, etc. An assault will include threats of imminent harm. These are key elements if section 16(1)(h.2) is to be invoked.

Without an assault, a party cannot rely on section 16(1)(h.2) to extend the limitation period. In *Holguin v. Mohan* (2021 ONSC 682), an Applicant who alleged to have been in an abusive intimate relationship sought to rely on section 16(1)(h.2) to extend the period in which to claim unjust enrichment and a constructive trust over the Respondent's property. The Applicant claimed that because he endured violence in the context of an intimate relationship, no limitation period should apply. At paragraph 45 of her reasons, Justice Kimmel discussed the applicability of section 16(1)(h.2):

> This section of the *Limitations Act* does not apply to the circumstances of this case. There are no allegations of sexual assault, of misconduct of a sexual nature or of assault. Holguin attempts to characterize his relationship with Mohan as intimate and involving financial, emotional, or physical dependence. However, this dependence is only relevant under ss. 16 (h.1)(iii) and (h.2)(ii) of the *Limitations Act* if the claim is based on misconduct of a sexual nature or assault, and that is nowhere alleged.

Thus, without an assault, section 16(1)(h.2) cannot be relied upon.

However, it is unclear whether proceedings related to the tort of intentional infliction of emotional distress would fall within this definition. On a plain reading of the *Limitations Act*, it would appear not. Therefore, the standard 2-year limitation period likely applies.

Conclusion

The lack of a limitation period for assaults and batteries perpetrated in the context of a spousal relationship is a recognition of the special type of harm that occurs with family violence.

The extended period provides victims, predominantly women, time to bring such claims. It allows them to not to have to decide in the immediate aftermath of the separation whether they want to relive their experience or abandon their legal remedies for damages.

It may be worth extending the limitation period for any intentional torts perpetrated in the context of an "intimate relationship." However, that is not the current state of the law.

For now, victims will be best served initiating proceedings for torts not covered in section 16(1) of the *Limitation Act* within 2 years after they have been discovered.

A review of the tort of intentional infliction of emotional distress

Christina Hinds

Overview

The tort of intentional infliction of emotional distress has been available to family law litigants since 1995. This article refers to the Court of Appeal decision of *Ahluwalia v. Ahluwalia*, outlines the three elements of the tort and discusses their application in the family law context.

Introduction

Following the release of the decision from the Court of Appeal in *Ahluwalia v. Ahluwalia* (2023 ONCA 476), there is no "tort of family violence" available to family law litigants. The Court of Appeal held that the allegations made by the wife in the case were already captured by existing torts, namely the tort of battery, the tort of assault, and the tort of intentional infliction of emotional distress. And thus, the creation of a new tort of family violence was not warranted.

Given the state of the law and family lawyers' relative inexperience with tort claims, this article will focus on the tort of intentional infliction of emotional distress (IIED) and explore the application of this tort to family law matters, with the goal of helping family law litigants and lawyers better understand its practical application.

The elements of the tort of Intentional Infliction of Emotional Distress (IIED)

In *Ahluwalia*, the trial judge found that existing torts, including the tort of intentional infliction of emotional distress, focused on individual instances rather than patterns of behaviour which lay at the heart of family violence cases. At paragraph 52, Justice Mandhane stated the following:

> … the tort of intentional infliction of emotional distress requires showing that a specific interaction or behaviour was "flagrant and outrageous" and resulted in injury. In the context of damage assessment for family violence, it is the pattern of violence that must be compensated, not the individual incidents.

The Court of Appeal's ruling confirmed that if family law litigants wish to seek compensation for abusive and controlling behaviour, they must rely on already existing

torts. The Court focused on the torts of battery, assault and intentional infliction of emotional distress.

The Court also found that these three torts applied to the allegations made by the wife and that she was entitled to damages under those torts.

The Court of Appeal's discussion with respect to the tort of intentional infliction of emotional distress began at paragraph 69 of its decision. The tort has three elements:

1. the defendant's conduct was flagrant and outrageous;
2. the conduct was calculated to harm; and
3. the conduct caused the plaintiff to suffer a visible and provable illness.

Element 1 - Flagrant and outrageous conduct

The conduct of the tortfeasor must reach the threshold of "flagrant and outrageous" to ground a claim of intentional infliction of emotional distress.

