FAMLNWS 2024-25
Family Law Newsletters
July 01, 2024

— Franks & Zalev - This Week in Family Law

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What Does "All Claims Are Dismissed" Mean to You?

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The trial decision in *Ahluwalia v. Ahluwalia* (2022), 68 R.F.L. (8th) 255 (Ont. S.C.J.) that created the new tort of family violence was first released in February 2022. The decision led to a significant uptick in the number of family law cases involving claims for relief in tort.

While the increase seemed to subside when the Ontario Court of Appeal overturned the trial judge's decision and concluded that the tort of family violence does not exist, now that the Supreme Court of Canada has agreed to hear *Ahluwalia*, we will not have any certainty about this important area of law until the court releases its decision. And, given that leave was only recently granted and that the appellant does not have to perfect her appeal until the fall of 2024, we almost certainly will not have a decision from the Supreme Court until mid 2025 at the earliest.

Given the current uncertainty in the law, and the fact that many Canadian jurisdictions have chosen to eliminate limitation periods for tort claims based on sexual assault or domestic violence, it is now more important than ever to ***expressly*** and ***definitively*** deal with potential tort claims when resolving family law cases. Otherwise, as unfortunately illustrated by *McCann v. Barens*, your client could find themselves in a situation where they *thought* that their family law case was fully and finally resolved, only to learn that they were wrong — and are now staring down the barrel of new (although old) claims, significant (further) legal fees, and potentially damage awards (for claims they thought had been released). And — should that happen — guess who gets sued? That's right . . . **you**.

The husband and wife in *McCann* married in 2013 and separated in 2018. They did not have any children. Litigation ensued after they separated, but it primarily dealt with spousal support and property division. During the proceeding the wife expressly alleged that the husband had committed "family violence" against her, had been "sexually, emotionally, and financially abusive" to her, and had "exploited her vulnerabilities throughout their marriage". However, she never made a tort claim against the husband based on those allegations.

In 2019, the husband, wife, and their respective lawyers attended mediation, and signed Minutes of Settlement that resolved *all of the issues* in the family law case. The Minutes provided, among other things, that all claims for spousal support were waived and that the wife would receive 60% of the sale proceeds from the parties' home while the husband would only receive 40%. It is not clear from the decision why the wife received more than half of the net proceeds of sale, or whether the Minutes expressly included releases. But there is no question that the consent Order they subsequently took out (incorporating the terms of the

Minutes) specifically provided that "[a]ny other claims by either party arising from their marriage or their cohabitation will be and are hereby dismissed as if there had been a trial on the merits."

Allow us to repeat that for dramatic effect: "**[a]ny other claims** by either party **arising from their marriage or their cohabitation** will be and **are hereby dismissed as if there had been a trial on the merits**." That statement does not leave much room for misunderstanding. Clearly the parties' intention must have been to resolve all claims between them on a full and final basis — not all claims ***except*** for claims in tort, or ***except*** for any other claims, for that matter.

In August 2022, which was approximately six months after the trial decision in *Ahluwalia* was released, the wife commenced a new claim against the husband for damages in tort, including the tort of family violence. She alleged that the husband had engaged in "a pattern of violent, coercive, and controlling behaviour" against her during their relationship, including a "long-term pattern of physical, emotional, psychological, and financial abuse". However, after the Ontario Court of Appeal overturned the trial judge's decision in *Ahluwalia*, the wife amended her claim and replaced the references to "family violence" in her pleading to "physical violence."

The husband responded to the wife's tort claim by bringing a motion to have it dismissed for a number of reasons, including that it was *res judicata* — as the wife's claims either had been raised or *could have been raised* in the prior proceeding (the husband also argued that the claim was an abuse of process and/or a breach of the release in the consent Order, but those issues were largely subsumed in the question of whether the new claim was *res judicata*).

As we recently discussed in the March 18, 2024 (2024-11) edition of *TWFL*, there are two types of *res judicata*: issue estoppel and cause of action estoppel. Issue estoppel deals with claims that were actually determined by the court, and requires the moving party to establish that:

1. The same question has already been decided;

2. The prior judicial decision was final; and,

3. The parties to the prior judicial decision or their privies were the same.

[See *Danyluk v. Ainsworth Technologies Inc.*, 2001 CarswellOnt 2434 (S.C.C.) at para. 25 and *Catalyst Capital Group Inc. v. VimpelCom Ltd.*, 2019 CarswellOnt 6611 (C.A.), leave to appeal refused, 2019 CarswellOnt 18743 (S.C.C.)]

