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Family Law Newsletters
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— Franks & Zalev - This Week in Family Law

Aaron Franks & Michael Zalev

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The Limitation Period Edition

The Supreme Court of Canada's long-awaited decision in *Ahluwalia v. Ahluwalia* was just released on Friday, May 15th. The majority of the Court (Wagner C.J. and Kasirer, Martin, O'Bonsawin, Moreau and Karakatsanis JJ., with Côté, Rowe and Jamal JJ. dissenting) allowed the appeal in part and held that it is appropriate to recognize a new tort of intimate partner violence. We will have plenty to say about it next week. But with the Court finally having weighed in on whether Canadian law will recognize a new tort in the family violence context, it felt like the right moment to turn to a related issue that family lawyers may soon have to confront more often than we are used to: limitation periods.

This week's cases approach that issue from very different angles. One asks whether a claim can be extinguished before it even exists. The other asks whether a claim that might appear to have been available earlier should nonetheless be allowed to proceed, particularly where family violence may have shaped what was realistically possible. Now that *Ahluwalia* is changing the tort landscape, those questions may stop being academic rather quickly. The doctrines are different. The facts are different. But the underlying concern is the same: when is the courthouse door actually closed.

Finality, Fairness, and Family Violence

***Malamas v. Wey*, 2026 CarswellOnt 2531 (C.A.) — Tulloch C.J.O., Roberts and George JJ.A.**

Malamas is what happens when doctrines such as *res judicata* and abuse of process (collectively, the "finality doctrines") are applied without first asking whether it was realistic to bring the claim earlier.

A motion judge dismissed a domestic violence survivor's civil action against her husband and his parents based on the expiry of the limitation period, as well as *res judicata* and abuse of process, and ordered her to pay $27,000 in costs. The Court of Appeal set the decision against the husband aside, holding that the reasons did not grapple with the admitted assaults, threats, or the financial deception running through the relationship, and remitted the matter for trial. The dismissal of the claims against the husband's parents, however, was upheld based on a 2017 consent order dismissing all claims against them.

The decision previews some of the issues we may face now that the Supreme Court has recognized the new tort of intimate partner violence in *Ahluwalia v. Ahluwalia*. Those issues include the effect of releases and dismissal orders; when, if ever, the limitation clock starts for a claim based on a newly recognized cause of action; and what must be pleaded to engage the exception under the *Limitations Act,* which eliminates limitation periods for claims based on, or in relation to, assault in an intimate relationship.

The Facts

The marriage lasted nine years. While the wife was pregnant, her then-fiancé told her that his parents would buy them a home. She understood this as a gift to both of them. In fact, the parents purchased it in their own name and never told her. The wife drained her savings on household expenses, believing the in-laws were covering the mortgage and taxes on what she understood to be the couple's home. Meanwhile, the husband physically assaulted her on multiple occasions — he admitted to multiple assaults on the wife and at least one on their daughter.

When the wife reported the assaults to police in 2016, the husband within weeks handed her a letter from his parents' lawyer: they owned the home, she had no right to be there, and she should leave. She alleged he threatened to burn the house down with her inside if she pursued a claim against the property.

After leaving, the wife became the children's sole provider while managing their mental health needs. In early 2017, she retained counsel and brought a family court application against the husband and his parents seeking interim possession of the home, child support, and a protection order. The application referenced the assaults and financial deception — but did not assert civil damages claims.

In August 2017, the application resolved by consent order: $50,000, interim child support, and supervised access restrictions against the husband, in exchange for vacating the home. The order dismissed "all claims" between her and the parents, but said nothing about claims against the husband.

Five years later, in 2022, the wife commenced a civil action against the husband and his parents for financial and emotional harm, including the loss of the family home. Pleadings of violence and abuse infused the statement of claim, alleging that these wrongs combined with the financial deception to intensify her emotional distress. The husband and his parents moved for summary judgment, arguing the action was statute-barred, *res judicata*, and an abuse of process. The motion judge accepted those arguments, dismissed the action in its entirety, and characterized the pressures the wife faced after the relationship broke down as "not uncommon" — without engaging with the admitted violence or its consequences.