The Court of Queen's Bench of Alberta in *Benison v. McKinnon* (2021 ABQB 843) considered what behavior will consist of "flagrant and outrageous" conduct. At paragraph 24, the court stated the following:

> Merriam Webster Dictionary (online) provides several different definitions of "flagrant" including "**conspicuously offensive" and "so obviously inconsistent with what is right or proper to appear to be a flouting of law or morality"**. It also includes in its definition of "outrageous" as "**going beyond all standards of what is right or decent."** I believe that it is these definitions that were intended when the courts have indicated that the conduct of the defendant must be "flagrant and outrageous". (emphasis added)

In *Costantini v. Constantini* (2013 ONSC 1626), Justice Pazaratz found that the husband's aggressive and intimidating behaviour was outrageous. The behaviour included verbal abuse, threats, degrading insults, and entering the wife's home post-separation while she was asleep.

In *McLean v. Danicic* (2009 CanLII 28892 (ON SC)), Justice Harvison Young found that flagrant and outrageous behaviour included the threatening letters written by the Respondent, including threats that the Respondent would "put a bullet" in the Applicant's head.

Element 2 - Conduct calculated to harm

The flagrant and outrageous conduct must occur with the intention of producing harm. At paragraph 70, the Court of Appeal in *Ahluwalia* explained that "the requirement that the conduct be calculated to produce harm is met where the actor desires to produce the consequences that follow from the act, or if the consequences are known to be substantially certain to follow."

Element 3 – Causing the plaintiff to suffer a visible and provable illness

The conduct of the tortfeasor must result in visible and provable illness.

But, the "visible and provable illness" element does not require expert medical evidence. In *Saadati v. Moorhead* (2017 SCC 28), the Supreme Court of Canada held that:

> ... while **relevant expert evidence** will often be helpful in determining whether the claimant has proven a mental injury, **it is not required as a matter of law**. Where a psychiatric diagnosis is unavailable, it remains open to a trier of fact to find on other evidence adduced by the claimant that he or she has proven on a balance of probabilities the occurrence of mental injury. And, of course, it also remains open to the defendant, in rebutting a claim, to call expert evidence establishing that the accident cannot have caused any mental injury, or at least any mental injury known to psychiatry. (emphasis added)

In *Costantini,* Justice Pazaratz found that the Respondent chose to say and do things with the "specific intention" of causing the Applicant pain and injury, stating:

> I have no difficulty concluding the Applicant's claim in tort should succeed. The Respondent's aggressive and intimidating behaviour was outrageous. He chose to say and do things with the specific intention of causing physical pain and injury, and significant emotional upset. The Applicant suffered physical and emotional injuries, precisely as the Respondent intended.

In *Yenovkian v. Gulian* (2019 ONSC 7279), the mother experienced cyberbullying from the father post-separation. The father posted videos of parenting visits with the children online along with derogatory commentary. Justice Kristjanson found that the father's conduct caused visible and provable illness to the mother. The Applicant sought assistance from her family doctor, experienced nightmares, felt physically ill, experienced mental stress and reported feeling "hyper-vigilant". Justice Kristjanson found that the mother had satisfied the elements of intentional infliction of mental distress and awarded the mother $50,000 in compensatory damages.

In *McLean v. Danicic,* Justice Harvison Young awarded $15,000 in compensatory and aggravated damages to the wife primarily in relation to the husband's conduct after separation. Her Honour stated "I find that Mr. Danicic caused Ms. McLean to suffer acute anxiety, fearfulness and great distress. She continues to be fearful for herself and others, including her legal counsel, and her family. She is particularly fearful of his taunt that one day it will start again and be much worse…"

The third element of the tort of IIED was also considered recently by the Court of Appeal in *AA v. BB* (2021 ONCA 147). In that case, the father called the Children's Aid Society and alleged that he had witnessed the mother abusing his children. The report was false, and the mother commenced an action claiming damages for intentional infliction of emotional distress, among other relief.

The trial was heard in 2016 and then re-opened in 2017. At the first trial, the trial judge concluded that while the first two elements were met, the court could not conclude that the father caused the mother to suffer "visible and provable illness."