As the wife in *McCann* had not made a tort claim against the husband in the prior proceeding, the first part of the test for issue estoppel — that the same question had already been decided — could not be met.

However, in contrast to issue estoppel, cause of action estoppel deals not just with claims that were actually decided, but also claims that ***could have been determined with the exercise of reasonable diligence***. It requires the moving party to establish that:

1. There has been a final decision of a court of competent jurisdiction in a prior proceeding;

2. The parties to the prior proceeding or their privies were the same;

3. The cause of action in the prior proceeding must not have been "separate and distinct"; and

4. The basis of the cause of action raised in the current proceeding was argued or could have been argued in the prior proceeding with the exercise of reasonable diligence.

[See *Re Cliffs Over Maple Bay Investments Ltd.*,, 2011 CarswellBC 883 (C.A.) at para. 13; *Catalyst Capital Group Inc. v. VimpelCom Ltd.*, 2019 CarswellOnt 6611 (C.A.), leave to appeal refused, 2019 CarswellOnt 18743 (S.C.C.); *Winter v. Sherman Estate*, 2018 CarswellOnt 14073 (C.A.); *Williams v. Kameka*, 2009 CarswellNS 553 (C.A.); *Hill v. Hill*, 2016 CarswellAlta 229 (C.A.); *Berthin v. Berthin*, 2018 CarswellBC 1085 (C.A.).]

In support of judicial economy and to prevent "litigation by instalment" a party must bring forward all of their claims at once: *Doering v. Grandview (Town)*, 1975 CarswellMan 64 (S.C.C.); *Maynard v. Maynard*, 1950 CarswellOnt 128 (S.C.C.). Perhaps even more so than other areas of the law, it is important in family litigation that all claims be tried at once: *Wong v. Wong*, 2006 CarswellOnt 8823 (S.C.J.); *Huismans v. Black* (2000), 10 R.F.L. (5th) 311 (Ont. S.C.J.); *Cunningham v. Cunningham* (2013), 35 R.F.L. (7th) 63 (Ont. S.C.J.); *1285310 Ontario Ltd. v. Sheick-Ali*, 2014 CarswellOnt 9418 (S.C.J.); *Telatin v. Shoumali* (2021), 61 R.F.L. (8th) 490 (Ont. S.C.J.).

The motion judge started her analysis by confirming that a consent order can, in certain circumstances, form the basis for finding that a claim is *res judicata*. As Justice Lander explained in *Spender (Guardian ad litem of) v. Spender*, 1999 CarswellBC 881 (S.C.) at paras. 18-22, which is one of the leading cases about this issue, to determine whether a consent order can form the basis for cause of action estoppel "the court must examine the consent order and any agreement, correspondence, or releases leading to its entry, in order to ascertain objectively whether the consent order was intended to finally dispose of all issues in the cause of action."

To this we would add — again — that, for very good reason, family law litigants should, as a general rule, be required to put forward ***all*** claims at once, and should not be permitted to litigate by instalment. As Justice Granger aptly put it almost 20 years ago in *Wong v. Wong*, 2006 CarswellOnt 8823 (S.C.J.):

> It seems to me that **it would be contrary to societal interests and contrary to public policy to allow one spouse to claim damages against the other for conduct suffered during their marital relationship following the final disposition of all claims which were or ought to have been presented to the court for resolution upon the breakdown of the marriage.** Other than for changed circumstance relating to custody of children and spousal and child support, when the parties come to a settlement or a court issues a final order, each party should be free to get on with his or her life, free from any further claims based on misconduct during the marriage. Claims for damages for abuse suffered during the marriage is a developing area in the law, and if such claims exist they should be adjudicated upon as part of a final determination of all claims between the parties. **A divorced or long-time separated spouse should not have to re-litigate a historical claim for damages for alleged misconduct during the marital relationship after that relationship has been terminated and all recognized claims at law finally resolved.** [emphasis added]

Given that the wife had raised allegations of abuse in the prior proceeding, had ample opportunity to make a tort claim before she settled with the husband, was represented by counsel, attended mediation and signed final Minutes of Settlement, and consented to an order that expressly dismissed ***"[a]ny other claims by either party arising from their marriage*** or their cohabitation . . . ***as if there had been a trial on the merits***," in our view this new claim was clearly *res judicata* by virtue of cause of action estoppel and should not have been allowed to proceed.