Subsection 16(1)(h.2): The Limitations Issue

The Ontario Court of Appeal emphasized that courts must be "particularly attentive" to evidence of intimate partner violence where relevant. On this record, that meant asking whether the violence formed a broader pattern that affected the wife's decision-making, whether the harms extended beyond physical injury to include fear, financial control, and trauma, and whether caregiving obligations and relationship dynamics shaped what she was realistically able to do. The motion judge did none of this. Whether the wife was "realistically able to advance civil claims at earlier stages" required engagement with her actual circumstances — not the dismissive observation that such pressures are "not uncommon" among separated mothers.

The wife's statement of claim did not clearly plead s. 16(1)(h.2) of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B, which eliminates limitation periods for claims "based on" or "in relation to" assault in an intimate relationship. As the Court of Appeal explained in its decision, the "based on" threshold requires only that the assault be an important component of the proceeding (*Choc v. Hudbay Minerals Inc.*, 2013 CarswellOnt 10514 (S.C.J.) at paras. 80 and 82), and the "in relation to" requirement captures claims with some connection to the assault — no direct or proximate link needed (*X.H. v. Cota*, 2022 CarswellOnt 4484 (C.A.) at para. 8; *Jane Doe v. Weinstein*, 2018 CarswellOnt 2350 (S.C.J.) at paras. 26-27). The Court emphasized that both are remedial and must be read generously.

The wife was self-represented and the husband had admitted the assaults. The court held that the motion judge was required to consider whether her claims "as pleaded or with amendment" could engage s. 16(1)(h.2). On this record, the admitted assaults were "capable of satisfying the 'based on' requirement", and had an "arguable temporal and contextual connection" to the financial deception — including events following her police report — sufficient to potentially engage the "in relation to" threshold as well. That question could not be resolved on summary judgment.

The court granted leave to amend, directed case management, and pointedly added that further summary judgment motions "would not be helpful" — a signal that failing to engage with s. 16(1)(h.2), whether advancing or defending, risks exactly the error that occurred here.

Res Judicata and Abuse of Process

The husband and his parents tried to end the case by arguing the wife should have advanced these claims in her earlier family proceeding.

As discussed in prior editions (see e.g. the September 1, 2025 (2025-31) edition on *Klassen v. Epp* (2025), 17 R.F.L. (9th) 95 (B.C. S.C.)), both *res judicata* and abuse of process can preclude claims arising from earlier litigation, though they operate differently. *Res judicata* includes issue estoppel (no re-litigation of decided issues) and cause of action estoppel (no re-litigation of claims that were or should have been brought). Abuse of process is broader — it applies even where *res judicata's* technical requirements are not met, if allowing the claim would bring the administration of justice into disrepute.

The problem in *Malamas* was not a lack of respect for finality, but the assumption that the finality doctrines apply automatically. They do not. Even where the technical elements are met, the court must still decide whether barring the claim would be unjust.

Both doctrines can involve a discretionary fairness analysis. The question is not just whether the elements are satisfied, but whether their application would be unfair in the circumstances — a balance between finality and fairness grounded in the realities of the earlier proceeding: *Continental Appraisals Ltd. v. Air Touch Communications Ltd.*, 2024 CarswellBC 2436 (C.A.) at paras. 67-78 and 94-96 and *Saskatchewan (Environment) v. Métis Nation - Saskatchewan*, 2025 CarswellSask 56 (S.C.C.) at paras. 32 and 38-40.

That is where the motion judge erred. He asked whether the claims could have been brought earlier, but not whether it would be unjust to bar them. It was also arguable that the earlier proceeding relied on the violence for interlocutory relief — protection orders, interim possession, supervised access — not civil damages. And representation by counsel in the earlier proceeding, while relevant, was not determinative of whether the wife had a meaningful opportunity to advance all available claims.

Courts are rightly skeptical of litigation by instalment. In *Wong v. Wong*, 2006 CarswellOnt 8823 (S.C.J.), Justice Granger criticized the proliferation of overlapping family and civil proceedings arising from the same relationship breakdown. But *Malamas* reminds us that not every failure to advance all claims at once reflects gamesmanship, neglect, or a fair opportunity to do so. Before invoking finality to bar a claim, the court must ask why it was not advanced earlier.