The trial judge held that while there was no doubt that the mother suffered tremendous stress as a result of the father's false allegations, the mother had not shown that she suffered visible and provable illness.

At the re-opened trial (*AA v. BB and CC*, 2018 ONSC 4173), which was upheld by the Court of Appeal, the trial judge found that the mother met all three elements of the tort of intentional infliction of emotional distress. Justice Corkery stated the following:

> …my original decision was released without me having the benefit of the very recent decision of the Supreme Court of Canada in *Saadati v. Moorhead* … on the extent to which expert evidence of mental health is required to prove damages. On the evidence of [the mother] alone, I am satisfied that the false referral caused [the mother] to suffer a visible and provable illness.

Conclusion

Since the introduction of the tort of intentional infliction of emotional distress in the decision of *MacKay v. Buelow* ([1995] O.J. No. 867 (Ont. Gen. Div.).), it has not been used in family law matters in any significant capacity.

Based on the cases reviewed above, it may be because the barriers to bringing a successful claim of IIED are high. Therefore, it is unlikely that this existing tort will be able to adequately address the emotional and mental harms suffered by victims of family violence. Still, it was helpful for the Court of Appeal in *Ahluwalia* to provide much needed overview of the tort.

But whether and to what extent the IIED tort will permeate the future of family violence cases is anybody's guess.

A review of seven recent tort decisions of family violence in Canada

Samantha Rich

Overview

It is difficult to find Canadian jurisprudence that includes damages awarded for family violence committed during relationships. The reason is that they are very few in number. This article attempts to make up in quality (i.e. providing better understanding of the claims of abuse) with what is missing in quantity (i.e. the small number of reported decisions).

Introduction

The Ontario Court of Appeal decision in *Ahluwalia v. Ahluwalia* (2023 ONCA 476) found that the tort specific to "family violence" should not be created. The Court held that it was unnecessary to create a novel tort and that existing torts already address patterns of behaviour for both liability and damages for family violence. The Court of Appeal also provided some examples of cases that have used civil torts to award damages to victims of intimate partner violence.

The following article offers a more in-depth review of cases of intimate partner abuse in Canada. Particularly, seven recent and notable decisions are summarized with respect to the specific abuses and the court's analysis with respect to the damages awarded.

The purpose of this article is to show the true impact of abuse by exemplifying the details that form the basis of the claims themselves. Upon appreciating the particulars of the abuse, we may then better assess whether the damages awarded actually achieved the justice that the victims deserved.

Jane Doe 72511 v. Morgan (2018 ONSC)

In *Jane Doe 72511 v. Morgan* (2018 ONSC 6607), the plaintiff claimed general, aggravated, and punitive damages for assault and battery and public disclosure of private facts. The plaintiff and defendant dated for approximately six months, they were never married and never lived together.

When the plaintiff realized that she was pregnant with the defendant's baby, their relationship deteriorated. The defendant accused the plaintiff of ruining his life and began seeing other women. One night when the plaintiff was seven months

pregnant, the defendant dragged her down the stairs of his parents' home, choked her, threatened her with a knife, and forced her out of the house.

The following provides a more detailed description of the events:

> Jane gave birth to a son, MK, in November 2013. Nicholas' physical and verbal abuse of Jane escalated. He would often drag her up or down the stairs, throw her around, cover her mouth with his hand and choke her. Nicholas' parents, the Morgans, witnessed his verbal and physical abuse because it took place at their home. They did nothing to stop it or to prevent further attacks.
>
> One day in March 2014, after Jane left the Morgans' house to catch the bus, Nicholas chased after her, wrestled her to the ground, forced her into his car, dragged her back out of it by her feet, and smashed her head against the car window. Jane phoned the police. Nicholas was arrested and later convicted of assault.
>
> In June 2016, Jane learned through a friend that Nicholas had, without her knowledge or consent, posted a sexually explicit video of them on a pornography website. The video … had been posted in March 2014 and was linked to ten other pornographic websites.1 Jane's face was clearly visible in the video while Nicholas' face was not. When Jane confronted Nicholas about the video, he admitted that he uploaded it as revenge for Jane calling the police … (paras. 3-5)

The plaintiff claimed $120,000 in total damages:

- $20,000 in general damages jointly and severally from the defendant and his parents for repeated assault and battery;
- $50,000 in general damages;
- $25,000 in aggravated damages; and
- $25,000 in punitive damages from the defendant for the posting of the explicit video on the internet.