The motion judge, however, thought otherwise, and found that cause of action estoppel did not apply in this case because:

- The settlement documents did not mention an actual or potential tort claim.

- There was no evidence from the parties, their lawyers, the mediator, or otherwise to show that the parties intended the Minutes or the consent Order to bar future tort claims related to abuse.

- The wife had only raised allegations of abuse in the family law case in the context of a request for interim relief. Accordingly, they were not covered by the final Consent Order.

- Even though the alleged acts by the husband had occurred during the relationship, they could not be said to have "arisen from the parties' marriage or cohabitation".

What is missing from this analysis, however, is consideration of the fact that, as previously noted, unlike issue estoppel, cause of action estoppel covers not just claims that were made, but also cover claims that ***could have been made in the prior proceeding with the exercise of reasonable diligence***. There is nothing in the reasons to explain why, on the facts of this case, it was

reasonable or appropriate for the wife to *at least appear* to settle all issues in the family law case — and agree that any other claims arising out of the marriage or the parties' cohabitation would be dismissed as though they were heard on the merits — and then start a new claim against the husband almost three years later for relief that could undoubtedly have been claimed in the original proceeding. If that is not "lying in the weeds" we do not know what is.

Depending on what the Supreme Court of Canada decides in *Ahluwalia*, we may start seeing a significant number of cases where judges are tasked with deciding whether a family law settlement instrument is broad enough to preclude a spouse from subsequently pursuing a tort claim.

There is another reason the wife's claim in this case should have been barred by *res judicata* — another Latin term: *stare decisis*.

The situation in *McCann* is too similar to that of *Lee v. Lee* (2010), 91 R.F.L. (6th) 385 (Ont. S.C.J.), aff'd, (2011), 1 R.F.L. (7th) 68 (Ont. C.A.) to be ignored. In *Lee*, after settlement, the husband tried to sue the wife for assault. The husband's claim was dismissed by the motion judge on summary judgment because it was *res judicata*:

> [4] For the reasons that follow, I agree with [the wife's] argument. She may or may not have perpetrated the torts alleged, but [the husband] knew that he had been wronged, and **he knew all he needed to know to raise any tort claims against his then wife contemporaneously with the matrimonial litigation; he ought to have done so . . .** in my opinion, **[the husband] cannot hold back his tort claim from the matrimonial litigation against [the wife], settle the matrimonial claim, take the benefits of the settlement, and then, in effect, disturb the settlement and litigate with her all over again about a complaint he already knew about.** [**emphasis**added]

We could not have said it better ourselves. But the Court of Appeal tried:

> [1] We agree with the motion judge, for the reasons outlined by him at paragraph 4 of his reasons, that the [husband] was precluded from proceeding with this tort claim against his former wife.
>
> [2] **The final settlement of the matrimonial litigation between the parties, achieved at a time when the [husband] knew and relied on the material facts surrounding the [wife's] conduct now complained of, is a full answer to the [husband's] tort action against the [wife]. The [husband] knew, at the time of the matrimonial litigation, all the facts necessary to advance this tort claim against the [wife]. He failed to pursue this claim or to reserve his future right to do so when finally settling the matrimonial litigation. In these circumstances, no genuine issue requiring a trial exists.** [**emphasis** added.]

That is pretty clear.

In any case, no matter what the Supreme Court eventually decides, the take away from *McCann* is the same: when drafting settlement instruments in family law cases, you ***must*** ensure that the release and/or dismissal order expressly releases/dismisses ***all*** claims, including those that were made, and those ***that could have been made***, as though they were determined on the merits; and then, to be safe, perhaps add, "and we really, really mean *everything*!"

Kidding aside, if you want to be extra careful, you can include an express reference to "tort claims" (although there may be circumstances where you do not want to do so for strategic reasons). This is important to do no matter where in Canada you are, but it is particularly critical if you practice in a jurisdiction such as B.C. or Ontario where there are no limitation periods for tort claims based on sexual assault or domestic violence.

Badges? We Got all Kinds of Stinkin' Badges (of Fraud)

2270752 Ontario Inc. v. Century 21 New Star Realty Inc., 2024 CarswellOnt 8058 (C.A.) — Huscroft, Coroza and Monahan JJ.A.

