

Violence in Ontario families: I smell gasoline | Michael Cochrane

By **Michael Cochrane**

Law360 Canada (December 9, 2024, 2:05 PM EST) -- In my previous column, Violence in Ontario families: Something is off, I looked at the astonishing multi-billion-dollar investment Canadian taxpayers are making to deal with the consequences of domestic violence. It is frankly and sadly a growth industry.

In this column, I want to examine a tool being proposed to deal with the violence in Canadian families — a new “tort of family violence.” This concept has entered recent family law discourse in part as a result of the Ontario trial decision of Justice Renu Mandhane in *Ahluwalia v. Ahluwalia* (2022 ONSC 1303), in which she awarded considerable damages under the heading of this new tort.



Michael Cochrane

Upon a review of her reasons, the Ontario Court of Appeal disagreed with her expansion of tort law, finding it unnecessary. Leave to appeal to the Supreme Court of Canada has been granted and intervenors are scrambling to participate, hailing this new tort as help for victims of domestic abuse. I have thoughts.

First, I have long been an advocate of advancing claims for financial compensation for abuse along with family law claims. For over 25 years I have been recommending in my book *Surviving Your Divorce: A Guide to Canadian Family Law* (now in its sixth edition) that victims of abuse not only consider civil claims in tort but also applications to the Criminal Injuries Compensation Board. Admittedly, I have not always been thrilled with the judicial reaction to those claims, but a body of law has been growing and compensation is being awarded. Witness *Schüetze v. Pyper*, 2021 BCSC 2209, and the award of \$795,029 for violence in an intimate relationship.

We need to take a closer look at where some of the peculiar twists and turns of the *Ahluwalia* case threaten to take us. Read on.

Not wealthy people, the parties fought about the usual issues: custody of two kids, support and property. The husband, 48, and wife, 47 at the time of separation, had immigrated to Canada from India in 2001 and 2002, respectively, just a couple of years after their marriage in India. They are described as being highly educated. He had trained as a lawyer, and she had various degrees, was a teacher and had even been a talk show host.

When they separated in 2016, after 16 years of marriage, the equity from the sale of their home was \$326,680. The husband’s business had a value less than the cost of most business valuations, a mere \$16,950. For some reason, they could not even agree on their respective incomes even though the evidence ultimately showed that he earned a modest \$86,000 and she, found to be intentionally under-employed, had a mere \$30,000 of income imputed to her.

He had a lawyer throughout. She had counsel for a few years, but then in 2019 after three years of litigation, like thousands of people in our family law system, she started to self-represent. Make a note about that because we are going to come back to it.

One year into the litigation and while counsel for the wife was involved, there were interim consent orders made by two very strong Superior Court judges, Justices Francine Van Melle and Gordon

Lemon. There were orders for joint parenting decision-making, weekend parenting time, the sale of the home and child support. To all outside appearances, the case looked routine and likely to resolve with a split of the equity in the home, a custody arrangement and child and spousal support. Poorer, they would go their separate ways and somehow try to start over in the fierce GTA housing market.

But then something happened. The litigation took its first dramatic turn.

On March 17, 2021, the wife — after five years of litigation and at this point self-representing — was permitted to amend her pleadings seeking general, exemplary and punitive damages for physical and mental abuse. Note: the wife did not plead the tort of family violence. She did not plead assault, battery, emotional distress or intentional infliction of emotional distress. She simply asked for damages for abuse. Her husband vehemently denied the allegations.

Then the matter took another unexpected turn.

Six months after the amendments to her pleadings, on Sept. 7, 2021, and now five years after their separation, the husband was charged with criminal offences for assaults that occurred prior to separation. As of the family trial those charges had not been dealt with in criminal court.

These two people of very modest means, one unrepresented, then had an 11-day trial in Brampton's Ontario Superior Court before Justice Mandhane in early 2022 — now some six years after they had separated.

What follows is an overview of the evidence of the abuse Ms. Ahluwalia suffered at the hands of her husband:

- There were three serious physical assaults, one in 2000 (before they arrived in Canada), one in 2008 and one in 2013. These assaults included punching, slapping and resulted in one case of her being "black and blue" from bruising.
- There was a pattern to the abuse. The husband would become irrationally jealous, drink, engage in verbal arguments and then beat the wife.
- There was also a pattern of controlling and coercive behaviour, psychological abuse, insults, belittling, threats to leave, controlling of finances, silent treatment and sexual demands.
- No question, the wife suffered physically, psychologically and emotionally in this marriage.

At the conclusion of the trial, Justice Mandhane invited written submissions to be centred around a series of questions.