Justice Gomery found that the plaintiff was assaulted on several occasions and held that the defendant was liable for both assault and battery.

Justice Gomery stated that:

> I do not see why assault and battery by a spouse should attract a lower range of damages than attacks by any other defendant. **Violence by a partner may in fact be a more traumatic event than violence by a stranger**. **Spousal violence violates the trust that we are taught to have in our partners**. It often involves repeated verbal and physical abuse. **It typically occurs at home, the place where we should feel the most safe and secure**. A

> **battered spouse may be left not only with bruises but with an inability to trust other people or ever really feel safe**. (emphasis added)

The court awarded the plaintiff the full sum of general damages of $20,000 and reasoned that this award is appropriate due to the repeated, ongoing nature of the physical and verbal abuse. The court also noted that despite the absence of any permanent physical injury, that the abuse suffered by the plaintiff has left her with "significant emotional and psychological trauma."

The Court awarded the plaintiff a total of $100,000 for the posting of the private video on the internet ($75,000 in general and aggravated damages and $25,000 in punitive damages).

Yenovkian v. Gulian (2019 ONSC)

In *Yenovkian v. Gulian* (2019 ONSC 7279), the wife claimed against the husband damages in the sum of $150,000 for nuisance, harassment, intentional infliction of mental suffering and invasion of privacy and $300,000 for punitive damages.

The parties were married for six years and had two children.

The court found that the husband was abusive during the marriage. Specifically,

> Mr. Yenovkian damaged furniture in anger, including with knives; trashed a laptop; threatened to kill both himself and Ms. Gulian; engaged in significant verbal abuse, including in front of the children; and orally threatened that if his business did not succeed, he would kill himself and the children. In December 2015 Mr. Yenovkian wrote an email attacking the respondent and her "satanic cruel family." He threatened that if Ms. Gulian sought to "take the children from [him]" or limit the time that he spends with the children he would "ensure that the damage done is irreparable" to Ms. Gulian and her family. (at para. 7)

Additionally, the husband orchestrated a campaign of cyberbullying in part as follows:

> Mr. Yenovkian has posted a video online of a person displaying posters of Ms. Gulian and her parents and the allegations at various locations in London, England. He established an online petition to persecute Ms. Gulian and her parents and enlisted the help of members of the public. He has spread his allegations on the internet and distributed them and links to the sites to friends, family members and business relations of Ms. Gulian and her parents,

> members of the Armenian community and her church in London, England, as well as to Ms. Gulian's fellow employees. (at para. 176)

Justice Kristjanson held that:

> In this case, **the false publicity is egregious**, involving alleged criminal acts including by Ms. Gulian against her children. The false publicity is widely disseminated on the internet, as well as through targeted dissemination to church friends and business associates. Ms. Gulian has **suffered damage as a mother, as an employee, in the Armenian community, and in her church community**. She is peculiarly vulnerable as the spouse of the disseminator of false publicity. The **false publicity has had a detrimental effect on Ms. Gulian's health and welfare, humiliation, caused her fear, and could be expected as well to affect her social standing and position**. Mr. Yenovkian has not apologized, nor has he retracted the outrageous comments despite court orders. (emphasis added) (at para. 191)

The court awarded the wife $50,000 in compensatory damages for intentional infliction of mental suffering. Justice Kristjanson reasoned that "the damages for intentional infliction of mental suffering are intended to be compensatory."

The court also awarded the wife $100,000 in damages for the tort of invasion of privacy and punitive damages in the sum of $150,000. The punitive damages were awarded "to express the court's denunciation, deterrence, and punishment."

O.O.E. v. A.O.E. (2019 SKQB)

In *O.O.E. v. A.O.E.* (2019 SKQB 48), the wife claimed damages against her husband for, among other things, assault, battery, and negligent infliction of mental suffering.

The parties were married and lived together for approximately one and a half years. They had no children.

Justice Tholl found that the wife was battered and assaulted in excess of fifty times by the husband, "with such incidents including hitting, dragging, pushing, kicking and knocking her to the floor." The wife was "also frequently and constantly belittled, insulted and threatened" by the husband.

