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— Franks & Zalev - This Week in Family Law

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### The Birth and Death of a Tort

*Ahluwalia v. Ahluwalia*, 2023 CarswellOnt 10325 (Ont. C.A.) — Benotto, Trotter, and Zarnett JJ.A.

We all knew this day would come — the release of *Ahluwalia* from the Ontario Court of Appeal.

In *Ahluwalia*, the Court of Appeal had to decide whether to permit a new tort of family violence to address patterns of coercive and/or controlling behaviour in the domestic context and, if so, what its requirements should be.

At the risk of ruining the surprise (or, perhaps in an effort to engage in "point first writing"), the Court of Appeal ultimately concluded that while "intimate partner violence is the cancer of domestic relationships", it was *not* necessary to establish a new tort, because the "existing torts are flexible enough to address the fact that abuse has many forms", including "[r]ecurring and ongoing abuse, intimidation, domination and financial abuse[.]"

Some readers may be disheartened that the Court of Appeal decided not to recognize a new tort to specifically address family violence. However, Justice Benotto's decision is *far* more nuanced than that and deserves a very careful read because, while disallowing the nascent tort, it contains significant *dicta* that should make it far easier for victims of intimate partner violence to seek redress based on torts that already exist, particularly the torts of assault, battery and intentional infliction of mental distress.

### The Decision Below ((2022), 68 R.F.L. (8th) 255 (Ont. S.C.J.))

We discussed the underlying facts at length in our comment on the trial judge's decision in the 2022-10 (March 21, 2022) edition of *TWFL*. However, in brief, the mother, who was self-represented at trial, made a number of claims against the father, including a claim for "general, exemplary and punitive damages for the physical and mental abuse suffered by the [mother] at the hands of the [father]."

After an 11-day trial, the trial judge found as fact that the father had physically, verbally, and psychologically abused the mother throughout the marriage, and that his behaviour caused the mother to suffer depression and anxiety.

The trial judge found the mother had established that the father was liable for having assaulted the mother at least three times from 2000 to 2013, and for the tort intentional infliction of emotional distress "as his pattern of coercive and controlling behaviour was 'flagrant and outrageous,' calculated to produce harm, and resulted in the Mother's depression and anxiety[.]"

Despite these findings, however, the trial judge then went on to create a new tort — the tort of family violence — because while the existing torts focused on *individual incidents* of abuse, they did not adequately cover situations where, as in this case, the tortfeasor had engaged in a *pattern* of abuse:

[54] While the tort of family violence will overlap with **existing torts, there are unique elements that justify recognition of a unique cause of action. I agree with the Mother that the existing torts do not fully capture the cumulative harm associated with the *pattern* of coercion and control that lays at the heart of family violence cases and which creates the conditions of fear and helplessness.** These patterns can be cyclical and subtle, and often go beyond assault and battery to include complicated and prolonged psychological and financial abuse. **These uniquely harmful aspects of family violence are not adequately captured in the existing torts. In general, the existing torts are focused on specific, harmful *incidents*, while the proposed tort of family violence is focused on long-term, harmful patterns of conduct that are designed to control or terrorize.** For example, 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.**

. . . . .

[59] First and foremost, I am concerned that casting the nature of the tortious conduct too narrowly risks distorting the fact-finding process in terms of properly assessing liability, damages, and credibility. In terms of liability and damages, **a narrow focus on the intentional torts of battery or assault committed on specific days or at specific times will obscure the lived reality of family violence.** In family relationships, the conditions of terror, fear, coercion, and control are often created through years of psychological abuse punctuated with relatively few acts of serious physical violence. In practice, a perpetrator need only administer one hard beating at the beginning of a marriage to create an imminent threat of daily violence. **Focusing too narrowly on specific incidents risks minimizing the tortious conduct, which is the overall pattern of violent and coercive behavior combined with a breach of trust. It follows then that a surgical focus on the mechanical elements of the physical assaults, for example, will not be adequate to understand and appreciate the true nature of the harmful conduct.** [*emphasis* in original; **emphasis added**]

[Remember these paragraphs. In fact, read them again, because they will be particularly important when we get to the reasons why the Court of Appeal overturned the trial judge on this issue.]

To address patterns of abuse akin to patterns of coercive control, the trial judge determined that the tort of family violence will be established where the claimant proves the following on a balance of probabilities:

[52] . . . Conduct by a family member towards the plaintiff, within the context of a family relationship, that:

1. is violent or threatening, *or*
2. constitutes a pattern of coercive and controlling behaviour, *or*
3. causes the plaintiff to fear for their own safety or that of another person [*emphasis* in original]

Notably, however, unlike most torts, the tort of family violence did **not** require a claimant to prove actual damages or harm.