The Parents and the Consent Order

The wife's appeal against the parents was dismissed, but not because her claim against them was barred by the discretionary exercise of *res judicata* or abuse of process. It was barred by the consent order itself, which dismissed "all claims" between the wife and the parents. Consent orders are interpreted in accordance with contractual interpretation principles: *Johnston v. McLean*, 2024 CarswellOnt 16816 (C.A.) at paras. 14, 17; *Corner Brook (City) v. Bailey*, 2021 CarswellNfld 258 (S.C.C.) at paras. 20-21, 33-34, and 43-44; *Shih v. Shih* (2017), 91 R.F.L. (7th) 102 (B.C. C.A.) at para. 34. The Court of Appeal read the order as a whole in light of its text, context, and purposes — and found no reversible error. Because the consent order disposed of those claims on its own terms, the motion judge's alternative holdings on limitations, *res judicata*, and abuse of process did not need to be reached.

The husband's position was different. The consent order said nothing about claims against him. Accordingly, he had to rely on *res judicata* and abuse of process — doctrines that require the exercise of discretion the motion judge did not address. That is why the appeal succeeded against the husband but not the parents.

Ahluwalia and What Comes Next

Malamas is a prelude. Now that the Supreme Court has recognized a new tort in *Ahluwalia*, *Malamas* could be a preview of the problems family lawyers who deal with these claims will have to grapple with.

One such issue is retroactivity. Will the new tort of intimate partner violence apply to claims based on conduct that predate the decision but that have not yet been decided or resolved? A new common-law tort would arrive through judicial decision-making, and the general rule is that courts apply the common law as it stands to the facts before them; prospective-only effect is the exception: *Ontario (Finance) v. Progressive Casualty Insurance Company of Canada*, 2009 CarswellOnt 1546 (C.A.) at paras. 52-60.

Another is about how the new tort will interact with limitation periods. If the new tort does not fall within s. 16(1)(h.2) — or if not all claims under it qualify — when will the limitation period start to run?

A further issue is the scope of releases and dismissal orders. How will courts deal with releases and consent orders that were entered into before the tort even existed?

Family lawyers like clean endings. Settlement. Releases. Final orders. But cases involving family violence are often anything but clean. *Malamas* is a reminder that before courts shut the door on a claim in the name of finality, they still have to ask whether the claimant ever had a realistic chance to walk through it.

A Limitation Period? Or a Get Out of Jail Free Card?

***Tessaro v. Gora*, 2025 CarswellOnt 217 (S.C.J.) — Myers J**

Tessaro is not a family law case; but its implications sure do impact family lawyers

Section 15 of the Ontario *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B (the "*Limitations Act*") states:

> **Ultimate limitation periods**
>
> 15 (1) Even if the limitation period established by any other section of this Act in respect of a claim has not expired, **no proceeding shall be commenced in respect of the claim after the expiry of a limitation period established by this section**.
>
> General
>
> (2) **No proceeding shall be commenced in respect of any claim after the 15th anniversary of the day on which the act or omission on which the claim is based took place**. [emphasis added]

Such a very short section. Such very significant implications.

If your client's cohabitation agreement or marriage contract was negligently drafted in Ontario (and some other provinces) more than 15 years ago, the lawyer who negligently drafted it may be beyond the reach of a professional negligence claim. That is similar to what happened in *Tessaro* — and it raises a very important question every family lawyer (or dare we say every lawyer) should consider: can a limitation period expire before the claim even exists? Justice Myers held that it can. And based on the plain wording of s. 15, he appears to be correct.

In Ontario, the 15-year "ultimate limitation period" under the *Limitations Act* runs from the date of the negligent act — not from the date anyone suffers damages (as the "act or omission" is properly characterised under s. 15 of the *Limitations Act*).

That is, if more than 15 years pass between the drafting of a document and the event that triggers the claim — even the discovery of the claim — the claim is statute-barred before it arises. The implications for cohabitation agreements and marriage contracts are immediate and serious.

In *Tessaro*, a lawyer drafted a will for Mr. Ryczkowski in 1991. The language in the will was, to be charitable, unclear. The will provided that his real estate would go "to such of my sisters living at the time of my death... in *equal shares per stirpes*." The problem is that those two phrases contradict each other. "Living at the time of my death" means only sisters who are still alive when the testator dies can inherit — if a sister predeceases him, she is out. But "*per stirpes*" means the opposite: if a sister predeceases the testator, her share passes down to her children. The will simultaneously said "only living sisters" and "but if a sister is dead, her children get her share." The contradiction was clear. It was unquestionably an "oops."

Mr. Ryczkowski died in July 2018, more than 25 years after the will was signed. One sister had predeceased him. Her two daughters and the surviving sisters disagreed about entitlements. The surviving sisters commenced a will-interpretation application in June 2019. The nieces issued a negligence claim against the lawyer on December 24, 2020, and the surviving sisters followed on December 29, 2020. The will-interpretation dispute was ultimately settled in June 2024. The negligence actions proceeded and were dismissed as statute-barred.