The Court considered the recurring nature of the abuse in this matter and the fact the majority of the abuse occurred within the spousal relationship. The Court reasoned that while the physical injuries suffered by the wife were more transitory in nature than some of the physical injuries noted in previous cases that awarded higher levels of damages, the wife has PTSD because of the husband's actions. The Court awarded

the wife combined general damages and aggravated damages in the sum of $40,000.

Justice Tholl held that the husband's "conduct was a marked departure from ordinary standards of decent behaviour." However, the Court considered the husband's very limited financial resources and awarded the wife punitive damages in the minimal amount of $5,000.

Petrie v. Lindsay (2019 BCSC)

In *Petrie v. Lindsay* (2019 BCSC 371), the wife claimed damages for personal injury arising from assault and battery during an incident that occurred between the parties just before separation.

The parties lived together for 28 years with only the last three years as a married couple. They had one daughter together who was an adult at the time of separation.

The details of the family violence were found at paragraph 14 of the decision:

> The claimant testified the relationship was marked by constant violence including, mental and physical abuse, emotional manipulation and financial control perpetrated against her by the respondent. She struggled to testify about her experiences, saying it was difficult for her to speak about the abuse. She also admitted to having difficulty recalling details of events because she tried to put many things out of her mind. She also admitted she had substance abuse problems for many years, which she attributed to the abuse she suffered.
>
> She described the respondent's frequent and typical behaviour towards her throughout their cohabitation as follows: kicking and pushing her; throwing her down; sitting on her chest to the point that breathing was difficult; choking her; calling her stupid and "ugly as sin"; telling her no one liked her; and demeaning and belittling her. When he got mad because she was not doing what he said, he would spit at her, getting saliva in her face and hair. She also said that the respondent told her she would get "what's coming to her" and that "he always threatened that he was going to kill [her]". She said she was traumatized, "living in fear all the time" and scared of everything.
>
> She said the respondent injured her by giving her bruises, a broken nose, and a broken thumb. She would not go to the hospital for treatment because she was trying to just "move on". She was embarrassed and "wanted everything to be OK". She testified that during the last violent incident before the date of

> separation, the respondent injured her back. She stated that injury was improving, but she was not yet 100% recovered.
>
> …
>
> The respondent would sometimes withhold money from her. He would abruptly leave without notice and be gone for as long as two weeks, leaving her no money, and she would run very low on food.
>
> She explained that she married the respondent, in September 2013, because she wanted and hoped things would get better and, she admitted, she did love him. However, things got worse after the marriage. He began threatening that he would call the police to take her away by saying that she had tried to kill herself. She did not perceive this as an attempt to get help for her, but as a threat. She testified this happened "constantly". She was afraid she would be locked up, and afraid the authorities would not believe her. She testified she was "afraid of [her] own shadow" at that point.
>
> She testified that as a result of the respondent's abusive behaviours, she was paralyzed with fear, often not leaving her home for long periods of time. She described herself as "broken" and often used the word "traumatized" to describe her state of mind during the relationship. She turned to alcohol and drugs as coping mechanisms, but said she had not used drugs for the past five or six years, and has not been drinking for the two months leading up to trial.
>
> Their daughter witnessed the abuse. According to the claimant, when their daughter was seven years old, the respondent kicked the girl in the stomach. The claimant knew it was wrong not to report that assault to the police, but the claimant stated she was always fearful of the respondent.

The wife claimed between $50,000 and $70,000 in damages.

Justice Sharma held that:

> Despite my findings that the **claimant suffered years of sustained physical, mental, emotional and financial violence from the respondent**, the claim for damages as pleaded relates only to the violent incident that triggered the parties' separation. In relation to that, however, I am satisfied that she injured her back, and it has not completely healed, more than three years after the assault. I also note that since that incident, the claimant has not worked and has been **diagnosed with PTSD, anxiety and depression**." (emphasis added) (para. 181)

The Court awarded the wife $20,000 in general damages.

It appears that the vast majority of the abuse during the nearly 30 years of the parties' relationship was not compensated for by the court.

Schuetze v. Pyper (2021 BCSC)

In *Schuetze v. Pyper* (2021 BCSC 2209), the husband and wife both claimed damages from one another based on the intentional tort of battery.