After setting out this test, the trial judge found the father liable for the new tort of family violence (in addition to the existing torts of assault and intentional infliction of emotional distress), and ordered him to pay the mother \$150,000 in damages: (a) \$50,000 in compensatory damages for her ongoing mental health disabilities (depression and anxiety), and her loss of earning potential; (b) \$50,000 in aggravated damages as a result of the "overall pattern of coercion and control and the clear breach of trust"; and (c) \$50,000 in punitive damages to strongly condemn the father's conduct.

To address potential "floodgates" arguments, the trial judge tried to make it clear that "bald assertions" or claims of "an unhappy or dysfunctional relationship" would not be sufficient to allow a claim of family violence to proceed to trial. Rather, claimants would need to "plead and prove on a balance of probabilities that a family member engaged in a pattern of conduct that included more than one incident of physical abuse, forcible confinement, sexual abuse, threats, harassment, stalking, failure to provide the necessities of life, psychological abuse, financial abuse, or killing or harming an animal or property."

However, despite these statements by the trial judge, at least anecdotally, after the decision below was released, there was a *significant* increase in the number of family law cases involving tort claims (both through initial claims and amendments to already existing claims). We also heard of cases where one party had used the threat to add or pursue tort claims as a way of trying to gain leverage in ongoing negotiations.

### The Appeal

The father appealed the trial judge's decision to the Ontario Court of Appeal. While the father did not challenge the trial judge's findings that he was liable to the wife in tort for assault and intentional infliction of emotional distress, he argued that the trial judge had erred in establishing the new tort, because "[i]t is poorly constructed, too easy to prove, would apply to a vast number of cases, and would create a floodgate of litigation that would fundamentally change family law." He also argued that the damages awarded by the trial judge were excessive, particularly since the mother had been awarded \$150,000 when she had only asked for a total of \$100,000.

The mother, on the other hand, argued for the creation of a new tort to deal with the harm caused by a pattern of family violence. However, somewhat surprisingly in our view, instead of pressing the Court to uphold the tort of family violence as established by the trial judge, the wife suggested that the Court of Appeal establish a narrower tort of "coercive control", which would apply "where a person (a) [i]n the context of an intimate relationship (b) inflicted a pattern of coercive and controlling behaviour (c) that, cumulatively, was reasonably calculated to induce compliance, create conditions of fear and helplessness, or otherwise cause harm."

The mother also argued that the trial judge's award of \$150,000 in damages was appropriate in the circumstances.

As a preliminary issue, the Court of Appeal, thankfully, *resoundingly* rejected the argument that the Supreme Court of Canada's decision in *Frame v. Smith* (1987), 9 R.F.L. (3d) 225 (S.C.C.) stands for the proposition that certain torts, including intentional infliction of mental distress, cannot apply in the family law context (or be claimed in a family law case):

[44] When La Forest J. spoke in *obiter* about not provoking lawsuits within the family, he was speaking of an issue for which there was a direct statutory remedy. More importantly, in the 36 years since *Frame* was decided, society, the legislature, and the courts have come to recognize the reality of intimate partner violence and the need to condemn it.

[45] As a final note, **some cases have relied on *Frame v. Smith* for the proposition that claims for intentional infliction of emotional distress are not permitted within the family law context at all: see *Lo v. Lo* (2009), 70 R.F.L. (6th) 309, at paras. 15-18 (Ont. S.C.); *Murray v. Toth*, 2012 ONSC 5815, at paras. 40-41. I would not endorse this broad statement. **While *Frame* does rule out the availability of the tort on the facts of that case — i.e., where one party is wilfully denying another parenting time following a marriage breakdown — it does not bar relief for intentional infliction of emotional distress during a marriage.** [emphasis added]**

The Court of Appeal readily agreed with the trial judge that intimate partner violence is a *pervasive* problem in Canada, and that society must take steps to address it. However, it disagreed with the trial judge's conclusion that it was necessary to create a new tort specific to family violence for a number of reasons, including:

- The trial judge did not cite any caselaw to support her statements at paragraphs 54 and 59 of her reasons (which are set out in full above), that "a pattern of tortious conduct is not captured by the existing torts of battery, assault, and intentional infliction of emotional distress", and that these "existing torts are too narrowly focused to capture these dynamics in a relationship."
- There are, in fact, numerous cases, including the many examples that the Court of Appeal referred to in paragraphs 73-90 of its decision, where courts have "considered the patterns of behaviour that constitute intimate partner violence without limiting their focus to individual incidents."

The Court of Appeal also took issue with aspects of a tort of family violence that were recognized by the trial judge, and the tort of coercive control that the mother argued should be recognized instead.

