

## Reducing Family Violence and Increasing Access to Justice: The Introduction of the Tort of Family Violence in Ontario Family Law

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The decision of Justice Mandhane in *Ahluwalia v. Ahluwalia*<sup>1</sup> was released on February 28, 2022. Since the release of this decision, there have been no reported family law decisions applying the new tort of family violence.

Furthermore, on March 24, 2022, a Notice of Appeal was filed by the Applicant, Amrit Pal Singh Ahluwalia seeking to set aside the Order of Justice Mandhane on the basis that the “novel” cause of actions of family violence was applied without any basis in existing common law, that the Court failed to conduct the *Anns/Cooper* test in recognizing and applying the “novel” cause of action of family violence, and that the Court erred in law by referencing and applying factors and considerations in the *Divorce Act* as the test for establishing a “novel” cause of action, as well as misinterpreting those factors and considerations in establishing the “novel” cause of action of family violence, amongst other reasons.

### The Tort of Family Violence in the Context of a No-Fault Family Law Regime

Ontario family law provides for a “no-fault” approach to separation and divorce. In practice, regardless of the reasons for the parties’ separation, both spouses are equally entitled to the division of property as well as child and/or spousal support, subject to the facts of each case. Post-separation financial entitlements are “blind” to fault, including adultery and even intimate partner violence. In fact, pursuant to section 15.2(5) of the *Divorce Act*, the Court is not permitted to take into consideration “any misconduct of a spouse in relation to the marriage” when granting an order for spousal support.<sup>2</sup> The entitlement to equalization of net family properties and spousal support may be exercised through the family court. Comparatively, tort law results in the award of damages, usually monetary, as compensation for losses sustained by one party because of the other party’s negligence or wrongdoing. It recognizes the “normative standard of personal responsibility in our society”,<sup>3</sup> seeks accountability for the actions of individuals, and is entirely based on “fault”, or liability, and is sought through the civil court.

Introduced as a remedy for the “extreme break of trust occasioned by... abuse”<sup>4</sup>, the novel tort of family violence established by Justice Mandhane in *Ahluwalia* seeks to simplify the process by which survivors of intimate partner violence are permitted to seek financial relief after the end of an abusive relationship. Recognizing that it is unrealistic to expect survivors of intimate partner violence to file a claim in both the family and civil court, this new tort of family violence was established to “give survivors an avenue to pursue both accountability and financial

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<sup>1</sup> 2022 CarswellOnt 2367, 2022 ONSC 1303, 68 R.F.L. (8th) 255, 81 C.C.L.T. (4th) 74 [*Ahluwalia*].

<sup>2</sup> *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.) at s. 15.2(5).

<sup>3</sup> *Ahluwalia* at para. 70.

<sup>4</sup> *Ibid.* at para. 5.

independence... **through a single, family law proceeding**<sup>5</sup> [emphasis added], thereby increasing access to justice for survivors of intimate partner violence. Therefore, rather than seeking monetary damages through the civil court and equalization of net family properties and/or support through the family court, the new tort of family violence permits survivors of intimate partner violence to do both concurrently through the family court.

Although this new tort certainly simplifies procedure, it seeks to do more than increase access to justice for survivors of intimate partner violence. It was established by Justice Mandhane with the intention that “the promise of significant financial compensation could make it more realistic for some [survivors] to leave violent relationships”<sup>6</sup> by “remov[ing] the economic barriers facing survivors that try to leave”,<sup>7</sup> and resolving the all-too-common power imbalance created by the financial dynamics of most abusive relationships; an imbalance disproportionately experienced by women. In the case of *Ahluwalia*, the Respondent, Kuldeep Kaur Ahluwalia, was awarded “\$150,000.00 in compensatory, aggregated, and punitive damages for the tort of family violence”<sup>8</sup> as compensation for the persistent abuse she sustained throughout the course of the parties’ marriage including three specific incidents which took place in 2000, 2008 and 2013.

Referencing Justice Martin in *Michel v. Graydon*<sup>9</sup>, Justice Mandhane in *Ahluwalia* acknowledged that there is a “direct line between survivors’ economic vulnerability and their diminished capacity to access to justice”.<sup>10</sup> By entitling survivors of intimate partner violence to financial compensation through the family court, the decision in *Ahluwalia* seeks to empower survivors to seek justice and accountability, to empower them to reclaim their autonomy and to provide them with the means of establishing a new life post-separation free from the remanence of financial abuse which plague most survivors after they have left their abusers. It bridges the gap between a no-fault system of family law in Ontario and liability under civil law, all in one courtroom.