Issues: Ontario — Fraudulent Conveyance

So you're married. And you have a matrimonial home. And you get yourself into a little trouble with creditors. And you decide the best way to protect your home is to transfer it to your wife for $2.00.

This is what happens . . .

While not a family law case, this was an appeal from the judgment of the trial judge awarding the respondent $600,000 in damages and setting aside the transfer of the appellants' matrimonial home as a fraudulent conveyance.

Below, the trial judge found that the Husband failed to return $600,000 he got from the respondent pursuant to a joint venture to build a gas station — a gas station that was never actually built. Knowing that he was likely to get sued, the Husband conveyed the matrimonial home to his Wife for $2.00 by way of an interim separation agreement. The trial judge determined the conveyance to be fraudulent.

The Wife argued that the trial judge erred in finding that she did not pay good consideration for the transfer and that the trial decision was fundamentally unfair, as she would lose the equity she had built up between the transfer and the judgment and also be liable on a mortgage required for the transfer.

The Husband argued that only $50,000 was owing to the respondent, and that the trial judge erred in finding that the Husband intended to fraudulently convey the matrimonial home or that his wife was aware of this intention.

That is, the Husband and Wife were challenging the factual findings of the trial judge — and we know how that generally turns out: *Housen v. Nikolaisen*, 2002 CarswellSask 178 (S.C.C.).

In the meantime, the trial judge found that evidence of a breach of trust by the Husband and a fraudulent conveyance of the matrimonial home to his Wife was "overwhelming". She also found the Husband's evidence to be "inconsistent and evasive," noting that it was, at times "completely unbelievable and tailored to the moment".

The trial judge had found multiple "badges of fraud" and that the Husband and Wife had failed to rebut the evidence of fraudulent intent.

In *DBDC Spadina Ltd. v. Walton*, 2014 CarswellOnt 6516 (S.C.J. [Commercial List]), the Court set out the circumstances that may give rise to a badge of fraud, at para. 67:

> The case law has identified the following circumstances as constituting "badges of fraud" for purposes of ascertaining the intention of a debtor: (i) the transferor has few remaining assets after the transfer; (ii) the transfer was made to a non-arm's length person; (iii) there were actual or potential liabilities facing the transferor, he was insolvent, or he was about to enter upon a risky undertaking; (iv) the consideration for the transaction was grossly inadequate; (v) the transferor remained in possession or occupation of the property for his own use after the transfer; (vi) the deed of transfer contained a self-serving and unusual provision; (vii) the transfer was effected with unusual haste; or, (viii) the transaction was made in the face of an outstanding judgment against the debtor.

See also *Iacobelli v. Iacobelli*, 2020 CarswellOnt 8126 (S.C.J.) and *Purcaru v. Seliverstova* (2015), 69 R.F.L. (7th) 388 (Ont. S.C.J.), aff'd, (2016), 80 R.F.L. (7th) 28 (Ont. C.A.).

The presence of one or more of these badges of fraud raises a presumption of fraudulent intent: *Conte Estate v. Alessandro*, 2002 CarswellOnt 4507 (S.C.J.) at para. 44. This then shifts the burden to the defendant (or here, the appellants) to explain the circumstantial evidence of fraudulent intent: *Purcaru v. Seliverstova* (2015), 69 R.F.L. (7th) 388 (S.C.J.), aff'd, (2016), 80 R.F.L. (7th) 28 (Ont. C.A.).

Notably, the Wife refused to produce her family law file, bank statements, and accounting records. And the interim separation agreement only dealt with the matrimonial home and debts, ignoring the issue of equalization in circumstances where the Wife would have otherwise owed the Husband a substantial equalization payment.

The Court of Appeal also emphasized an important point with respect to the Wife's claim that a finding of fraudulent conveyance was "unfair" such that she might stand to lose some of her equity in the home:

> As this court explained recently in *Bank of Montreal v. Iskenderov*, 2023 ONCA 528, 168 O.R. (3d) 1, at paras. 42-44, an order under the *Fraudulent Conveyances Act*, R.S.O. 1990, c. F.29 **does not have the effect of changing title**. Creditors simply regain the ability to execute against the property for payment of debts owed to them by the transferor of the property. In effect, "[t]he conveyance is set aside but only as against creditors or others." [emphasis added]

Appeal dismissed.

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