The Court of Appeal disagreed with the trial judge's reliance on the statutory definition of "family violence" that was added to the *Divorce Act* in 2021 to justify creating a new tort. These new provisions of the *Divorce Act* applied only to parenting Orders, and had the legislature intended to create a new remedy for family violence, it would have done so when it added the definition of family violence to the statute. Having not done so, "the legislature must be taken to have intentionally introduced this concept only in the context of parenting" — or, in the vernacular, "if we mean it we say it."

As for the proposed tort of coercive control, the Court of Appeal concluded that this proposed tort was largely the same as the tort of intentional infliction of emotional distress, which requires the plaintiff to establish that the defendant's conduct (1) was flagrant and outrageous; (2) was calculated to harm the plaintiff; and (3) caused the plaintiff to suffer a visible and provable illness: *Merrifield v. Canada (Attorney General)*, 2019 CarswellOnt 3716 (Ont. C.A.) at para. 54. However, there was one very significant difference: instead of requiring the claimant to establish *actual* harm, the proposed tort of coercive control would only require the plaintiff to show that the tortfeasor engaged in conduct that was *calculated* to cause harm.

The Court of Appeal gave three reasons why it disagreed with the mother's argument that proof of actual harm should be eliminated. **First**, as the mother had already established proof of actual harm, the Court was of the view that "it would be inappropriate to make a significant change to the law based on a hypothetical." (We could have done without this first reason. This would not be making law based on a hypothetical. As actual harm had been established, considering actions "calculated to cause harm" would not be a hypothetical. It is, to borrow from our criminal friends, a lesser but included offence.)

**Second**, the threshold for proving harm when dealing with claims of intentional infliction of mental distress was no longer as onerous as it once was. While the "visible and provable injury" requirement historically required proof of a recognized psychiatric injury, in more recent cases, including *Saadati v. Moorhead*, 2017 CarswellBC 1446 (S.C.C.), courts have started to move away from "the historical practice of requiring 'claimants alleging mental injury to show that such injury has manifested itself to an expert in psychiatry in the form of a clinically diagnosed, recognizable psychiatric illness'", and have started applying a lower threshold whereby a "compensable psychiatric injury 'must be serious and prolonged and rise above the ordinary annoyances, anxieties and fears that people living in society routinely, if sometimes reluctantly, accept'." No one is going to seriously suggest that patterns of coercive, controlling violence lead only to feeling of anger and frustration, or mere "psychological upset" instead of psychological injury: *Bothwell v. London Health Sciences Centre*, 2023 CarswellOnt 6771 (Ont. C.A.).

**Finally**, the Court of Appeal was concerned about the impact that creating a new tort that did not require proof of harm could have on what is supposed to be a no-fault family law system, and concluded that that this was a decision that was best left up to the legislature. As the Court explained:

[119] The [mother] would have this court eliminate the requirement to offer proof of injury. **This would result in a significant change in the jurisprudence with unknown, potentially far-reaching and unintended effects — particularly for families involved in litigation.** I will explain.

[120] Family law affects not just the parties, but their children, their extended families and society at large. And for every claim that has merit, there are some which involve claims made for strategic reasons. That is why, **for decades, progressive elements in family law sought to move away from the fault allegations that were shown to cause permanent and ongoing damage to the family. It took time, but the move away from an adversarial approach towards a resolution-based approach has been adopted.** Law schools offer courses in negotiation for family law. Collaborative law associations have been established. The *Family Law Rules*, O. Reg. 114/99, require three conferences with a judge prior to proceeding to trial. This has significantly reduced the number of cases that actually proceed to trial. **The aim is to reduce conflict so as to assist families to better function cooperatively after separation.**

[121] **These changes were necessary because the classic adversarial model of dispute resolution was not achieving this goal.** The devastating exchange of incriminating affidavits remained accessible to the children. And every allegation required a response, resulting in the classic "affidavit war". **The evolution towards case management, early resolution, alternate forms of dispute resolution, negotiation strategies, cooperative lawyering has been gradual but beneficial.**

[122] **I do not for a moment suggest that it is appropriate to shift cases involving intimate partner violence from the court system.** Nor do I diminish the importance of properly addressing it in the context of family law litigation through tort claims. **Where abuse, physical or otherwise, leads to psychological injury, compensation is in order, and any approach suggesting otherwise must be rejected. I simply caution that to lower the level of impugned conduct may unintentionally encourage allegations of fault in every case, thereby undermining the movement towards a resolution-based system.** [emphasis added]

As a result, the Court of Appeal declined to recognize either the tort of family violence or the tort of coercive control as part of the law of Ontario. With respect to damages, while the Court of Appeal saw no basis to interfere with the trial judge's award of \$50,000 for general damages and \$50,000 for aggravated damages, it set aside her decision to award \$50,000 in punitive damages because the mother only asked for a total of \$100,000 in damages. Also, the trial judge "did not address, and made no finding that the award of general and aggravated damages was insufficient to achieve the goals of denunciation and deterrence" as required by the Supreme Court of Canada's seminal decision on punitive damages, *Whiten v. Pilot Insurance Co.*, 2002 CarswellOnt 537 (S.C.C.).