### What is the Test for the New Tort of Family Violence?

According to Justice Mandhane, drawing from the definition of “family violence” found in s. 2 of the *Divorce Act*,<sup>11</sup> in order to establish liability under the new tort of family violence, the moving party “**must establish conduct by a family member towards the moving party, 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**”.<sup>12</sup>

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<sup>5</sup> *Ibid.* at para. 68.

<sup>6</sup> *Ibid.* at para. 68.

<sup>7</sup> *Ibid.* at para. 67.

<sup>8</sup> *Ibid.* at para. 4.

<sup>9</sup> 2020 CarswellBC 2302, 2020 CarswellBC 2303, 2020 SCC 24.

<sup>10</sup> *Ahluwalia* at para. 67

<sup>11</sup> *Divorce Act* at s. 2.

<sup>12</sup> *Ahluwalia* at para. 52.

(a) *Violent or Threatening Conduct*

In the case of violent or threatening conduct, it must be established that the family member “**intended to engage in conduct that was violent or threatening**”.<sup>13</sup>

(b) *Conduct that Constitutes a Pattern of Coercive and Controlling Behavior*

In the case of conduct that constitutes a pattern of coercive and controlling behavior, it must be established that the family member “**engaged in behavior that was calculated to be coercive and controlling to the plaintiff**”.<sup>14</sup>

(c) *Conduct that Causes the Plaintiff to Fear for Their Own Safety or that of Another Person*

In the case of conduct that causes the plaintiff to fear for their own safety or that of another person, it must be established that the family member “**engaged in conduct that they would know with substantial certainty would cause the plaintiff’s subjective fear**”.<sup>15</sup>

Mere unhappiness or dysfunctionality in the parties’ relationships would be insufficient to establish liability and entitlement to damages according to the new tort of family violence.<sup>16</sup> Instead, the claim must be supported by the inclusion of specific examples of family violence and cannot be a series of baseless and unsupported accusations.<sup>17</sup>

As outlined in *Ahluwalia*, the moving party will have 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 family violence,<sup>18</sup> defined by section 2 of the *Divorce Act*, as: physical violence, 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.<sup>19</sup> At the same time, these claims need to be sufficiently detailed by the moving party to permit the responding party an opportunity to address the accusations, and to “know the case to meet”.<sup>20</sup>

In practice, this means including the claim for the tort of family violence in box “50” of either the Applicant’s Form 8: Application or the Respondent’s Form 10: Answer, along with the necessary facts to support the claim, as the family law forms have not been amended to specifically carve out a section for the new tort of family violence under the sections, “Claims by the Applicant” (in the case of a Form 8: Application), or “Claims by the Respondent” (in the case of a Form 10: Answer).

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<sup>13</sup> *Ibid.* at para. 53.

<sup>14</sup> *Ibid.* at para. 53.

<sup>15</sup> *Ibid.* at para. 53.

<sup>16</sup> *Ibid.* at para. 55.

<sup>17</sup> *Ibid.* at para. 56.

<sup>18</sup> *Ibid.* at para. 55.

<sup>19</sup> *Divorce Act* at s. 2.

<sup>20</sup> *Ahluwalia* at para. 56.

### How are the Damages Quantified by the Court for the New Tort of Family Violence?

Once liability has been established in trial on a balance of probability following an investigation of the responding party's conduct, "the nature of the family violence—circumstances, extent, duration, and specific harm—will all be factors relevant to assessing damages", including compensatory, aggravated, and punitive damages.<sup>21</sup>

In the case of *Ahluwalia*, compensatory damages were ordered in the amount of \$50,000.00 in **compensation for the Respondent's ongoing mental health disabilities and lost earning potential resulting from the year of abused suffered by her at the hands of the Applicant.**<sup>22</sup> In the context of this case, Justice Mandhane acknowledged that the inclusion of spousal support as part of the Court's award reduced the Respondent's potential compensatory damages to avoid double-dipping, stating, "had there been no spousal support payable, I could easily have ordered compensatory damages in the range of \$100,000.00".<sup>23</sup>