The wife's claims for damages included non-pecuniary damages, damages for past and future loss of earning capacity, the cost of future care and special damages, as well as aggravated and punitive damages based on the history of violence and the nature of a particular violent incident.

The wife claimed an award of non-pecuniary damages in the range of $155,000 to $185,000.

Justice Fleming held that:

> The amount of the award is not determined by the nature or seriousness of the plaintiff's injuries alone. **Additional factors include the plaintiff's age; the severity and duration of the pain; disability; emotional suffering; impairment of family, marital and social relationships; impairment of physical and mental abilities; loss of lifestyle; and the plaintiff's stoicism** .... An appreciation of the plaintiff's loss is the key (emphasis added) (para. 398)

The wife was awarded a total amount of $795,029, comprising of the following damages:

- $100,000 in non-pecuniary damages;
- $11,250 for psychology/trauma counselling;
- $8,450 for a kinesiology/rehab assistant;
- $249 plus GST for the cost of a self-defence course;
- $300 for an annual pass for restorative yoga sessions;
- $1,210 for physiotherapy/active vestibular therapy;
- $800 for occupational therapy;
- $239,485 for past loss of income;
- $425,000 for loss of future earning capacity; and
- $8,273.23 in special damages.

The Court did not award the wife punitive damages, reasoning that the very significant damages already awarded to the wife would serve to punish the husband and deter other wrongdoers.

ES v. Shillington (2021 ABQB)

In *ES v. Shillington* (2021 ABQB 739), the plaintiff and defendant were not married but lived together for approximately 11 years. They had two children together.

The court found that the relationship was marred by the defendant committing multiple acts of physical and sexual assault against the plaintiff. The parties separated when the plaintiff left the defendant and went to live in a shelter for women at risk.

The specifics of the abuse were highlighted at paragraphs 10 to 14 of the decision:

> The Plaintiff testified that prior to this relationship she was a happy person, and was loving and appreciated her sexuality. As part of her relationship with the Defendant she shared with him photographs of her in which she was in various states of undress and engaging in sexual activity. These were shared with her partner as a private gift to him. One of the reasons she provided him these images was due to their separation caused by his military deployment. It was understood between them that he would not distribute these images in any way.
>
> While he was deployed, near the end of their relationship, the Defendant confessed to the Plaintiff that he had posted her images online. Through accessing the Defendant's social media accounts the Plaintiff was able to track some of these postings and was disturbed to find many of those private, explicit images available on the internet at pornography sites. At no time did the Defendant have the Plaintiff's consent to publish these images. The Defendant admitted that he had posted photos as early as 2006, and the Plaintiff has located images posted as late as 2018. As recently as early 2021 the Plaintiff was able to find some of these images online.
>
> The availability of these photos, including the fact that the Plaintiff is identifiable in some images, resulted in the Plaintiff being recognized in them by a neighbour that spoke to her sexually, having seen her likeness on a website. She has experienced significant mental distress and embarrassment as a result of the postings. She suffers nervous shock, psychological and emotional suffering, depression, anxiety, sleep disturbances, embarrassment, humiliation, and other impacts to her wellbeing.
>
> The relationship was also marred by abuse. The final instances occurred on November 11, 2016, when the Defendant violently sexually assaulted the Plaintiff in a public Legion in front of bystanders. He grabbed her by the throat and pressed her up against a wall and then ripped open her shirt and roughly handled her breasts. While trying to leave the Legion and simultaneously convince the Defendant to not go to his parents' home (where their children

> were) the Defendant punched the Plaintiff in the stomach while in the parking lot. Following this, in the vehicle on the drive home, with other people present in the car, the Defendant pulled down the Plaintiff's pants and attempted to insert his fingers in her vagina. He then exposed his penis and tried to push the Plaintiff's head into his lap. Upon arriving home, the Defendant forced the Plaintiff to remove her clothes and then attempted to force intercourse, but she was able to escape from him.
>
> Following this series of events, the Plaintiff suffered bruising and soreness to the abdomen, nervous shock, psychological and emotional suffering, sleep disturbances, post traumatic stress disorder, public embarrassment, and humiliation.