Notwithstanding the wife having not pleaded a tort of family violence, nor even other civil torts, Justice Mandhane posed two, dare I say leading, questions:

1. Is there a tort of family violence in Canadian law?
2. If not, should such a tort be recognized by the court?

In her decision, Justice Mandhane appears to have brought to bear her past experiences and activism as Chief Commissioner of the Ontario Human Rights Commission and possibly the fact that her own parents had immigrated to Canada from India. Over 200 paragraphs later and after a very extensive review of everything from Canadian tort law to U.S. case law and literature to United Nations Conventions, we are given the following: "I have specifically framed my analysis under the new tort of family violence ... the promise of significant financial compensation could make it more realistic for some women to leave violent relationships ... The no-fault nature of family law must give way ..."

Huh? After an 11-day trial with one party unrepresented?

Where this came from I do not know. Surely the unrepresented wife did not file an exhaustive factum — that included UN conventions — seeking relief under a heading she did not even know existed. Was this novel concept only discussed in written submissions or was it tested throughout the trial? I had an unpleasant flashback to law school and Lord Denning.

Reading the above paragraphs from the trial decision I paused to recall the words of the excellent Justice Mary Jo Nolan retired but now an equally excellent mediator arbitrator in Windsor. During a difficult family mediation, she told me that her approach was to try to determine which one was pouring gasoline on the fire. Wise words.

In family law proceedings telling the parties — particularly the staggering number of self-represented litigants — that there may be significant financial compensation if they can convince a court that there has been abuse in their dysfunctional relationship is the equivalent of handing litigants a can of gasoline. The judge's obiter comments threaten to bring the concept of fault back to family litigation with a vengeance.

I shudder to think about the number of motions to amend pleadings that lawyers and parties will have put forward (or reports to LawPro that will be made for failing to do so). Will lawyers and clients now need to conduct a painstaking review of the entire history of the relationship, even pre-marriage? Even before they arrived in Canada? Gather that evidence?

At least if good counsel is involved some restraint and scrutiny can be applied to what is appropriate and what is not. That will not be the case with the thousands of self-represented who draft their own pleadings. Is it fair to ask case management judges to wade through historic abuse allegations about unhappy relationships and decide who is making a legitimate claim and who is just plain angry, looking for leverage or, worse, seeking revenge?

Some of the statements made and conclusions drawn in this trial decision are nothing short of extraordinary. The methodology for assessment of damages alone is head-scratching. Have you ever made a request to the court for something and been told, don't be so modest, here is more than you asked for?

The wife in this case sought \$100,000 in damages. Justice Mandhane awarded \$150,000 — \$50,000 compensatory, \$50,000 aggravated damages and \$50,000 punitive. At one point she remarked, "Had there been no spousal support payable, I could easily have ordered compensatory damages in the range of \$100,000." Really? On what basis? Note: the spousal support ordered was just \$2,224 per month. At another point, she noted that she had "shown restraint in my award of punitive damages ..." In other words, she would have gone far beyond even \$150,000.

The outcome of the trial decision it should be noted was that the husband left this marriage with nothing, in fact, less than nothing as he was now estranged from his children. The wife received all the equity in the home, child and spousal support, and costs. The damage assessments for the new tort, it should be noted, occurred without even proper first consideration of Net Family Property statements at trial. It seems the idea of a novel new tort captured the proceedings.

As the Court of Appeal correctly points out in their reasons, carefully written by Justice Mary Lou Benotto, this activist expansion of tort law was totally unnecessary. "It was unnecessary to create a novel tort. ... in the circumstances of this case, existing torts, properly applied, address the harm suffered. ... The creation of a new tort is only appropriate when there is harm that "cries out" for a legal remedy that did not exist." Readers will recall that this is precisely what happened in creating a new tort for intrusion on seclusion.

In its reasons, the Court of Appeal refers to several precedent decisions that used existing tort law and which were in line with what the wife sought in terms of damages for a pattern of abuse.

While the Court of Appeal left the trial decision largely intact with respect to the custody, and support orders it did reduce the damage award by eliminating the weakly reasoned punitive damage component.

Importantly Justice Benotto added these cautionary words:

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 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 ... I simply caution that to lower the level of impugned conduct may intentionally encourage allegations of fault in every case, thereby undermining the movement towards a resolution-based system.

Where does this leave lawyers and those self-representing litigants as the Supreme Court of Canada gets ready to hear submissions on whether Ontario courts and litigants need a new family tort for violence? I see the choice as straightforward — continue to use our existing, proven and successful tort-based civil torts — or pass the gasoline.

Michael Cochrane is Counsel to Brauti Thorning LLP in Toronto (www.btlegal.ca). He is the author of several family law works, including Family Law in Ontario for Lawyers and Law Clerks (Thomson Reuters), Surviving Your Divorce (6th ed) (Legal Intel) and the recent trilogy novels, Night Soil and Night Soil II: Inferno, about a nasty Toronto divorce lawyer who is so bad he's good (www.michaelcochrane.ca).

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the author's firm, its clients, Law360 Canada, LexisNexis Canada or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

Interested in writing for us? To learn more about how you can add your voice to Law360 Canada, contact Analysis Editor Peter Carter at peter.carter@lexisnexis.ca or call 647-776-6740.

All Content © 2003-2025, Law360 Canada