As stated by the Court in *Ahluwalia*, "**aggravated damages may be awarded for betrayal of trust, breach of fiduciary duty, and relevant post-incident conduct**"<sup>24</sup> and are compensatory in nature. In this case, the Respondent was awarded aggravated damages in the amount of \$50,000.00 "due to the overall pattern of coercion and control and clear breach of trust"<sup>25</sup> during the parties' marriage, as well as his post-separation conduct which "aggravated the mother's damages", including the Applicant's refusal to pay proper support to the Respondent.<sup>26</sup>

In addition to compensatory and aggravated damages, Justice Mandhane also stated that, "**punitive damages will generally be appropriate given the social harm associated with family violence**"<sup>27</sup> and awarded the Respondent \$50,000.00 in punitive damages for 16 years of abuse requiring "strong condemnation" by the Court.<sup>28</sup> It should be noted that the Applicant was still facing criminal charges at the time that Justice Mandhane's decision was rendered. Consequently, Justice Mandhane stated that she had "shown restraint in her punitive damage award because the [Applicant] [was] still facing outstanding criminal charges, [was] subject to ongoing bail conditions, and may face additional punitive sanctions".<sup>29</sup>

Ultimately, quantifying damages for the new tort of family violence requires a thorough review of the facts of each case and may be affected by things such as the receipt of spousal support, post-separation financial behaviors and a general review of the severity of the abuser's conduct during the parties' marriage. Outside of the scope of this article, the damages awarded in the new tort of family law would likely face the same, if any, cap in the amount awarded in

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<sup>21</sup> *Ibid.* at para. 57.

<sup>22</sup> *Ibid.* at para. 114.

<sup>23</sup> *Ibid.* at para. 118.

<sup>24</sup> *Ibid.* at para. 57.

<sup>25</sup> *Ibid.* at para. 119.

<sup>26</sup> *Ibid.* at para. 119.

<sup>27</sup> *Ibid.* at para. 57.

<sup>28</sup> *Ibid.* at para. 120.

<sup>29</sup> *Ibid.* at para. 120.

compensatory, aggravated, and punitive damages in Ontario. No cap for tort of family violence is identified by Justice Mandhane in *Ahluwalia*.

### **Why Concurrently Adjudicating the New Tort of Family Violence with Family Law Claims Such as Equalization of Net Family Properties Just Makes Sense**

On separation, married spouses are entitled to an equal division of net family properties, subject to certain deductions and exclusions as prescribed by the *Family Law Act*.<sup>30</sup> In most cases, matrimonial homes and other jointly owned properties are sold during a family proceeding, with the net proceeds of sale held in trust pending a final resolution of all property issues, either by court order or agreement between the parties. By permitting survivors of intimate partner violence the opportunity to seek damages for the new tort of family violence concurrently with all other family law claims, the decision in *Ahluwalia* offers a “security” in terms of collecting the damages awarded; it is an adjustment to equalization that could result in an unequal division of net proceeds held in trust. It ensures that survivors of intimate partner violence can avoid further economic abuse at the hands of their abusers, who may otherwise evade these damages had the tort of family violence been restricted to the civil court.

### **Conclusion**

Procedurally and economically this new tort of family violence established by Justice Mandhane in *Ahluwalia* is an enormous step in the right direction for protecting vulnerable persons; however, while the new tort of family violence was established with the intention of simplifying court procedure and increasing access to justice, there will likely be unintended side effects. There is a real concern that this new tort of family violence will result in an increase in extended family proceedings and/or family trials, inflaming an already contentious process. While parties may be willing to negotiate all other issues outside of court, it does not seem likely that parties will be willing to negotiate this novel claim outside of court, especially since there is no guidance in the decision of Justice Mandhane on quantifying compensatory, aggravated, and punitive damages. Consequently, this may delay the actualizing of the equalization of net family properties and will subject survivors of intimate partner violence to extended proceedings. An additional concern is the weaponizing of this new tort of family violence, with claimants inundating the court with baseless claims unsubstantiated by any facts or evidence necessary to establish liability and entitlement to damages, increasing parties’ legal fees and putting an additional stress on the courts that are still dealing with the backlog from COVID-19 delays. Only time will tell.

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<sup>30</sup> *Family Law Act*, RSO 1990, c. F. 3 at s. 5.