Timing doomed the negligence actions. Subsection 15(2) of the *Limitations Act* bars any proceeding commenced more than 15 years after "the day on which the act or omission on which the claim is based took place." The transition provision in s. 24(5) deems the act to have occurred on January 1, 2004, because the claims had not yet been discovered. That put the deadline at January 1, 2019.

The ultimate limitation period exists for defensible reasons. Before the *Limitations Act* came into force, the discoverability principle could have delayed limitation periods indefinitely, long after documents were lost, memories faded, and witnesses were dead. The Legislature decided 15 years was long enough. But did anyone turn their mind to what that meant for domestic contracts? We thinks not.

We have seen a similar "no discoverability" logic in the *Trustee Act* context (see our discussion of *Ingram v. Kulynych Estate*, 2024 CarswellOnt 13710 (C.A.) in the December 9, 2024 (2024-47) edition of *TWFL*), which underscores that these hard caps are a legislative choice, not a drafting glitch.

Soon after *Tessaro*, the Court of Appeal reached the same conclusion in *Huether v. Sharpe*, 2025 CarswellOnt 2034 (C.A.), refusing to stretch the ultimate limitation period to cover a 35-year-old building permit. That is appellate authority, and its reasoning is consistent with Justice Myers's reasoning: the ultimate limitation period is a deliberate legislative choice, not a suggestion.

Nor is this an Ontario-only problem. British Columbia has a 15-year ultimate limitation period (*Limitation Act*, S.B.C. 2012, c. 13, s. 21), as do Saskatchewan (*Limitations Act*, S.S. 2004, c. L-16.1, s. 7(1)) and Manitoba (*Limitations Act*, S.M. 2021, c. 44, C.C.S.M., c. L150, s. 10(1)). Alberta's is 10 years (*Limitations Act*, R.S.A. 2000, c. L-12, s. 3(1)(b)). The structural problem *Tessaro* identifies is baked into limitations legislation across the country.

The actions against the lawyer in *Tessaro* were commenced in late December 2020, almost two years too late. The beneficiaries made the obvious argument: the "act or omission" should run from the date of death, not the date of drafting. Under s. 22 ("Wills speak from death") of the *Succession Law Reform Act*, R.S.O. 1990, c. S.26, wills speak from the date of death. Beneficiaries have no rights until the testator dies and cannot sue before that, because the testator can change or revoke the will at any time. If the clock starts at drafting, any testator who lives more than 15 years after signing a will effectively immunizes the drafter against all liability.

Justice Myers was not persuaded. The statute focuses on the "act or omission on which the claim is based." The act is the negligent drafting — and that happened way back in 1991. Everything that followed — death, dispute, settlement — was happenstance from the perspective of the beneficiaries. The testator could have died the next day or 50 years later. None of that changes when the lawyer did the negligent act.

Nor could the beneficiaries recast the claim as an omission, although they tried valiantly to do so. An omission in tort requires a failure to act when under a duty to act. The lawyer owed no duty on the date of death. [Fair enough — but that actually proves the point, no?] The claim was about the quality of the drafting, not a failure to do something later. Justice Myers acknowledged the result may appear harsh, but no amount of mental gymnastics could stretch the language of the statute to create a special exemption by fanciful interpretation.

This state of affairs obviously does not work for will beneficiaries, and Justice Myers said as much. They cannot review the lawyer's work. They have no claim until the testator dies. If the testator lives more than 15 years after signing the will, the right to sue is extinguished before it exists. But the wording of the statute is clear and, while the Legislature could have created an exception to address this type of situation, it did not. Whether that was the wrong call is for the Legislature to decide.

For family lawyers, the real takeaway is not about wills. It is about domestic contracts: cohabitation agreements and marriage contracts. Justice Myers said so himself, noting that cohabitation agreements may contain negligently drafted separation terms that do not take effect until a couple separates, and that the same logic applies to other instruments with deferred consequences. Marriage contracts are the obvious extension of the same principle. In each case, the clock starts when the document is *executed* — not when parties separate or discover the problem years later.

