

Novel family violence tort has no place in Ontario law, Court of Appeal rules (*Ahluwalia v. Ahluwalia*)

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In July 2023, the Ontario Court of Appeal held that a novel tort specific to “family violence” should not have been created in family law proceedings since the law is clear that new torts should only be introduced where the existing remedies are inadequate: *Ahluwalia v. Ahluwalia*, 2023 ONCA 476 (CanLII). In setting aside the lower court’s decision creating the tort, the Court of Appeal determined that existing torts, properly applied, were already in place to address the claims of domestic violence and coercive control at issue.

In *Ahluwalia*, the appellant husband and respondent wife sought to address various family law issues arising from the breakdown of their marriage, including property equalization, child support, and spousal support. In addition, the wife sought damages in relation to the husband’s alleged abuse during their marriage. The wife also argued that her husband had stifled her ability to seek out gainful employment in order to assert his economic dominance and was aggressive towards her attempts to gain any independence.

The trial judge found that the marriage in this circumstance was a 16-year relationship characterized by a pattern of emotional, psychological abuse, physical abuse, and financial control. The decision affirmed a new tort of family violence and awarded \$150,000 in damages for “family violence during the marriage” in addition to spousal support and child support.

The trial judge further held that the federal *Divorce Act* does not create a complete statutory scheme for addressing all the legal issues arising in a situation of alleged family violence. Given that the *Divorce Act* does not provide the victim with a direct avenue to obtain reparations from harms flowing directly from family violence and that go beyond the economic fallout of the marriage, the trial judge accepted that creating the tort of family violence provides for a remedy that properly accounts for “the extreme breach of trust” occasioned by the husband’s violence, and that “brings some degree of personal accountability to his conduct.”

In defining the elements on this new tort, the trial judge held that a plaintiff can establish that they experienced family violence. Under the first mode of liability, the plaintiff must establish that the family member intended to engage in conduct that was violent and threatening. Under the second mode of liability, the plaintiff must establish that the family member engaged in behaviour that was coercive and controlling. The third mode of liability requires that the plaintiff establish that the family member engaged in conduct that they would know, with substantial certainty, would cause the plaintiff’s subjective fear.

On appeal, the appellant husband conceded that he was liable in damages but objected to the novel tort on the basis that it was 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. Further, the husband argued that the trial judge’s decision largely disregarded the recent amendments to the *Divorce Act*, which were intended to address family violence. The fact that the legislature did not remove the restriction on considering spousal misconduct when making a spousal support award or including family violence as a factor for such an award should be respected.

In response, the wife submitted that the new tort was necessary because existing torts do not address the cumulative pattern of harm caused by family violence. She further proposed that the appellate court define a narrower tort of “coercive control” which would provide a more sophisticated recognition of family violence, one that is made out “where a person in the context of an intimate relationship inflicted a pattern of coercive and controlling behaviour that, cumulatively, was reasonably calculated to induce compliance, create conditions of fear and helplessness or otherwise cause harm.”

In overturning the trial judge’s decision, a unanimous panel of the Court of Appeal declined to affirm the new tort, finding that existing torts have enough flexibility to address the fact that abuse has many forms. While the appellate court recognized that intimate partner violence is a “pervasive social problem” and it is “axiomatic” that family violence must be recognized, denounced, and deterred, this did not, by itself, justify the judicial creation of a new tort.

Further, the Court of Appeal had concerns that adopting the definition of “family violence” for a new cause of action in the context of family law litigation ignored the clear intention of the legislature to reduce the application of the concept only in the context of parenting. Similarly, the court disagreed with the wife’s proposed new tort of coercive control since, among other things, the existing tort of intentional infliction of emotional distress already provided an adequate remedy and eliminated the requirement to establish visible and provable injuries.

In the result, the Court of Appeal determined that it was unreasonable and disproportionate to add punitive damages in the amount of an additional 50% of the total claimed. The appeal with respect to the punitive damage award was allowed, thereby reducing the total damages by \$50,000 to \$100,000.

Given the acknowledged prevalence and nature of family violence, it is unclear what the implications will be for survivors of patterns of abuse. The decision affirms that in most cases the creation of new tort laws will be left to the elected members of the provincial government rather than arising from a dispute between two private parties. However, the decision may signal a need for lawmakers to create a more comprehensive statutory scheme to address all the legal issues that can arise in situations of family violence. The need to stay abreast of social change cannot strictly fall on the court’s reliance on the general principle of tort law but rather must involve a coordinated community response to support victims of violence and their families. A PDF version is available to download [here](#).

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