Finally, the Court of Appeal discussed how torts should be dealt with in the family law context. In *Ahluwalia*, the trial judge dealt with the tort claims *before* she decided the child support, spousal support, and property issues. This, according to the Court of Appeal, was an error, because trial judges should always start by applying the applicable statutory scheme, and only consider other claims, including tort claims, after that has been done:

[136] **The starting point for a determination of financial issues arising from the marriage is the application of the statutory provisions** which, in this case are the *Divorce Act* and the *Family Law Act*, R.S.O. 1990, c. F.3. **Only after those determinations are made should the court consider other claims.**

[137] **When claims other than those arising directly from the statute are raised in a family law proceeding, the statutory entitlements may inform those determinations.** This issue arises in other situations, for example, when a party makes a claim for unjust enrichment. This court has held that the provisions of the *Family Law Act* entitlements should be established first: *McNamee v. McNamee*, 2011 ONCA 533, 106 O.R. (3d) 501. It may be that the operation of the equalization provisions would resolve the claim: *Martin v. Sansome*, 2014 ONCA 14, 118 O.R. (3d) 522, at para 61.

.....

[140] I recognize that a tort claim differs from a claim in equity. A claim in equity may go to asset ownership. But **the principle of first determining statutory entitlements, including equalization and corollary relief under the *Divorce Act*, is sound.** Child support is a right of the child and cannot be set aside for later. A compensatory support award under the *Divorce Act* may impact the quantum of damages. If the abuse allegation involves financial abuse, there may be an order for unequal division of net family property.

[141] In my view, **the court should complete the statutory claims before assessing liability and damages for tort claims.** [emphasis added]

Unfortunately, however, the Court of Appeal did not address how tort claims fit into Ontario's equalization regime. To help illustrate the potential problem, consider the following example:

- On the date of marriage, neither party had any assets or debts;
- On the date of separation, the husband had a net worth of \$200,000, and the wife had a net worth of \$100,000; and

- During the marriage, the husband engaged in tortious conduct against the wife that caused her damages totalling \$100,000.

Before considering the tort claim, the husband would owe the wife an equalization payment of \$50,000 based on 50% of the difference between their respective net worths on the date of separation, and leave both parties with a net worth of \$150,000 (i.e. the husband would have his \$200,000 minus the \$50,000 equalization payment he owed the wife, while the wife would have her \$100,000 plus the \$50,000 equalization payment the husband owed her).

But since the husband's tortious conduct occurred *during the marriage*, we cannot ignore the fact that on the date of separation, the husband also had a potential liability to the wife for an additional \$100,000 which, if proven, would mean that: (a) the husband's net worth on the date of separation was actually only \$100,000, while the wife's net worth was actually \$200,000; (b) the wife would owe the husband an equalization payment of \$50,000 (instead of the other way around); and (c) both parties would still be left with a total net worth of \$150,000 — a zero sum game.

If this analysis is correct, the equalization regime would, in most cases, wipe out the potential financial benefits of a making a tort claim in cases involving married spouses in Ontario.

This can't be right, can it?

We initially struggled to find a solution to this problem, but eventually realized that the *Family Law Act* provides a fairly simple and straightforward solution. Pursuant to s. 4(2) of the *Family Law Act*, "[d]amages or a right to damages for personal injuries, nervous shock, mental distress or loss of guidance, care and companionship, or the part of a settlement that represents those damages" are to be excluded when calculating an equalization payment.

Accordingly, the value of the wife's claim in this scenario would not be included in her net worth on the date of separation, or deducted from the husband's net worth, and the end result would be that: (a) the husband would owe the wife a total of \$150,000 (\$50,000 for the equalization payment and \$100,000 in damages); (b) the husband would be left with a net worth of \$50,000 (i.e. his initial \$200,000 minus the \$50,000 equalization payment and the \$100,000 in damages he owed the wife); and (c) the wife would be left with a net worth of \$250,000 (i.e. her initial \$100,000 plus the \$50,000 equalization and the \$100,000 in damages the husband owed her). This makes much more sense. However the problem would persist for damages awards that were not for some sort of personal injury.

### What Happens Next

We suspect the Court of Appeal's decision may not represent the final word about these important issues. The decision was only released on July 7, 2023, and it would not surprise us if the mother or one of the interveners decides to seek leave to appeal. In the meantime, if you have made a claim for the tort of family violence, you need to give *Ahluwalia* a very careful read and decide whether and how to reframe the claim using one of the other torts that are discussed in the decision, and consider how you can go about trying to prove actual damages or harm.