The plaintiff claimed damages for the torts of public disclosure of private facts, breach of confidence, assault, sexual assault, battery, and intentional infliction of mental distress.

The Court found that the evidence provided showed that the plaintiff had suffered physical, mental, and emotional harm and that the consequences suffered by the plaintiff are ongoing.

Justice Inglis awarded the plaintiff the sum of $80,000 in general damages. She held that, "the pain and suffering she has experienced are significant."

The plaintiff was also awarded the sum of $50,000 in punitive damages and $25,000 for aggravated damages.

The plaintiff claimed non-pecuniary damages of $175,000; aggravated damages of $50,000; and punitive damages of $50,000.

The Court awarded the plaintiff all of the damages claimed. Justice Inglis held that, "The criminal aspects of the attacks against the plaintiff in the supposed safety of her partnership warrant significant recognition by this court."

The plaintiff claimed special damages for medical costs, childcare expenses, necessities of life expenses, and schooling costs. The Court held that, "the direct causation link to the torts was not fully developed, particularly related to the delays in her schooling and potential future loss of income." The Court awarded the plaintiff only a portion of the special damages in the sum of $30,000.

Smith v. Smith (2021 ONSC)

In *Smith v. Smith* (2021 ONSC 6315), the wife claimed damages in the sum of $50,000 for two assaults by the husband.

The parties were married for 19 years (1999 to 2018) and did not have any children.

The wife claimed abuse during the marriage, with the first assault taking place in 2003 when husband choked her and pushed her up against the fridge in the kitchen. The second claim was in 2016, when the husband elbowed her in the back so hard she fell out of bed. The wife also claimed the husband threw a land line phone at her in 2018, but it missed.

In terms of evidence, the Court found that the wife did not provide any medical records in respect of any injuries arising from the assaults nor did she particularize the nature of her injuries.

Justice Fitzpatrick found that on the balance of probabilities, the assault in 2003 did occur and the assault in 2018 did not occur.

The court reasoned at paragraph 96 of the decision as follows:

> I make these findings on the basis of the nature of the alleged assaults. I believe Fay when she says she was choked in 2003. Being choked is hard to forget.
>
> Being elbowed in bed is also not easy to forget, but it can be explained as an accidental hitting or an unfortunate result of another person's sleep pattern. On the evidence I do not believe the interaction between Paul and Fay rises to the level that would allow me to find a civil assault occurred in 2018.
>
> I find Fay has not proven any significant damages arising from either incident. I appreciate she testified she has been traumatized by the events leading to her separation and thereafter. However, there was not sufficient evidence led for me to make the necessary causal connection between the 2003 incident and the trauma Fay testified she experienced and is experiencing on an ongoing basis.

Justice Fitzpatrick ultimately held that:

> **Fay has not proven any significant damages arising from either incident**. I appreciate she testified she has been traumatized by the events leading to her separation and thereafter. However, there was **not sufficient evidence led for me to make the necessary causal connection between the 2003 incident and the trauma Fay testified she experienced and is experiencing on an ongoing basis**. (emphasis added)

The Court awarded the wife nominal damages for the 2003 assault in the sum of $500.

Conclusion

In the context of family violence claims, there are several torts under which one could potentially claim damages. In the most recent cases as canvassed above, damages resulting from family violence were successfully claimed under the following torts:

- invasion of privacy;
- public disclosure of private facts;
- breach of confidence;
- assault;
- sexual assault;
- battery; and
- intentional infliction of mental distress.

The awards of general damages ranged between $20,000 and $100,000. The awards of aggravated damages ranged between $25,000 and $75,000. The awards of punitive damages ranged between $5,000 and $150,000. In some cases, where applicable, compensatory, special and non-pecuniary damages were also claimed and awarded to claimants.

The reasoning for the awards of damages focused on the credibility of the claimant as well as the evidence presented. Where the judge found the claimant's version of events credible and sufficient expert evidence was presented, the court generally found in the claimant's favour.

Overall, the above cases show how difficult it is for claimants of family violence of various kinds to achieve meaningful results. It takes mental stamina, financial resources and an ability to re-live the trauma for many months or even years after the abuse has stopped.

It is no wonder that only a few claimants decide to embark on these perilous legal paths to begin with.