The practical implication is straightforward: if your client signed a cohabitation agreement or marriage contract more than 15 years ago, and they are now separating and discovering it was negligently drafted, the lawyer who drafted it is likely beyond the reach of a negligence claim. The ultimate limitation period may have expired before your client even knew there was a problem. That is worth bearing in mind for all of us when advising clients where enforceability or fairness of an old agreement is a live issue.

To be fair, there is some logic to drawing a bright line. Certainty has value, and professional advisers should not face indefinite exposure. But consider what the bright line here actually produces. Two couples sign identical cohabitation agreements on the same day, drafted by the same negligent lawyer. One couple separates 14 years and 364 days later. The other separates 15 years and one day later. The first couple can sue. The second cannot. The negligence is identical. The harm is the same. The only variable is how long the relationship lasted (where public policy encourages reconciliation, no less) — which is a hell of a thing to base immunity on.

Consider *Martin v. Giesbrecht Griffin Funk & Irvine LLP and Lavergne* (2022), 71 R.F.L. (8th) 374 (Ont. S.C.J.)-level exposure (discussed in the August 8, 2022 (2022-28) edition of *TWFL*), where a lawyer was held liable for nearly $1 million for negligently drafting a marriage contract, except that if separation had happened after year 15, that exposure vanishes. That is a legal distinction with a difference.

The practical reality is even worse. No one discovers a drafting deficiency and issues a negligence claim the day after they separate. By the time new counsel reviews the agreement — realistically months later, anyone *near* the 15-year line is likely already too late. The *Act* is not protecting anyone from stale evidence, faded memories or dead witnesses in that scenario. The lawyer may still be alive and practising; in *Tessaro* itself, the defendant lawyer died after the actions were commenced, but in many domestic contract cases the evidence will be fresh enough to prove the claim. The agreement is in the file. The negligence is provable. The statute is simply producing immunity.

That said, *Tessaro* is a Superior Court decision, not an appellate one. It is generally binding on other Ontario Superior Court judges as a matter of horizontal *stare decisis.* The Supreme Court of Canada confirmed in *Canada (Attorney General) v. Sullivan*, 2022 CarswellOnt 6589 (S.C.C.), that a Superior Court judge must follow prior decisions of their own court unless one of three narrow exceptions applies: (1) the rationale has been undermined by subsequent appellate decisions; (2) the decision was made *per incuriam*, without considering a relevant statute or binding authority; or (3) the decision was not fully considered, such as where it was made in exigent circumstances.

But no appellate court has considered the question as it applies to domestic contracts, and *Tessaro* may not necessarily be the last word. And under the *Sullivan* framework, another Superior Court judge *could* depart from it if the rationale has been undermined by subsequent appellate authority, if the decision was made *per incuriam*, or if it was not fully considered. The question, then, is whether a principled distinction exists, and there are certainly arguments on both sides.

The argument against the client is straightforward. A party to a cohabitation agreement or marriage contract is in a stronger position than a will beneficiary. They are the lawyer's own client. They sat across from counsel, received the advice, signed the agreement, and had 15 years in which they could have had it reviewed. The policy concern that troubled Justice Myers in the wills context — that the claimant had literally no way to discover the problem before the triggering event — applies with less force to someone who held the document in their hands over the years. If the bar is tolerable anywhere, it is arguably more tolerable here than in the wills context.

The argument in favour of the client is different, and it engages the statutory text directly. In a wills context, the "act" is plainly complete at drafting; the lawyer's job is done when the will is signed. In a domestic contract context, the retainer is to deliver an agreement that will function correctly at separation. On that framing, the "act or omission on which the claim is based" may not be merely putting words on paper at execution; it may be delivering a contract that fails when called upon to operate. The negligent act is only complete when the deficiency manifests at separation. If that characterization is accepted, the clock would start at separation rather than at signing, and a claim commenced within 15 years of separation would be timely. This is not a plea for a judicial exception to the statute; it is a different reading of when the act occurred, grounded in the text of s. 15 of the *Limitations Act* and the scope of the retainer.

Neither argument has been tested. The question is open, and it could go either way.

Can a limitation period expire before the claim exists? *Tessaro* holds that it can. And if that reasoning is extended to domestic contracts, then for cohabitation agreements and marriage contracts drafted more than 15 years ago, what the statute produces is, in effect, not a limitation period — it is immunity. Whether the Legislature intended to confer that immunity on lawyers who draft domestic contracts is a question that, sooner or later, a court will have to answer.

But the real concern is this: will we be shunned from the lawyers club for even suggesting there may be a problem here?

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